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

Chamber Ref: FTS/HPC/PR/19/1320

Re: Property at 61 Dundee Loan, Forfar, DD8 1EB ("the Property")

Parties:

Mr Shaun Mason, 1A The Vennel, Forfar, DD8 2AN ("the Applicant")

Strathmatics Leisure Ltd, Glenhill, 15 Kinnordy Road, Kirkiemuir ("the Respondent")

Tribunal Members:

Lesley Johnston (Legal Member) and Jane Heppenstall (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should make payment to the Applicant in the sum of £433.

Background

On 1 May 2019 the Tribunal received an application from the Applicant for an Order for Payment under Rule 103 (an Application for an order for payment where the landlord has failed to carry out his duties in relation to tenancy deposits) in respect of a lease entered into the Applicant and the Respondent ('the parties') for the property at 61Dundee Loan, Forfar, DD8 1EB ('the property').

Lodged with the application were:

1. Copy of a handwritten letter from the Applicant to the Respondent dated 1 March 2019;
2. Copy bank statements for the Applicant covering the period 19 January to 15 February 2019.

The application stated that the Respondent had failed to provide a copy of the lease to the Applicant; the Applicant had not moved into the property; the Landlord had refused to repay a £433 deposit paid by the Applicant to the Respondent; the Landlord refused to provide information on where the deposit was registered.

At sift of the application, the Tribunal asked the Respondent to clarify the nature of his application and to provide additional documents in support of his claim.

The Respondent was asked whether his application was for the return of the deposit of £433 (which would require an application under rule 111) or for an order in respect of the Landlord's failure to pay the deposit into an approved scheme (which would be an application under rule 109 as set out in the application.).

In response, the Applicant advised that he sought "help to get my deposit back but I'm unsure which rule number I'm supposed to apply under."

The Applicant also lodged additional documents as follows:

1. Letter from Letting Protection Scotland
2. Screenshot of a gumtree advertisement for a lease for the property
3. An email setting out further details in respect of his claim

The Tribunal accordingly allowed the application to be amended to proceed under rule 111 (civil proceedings arising from a tenancy).

CMD

A Case Management Discussion took place on 5 September 2019.

In advance of that hearing the Respondent lodged a written submission and a copy of the Minute of Lease dated 17 January and 5 February 2019.

At the hearing, the Tribunal allowed the application to be amended to change the designation of the Respondent from "Chapelbank Hotel" to Strathmatics Limited as there was agreement between the parties that the Landlord was Strathmatics Limited and there was no objection to the application for amendment.

At the CMD the Applicant informed the Tribunal that his mother, Pauline Clark would be giving evidence at the substantive hearing.

The Applicant's position at the CMD was that, having signed the lease in January 2019, he did not move into the property a the entry date (1 March) because there were issues with the heating. He wanted the deposit paid in advance of the entry date to be returned to him from the Respondent.

The Respondent's position was that he was under no obligation to pay the deposit into a Tenancy Deposit Scheme because the tenancy had not commenced. The tenants had not taken entry, despite having been given the keys to the property in advance, and so the tenancy had not commenced. The lease provided for one month's termination and he had withheld the deposit in lieu of notice.

The Tribunal noted that the Minute of Lease did not appear to have been drafted in accordance with the provisions of the Private Housing (Tenancies) (Scotland) Act 2016.

The Tribunal continued the application to a full hearing "to allow the parties to produce evidence in support of their respective positions to enable the Tribunal to make a determination."

Hearing on 9 December 2019

A hearing took place on 9 December 2019 at Caledonia House, Dundee at 10am.

The Applicant was personally present and not represented.

Mr David Clark appeared on behalf of the Respondent. Mr Clark is a Director of the company.

At the hearing, the Applicant confirmed that his mother, Pauline Cameron, was in attendance in order to give evidence to the Tribunal. That being the case, the Tribunal asked Ms Cameron to wait outside the hearing until it was her turn to give evidence.

No list of witnesses or documents were lodged by either party in advance of the hearing per rule 22.

The Applicant confirmed that he did not lodge a list of witnesses because he had confirmed to the Tribunal at the CMD of his intention to call Ms. Cameron to give evidence.

The Respondent sought to lodge three screenshots of text messages not previously submitted to the Tribunal dated 27 February, 28 February and 1 March between the Respondent and the Applicant's co-tenant, Dylan Pirie.

The Respondent advised that he did not know that he was required to submit evidence in advance of the hearing, but when he had seen the text messages lodged by the applicant, realised that he also had messages he wished to rely upon.

The Tribunal considered the late notification of the Applicant's list of witnesses and the late lodging of the Respondent's documents in terms of rule 22. The Tribunal considered that both parties had reasonable excuse – the applicant had already told the Tribunal that he intended to call Ms Cameron as a witness. The Tribunal accepted the Respondent's explanation as to his innocent mistake and understanding of the rules. In addition, the Tribunal took into account that no orders had been made on the timescales for lodging documents at the CMD. The Tribunal therefore exercised its discretion and allowed the documents to be lodged for the Respondent and for Ms Cameron to give evidence.

The evidence

Mr Mason gave evidence in support of the application.

Mr Mason saw the property advertised for let on gumtree. The screenshot of the gumtree advert was produced and Mr Mason confirmed that was the correct advert. He saw the advert in around January 2019.

He and his proposed co-tenant, Dylan Pirie viewed the property. They were happy with how the property looked, but didn't check that the heating was working.

At some time around 16 January, he and Mr Pirie met Mr Clark at Chapelbank Hotel (owned by the Respondent) and signed the lease. Mr Clark told Mr Mason and Mr Pirie that he would send them a copy of the lease but he never did.

Mr Mason accepted that the lease produced to the Tribunal by the Respondent was the lease he signed and that it set out the terms of lease between the parties.
At that point, the Respondent gave Applicant the keys in order that they could "store some stuff there" before moving in.

Mr Mason paid the deposit of £433 to Mr Clark by electronic bank transfer in around February. He referred to the bank statements lodged with the application and advised that these were not for the right period; that they did not show the payment to the Respondent; and that the payment must have been made after the period shown in the bank statements.

Around two weeks before moving in, Mr Mason advised Mr Clark that the heating wasn't working in the property. Mr Mason said he was going to get it fixed. There was a problem with the bathroom floor too. In that regard, he referred to the text messages lodged on his behalf, the relevant terms of which stated:

> *"Hi Dave, we are a bit concerned about some of the problems in the flat. Both fire alarms don't have a battery, the boiler still isn't going on, the fan in the bathroom doesn't work, there is part of a plug stuck in a socket in the kitchen and the carbon monoxide detector is out of date."*

To which the Respondent replied:

> *"Hi Shaun, I will have these issues sorted before you move in. I gave you the keys a month earlier gust [sic] to help you move your stuff. My handyman will go round the flat on Monday and check the repair."*

Around two days before moving in, Mr Mason told Mr Clark that the heating wasn't working. He thought there was no point in moving from a house that had heating and hot water into a house that didn't. At that point, he and Mr Pirie told Mr Clark that they did not want to move in to the property and asked for the return of their deposit.

On 1 March the Applicant's mother (Pauline Cameron) wrote a handwritten letter confirming the position. The letter stated:

> *"I'm returning the key for 61 Dundee Loan. I informed you on the Wednesday 27th February that I wasn't taking the property due to heating not working and the carbon monoxide detector not working. I requested my deposit back today (1/3/19) and you offered me half - £200. As the tenancy agreement stated 1/3/19 you have no right to obtain my deposit. I have took legal advice and will not take this further if I don't get my full deposit back. Nobody stayed in this property at all. Signature o proof of keys returned [blank]."*

On the same day, the Applicant and Ms Cameron went to the Chapelbank Hotel to give this letter to Mr Clark and to hand back the keys. Mr Clark said the heating was working and refused to take the letter or keys and told the Mr Mason and his Mum to get out.

In cross-examination, Mr Clark asked Mr Mason to confirm that he had shown him the heating on 1 March 2019 and that it was working at that point. Mr Mason accepted that the heating was working on 1 March 2019, but stated that it had not been working on 27 February when he gave notice that he did not want to move in.

In cross-examination, Mr Clark put to Mr Mason that the real reason he didn't go ahead with the tenancy was because he found "somewhere else" and referred to a copy of a text message from Mr Pirie and lodged by the Respondent as follows:

> *"Hi Dave I know it's last minute me and Shaun have decided were [sic] not going ahead with the flat, we've found somewhere else so we'll need our deposit back."*

Mr Mason advised that he didn't send that text message and in any event, it did not say that they were not proceeding with the tenancy 'because' they had found somewhere else.

In questioning from the Tribunal, Mr Mason gave evidence as follows.

The Respondent gave Mr Mason the keys so he could start moving furniture and "stuff they didn't really need" into the house earlier than the start date of the lease. However, they had not lived in the property at all.

The text messages produced by the Applicant were sent around two weeks before the start-date of the tenancy. He also sent text messages two days before the start-date but had not lodged them. Mr Pirie also sent text messages which appeared to be those lodged by the Respondent, although Mr Mason had never seen these text messages before.

On being asked what happened on 1 March and Mr Mason's acceptance that the heating was working on that date, Mr Mason advised that the Respondent wanted to show him that the heating was working so they went to the property along with the Applicant's mother and Mr Pirie on 1 March. The heating did work but Mr Mason and Dylan said they didn't want to move in because they had already told the Respondent by that point that they didn't want to move in. They told Mr Clark that they wanted their

deposit back. Mr Clark was swearing at them and offered half of the deposit back which they didn't accept.

Mr Mason advised that prior to 1 March he and Mr Pirie had "started taking their stuff out of the property" because they no longer wanted to go ahead with the tenancy.

On 1 March, he and his Mum drafted the letter to the Respondent and took it to the hotel along with the keys on 1 March 2019. The Respondent refused to take the letter, crumpled it up and wouldn't take the keys from them.

Ms. Cameron

Ms Cameron is the Applicant's mother.

Ms Cameron gave evidence that the tenancy was due to start on 1 March 2019. Mr Clark had given the Applicant keys early. There were various issues with the property, including the heating, carbon monoxide detector and the bathroom floor needing fixed. These issues were raised with Mr Clark by Mr Mason. In relation to the bathroom, he responded to say that he would need to pay more if he wanted that fixed.

The tenancy was due to start on Friday 1 March. Ms Cameron went to the property on Wednesday 27 February. The heating wasn't working as it wasn't starting up. The carbon monoxide detector wasn't working. At that point, her son and Mr Pirie decided not to go ahead with the property and text Mr Clark about that.

Ms Cameron took the Applicant and Mr Pirie to the Citizens' Advice Bureau who advised that Mr Clark should have produced a copy of the lease. CAB advised them to write a letter and take it to the Respondent to confirm the position.

Ms Cameron was referred to the handwritten letter dated 1 March and confirmed that was the letter she wrote on her son's behalf.

On the morning of 1 March, prior to handing the letter to Mr Clark, she and her son went to Chapelbank Hotel to hand back the keys to him. They told him that they had received advice from CAB that he should have given them a tenancy agreement and they asked the deposit to be returned. At this point, Mr Clark became angry. He said the heating had been fixed and demanded that they all go to the property for him to show that the heating worked. They (Ms Cameron, the Applicant, Mr Clark and Mr Pirie) went to the property and the heating did work.

She told Mr Clark that Mr Mason and Mr Pirie had already decided they didn't want to take the property and asked for the deposit back. Mr Clark was aggressive and said it was "like giving a bairn a toy and taking it back."

Mr Clark offered to pay Mr Mason £200. Ms Cameron told him that wasn't accepting that.

Ms Cameron, Mr Mason and Dylan left the property at which point Ms Cameron drafted the letter dated 1 March. Mr Mason took the letter to the hotel in the afternoon. She was not present at that meeting.

Mr Clark did not wish to cross-examine Ms Cameron. He advised that everything she had said was "as is".

On questioning from the Tribunal, Ms Cameron confirmed that neither her son nor Mr Pirie had moved into the property as at 1 March 2019.

Mr Clark

Mr Clark gave evidence that he received a text message from Pirie on 27 February and referred to the copy lodged. The text said:

> *"Hi Dave I know it's last minute me and Shaun have decided were [sic] not going ahead with the flat, we've found somewhere else so we'll need our deposit back."*

The Respondent replied o 28 February:

> *"Good morning Dylan. Sorry to hear your change of mind on the flat. If you could put the key back at chapelbank today we send you out a termination letter. Cheers Dave."*

On 1 March Mr Pirie text the Respondent again:

> *"You should have provided us with a tenancy agreement for the flat, you need to tell us where you have put our deposit, you are breaking the law by not telling us."*

Mr Clark's position was that the text on 27 February gave one day notice, rather than two days, that the tenants no longer wanted to move into the property.

Mr Clark advised that he had received £433 from Mr Mason in around February by bank transfer. The reason the lease was signed in January with a start date of 1 March was because the Applicant had to give notice to his existing landlord to bring that lease to an end.

Mr Clark confirmed that his position, consistent with his written submission and his position at the CMD was that the tenancy had not started; there was no obligation on him to produce a copy of the tenancy agreement; there was no obligation on him to lodge the deposit into a tenancy deposit scheme.

Mr Clark said that he retained the deposit because under the lease the Applicant and Dylan had to give one month's notice to terminate and that had not been given. He therefore retained the deposit as one month's rent.

The heating was fixed by 1 March. The reason it didn't work was that the meter is pre-paid and cuts off after a while. The valve cuts off and has to be re-set which is what happened here. The sockets, CO2 monitors, and heating were all fixed by 1 March. He had done everything he needed to do.

He was told a day before that the tenants had found somewhere else. The reason he offered to pay £200 was because a tenant "can't just say they are taking the property and then say they are not taking it."

It wasn't the case that he refused to take the keys back. Rather, the Applicant said he would give the keys back if the Respondent refunded him the deposit, which he was not prepared to do. He was unclear as to whether he had seen the letter of 1 March before, but then advised in evidence that the reason he didn't sign it was because it accused him of breaking the law.

Mr Clark had to pay to change the locks, which he did about 1 week later. He then had to re-market the property.

Mr Mason did not have any questions on cross-examination.

In response to the Tribunal's question as to why he had accepted payment of £433 in February when the lease stated that it was payable on entry, Mr Clark advised that he couldn't remember. However, Mr Mason advised that he had told Mr Clark he would pay it when he could and he made the payment in February. Mr Clark accepted that as being correct.

Mr Clark said everything was amicable until the eleventh hour when he was told the Applicant no longer wanted the tenancy.

Mr Clark accepted that the Applicant had not moved into the property. He accepted that the Applicant did not live at the property. However, he and Dylan did move items of property in on getting the keys early which meant that they had taken possession. When asked if he accepted that these items had been moved in prior to the tenancy commencing on account of Mr Clark offering that, he accepted that position.

The Tribunal also queried this part of his evidence in relation to his written submission – namely that the tenancy had not commenced and therefore he was under no obligation to lodge the tenancy into a tenancy deposit scheme. The Respondent confirmed that was correct. He had not lodged the deposit because the tenancy had not started and had been cancelled 12 hours before. He did not therefore consider that he was breaking the law in any way.

Submissions

The Applicant submitted that he wanted the deposit paid back to him. The Respondent had no reason to have withheld the deposit.

The Respondent submitted that he was not obliged to pay the deposit into a Tenancy Deposit scheme in terms of regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulation because the tenancy had not commenced.

The Respondent submitted that he was entitled to retain the deposit on the basis of clause 2 of the lease:

> "The lease shall be for a period of 12 months (hereinafter referred to as "the set period") from and after the First day of March 2019 and two monthly thereafter until terminated by either party. The landlord is required to give the Tenant two months' notice in writing. The Tenant is required to give least one month's notice in writing. Notwithstanding the forgoing should the Tenant terminate the Lease before the expiry of the set period then they will require to pay the full rent for each month the set period is reduced by themselves earlier termination."

The Applicant was not entitled to unilaterally terminate the lease and should have provided one month's notice in terms of the lease (section 49(3) of the Act). Even if the lease does not constitute a valid agreement between the parties, under section 49(3)(b)(i) of the Act, the Applicant should have given 28 days' notice to the Respondent. As the Applicant failed to give valid notice to terminate the tenancy the Respondent is entitled to retain the Deposit in lieu of the notice to which it was entitled.

At the close of their submissions, the Tribunal queried with the parties whether they had any submission to make in relation to this Tribunal's jurisdiction to determine the matter if it found that no private residential tenancy had commenced. Neither party had any representations to make on this issue.

Findings in Fact

1. By lease dated 17 January and 5 February the parties entered into a contract for lease of the property at 61 Dundee Loan, Forfar, DD8 1EB;
2. The lease was for a period of 12 months from 1 March 2019 and two monthly thereafter until terminated by either party;
3. Rent of £433 was payable on 1 March 2019 and monthly thereafter and in advance during the Lease
4. At entry the Tenant was required to pay a deposit of £433;
5. The Applicant paid £433 by way of the tenancy deposit to the Respondent in February 2019
6. The Respondent received the tenancy deposit of £433 from the Applicant alone;
7. On 27 February the Respondent told the Applicant that he did not wish to move into the property on account of repairs required to the property
8. On 27 February the Respondent asked for the return of the deposit
9. On 1 March the Respondent attempted to persuade the Applicant to move into the property but the Respondent and his co-tenant refused to do so
10. On 1 March the Applicant requested payment of the deposit from the Respondent
11. The Respondent did not accept the return of the keys on 1 March 2019
12. The Respondent changed the locks one week after 1 March 2019 and remarketed the property for let
13. The deposit was not lodged with any Tenancy Deposit Scheme
14. The tenancy did not commence on 1 March 2019

15. The Respondent continues to hold the deposit of £433

Reasons for Decision

The Tribunal considered that all witnesses did their best to assist the Tribunal and found that all witnesses were credible and reliable. There was substantial agreement in their evidence as to the facts of the case.

From their evidence, the parties were agreed on the following matters:

1. The parties signed a Minute of Lease in January 2019;
2. The Minute of Lease lodged by the Respondent was the lease signed by the parties;
3. The respondent gave the applicant the keys to the property early, in advance of the date of entry;
4. The applicant paid all of the deposit (£433) in February 2019;
5. The Applicant and his co-tenant gave notice on 27 February that they did not wish to take the tenancy ;
6. The tenancy did not commence;
7. The Applicant attempted to hand back the keys to the Respondent but the Respondent did not accept return of the keys;
8. The respondent continues to hold the deposit .

The only issue in dispute was whether the Respondent was entitled to retain the deposit in the sum of £433 in light of the Applicant's intimation on 27 February that he no longer wanted to take the tenancy.

Jurisdiction

The Tribunal has jurisdiction in terms of section 71 of the 2016 Act to determine the matter. The parties intended a tenancy to be constituted which, having been entered into after 1 December 2017, would have been a private residential tenancy. The Tribunal is therefore of the view that this is an application for civil proceedings arising from a private residential tenancy.

Termination provisions

The Respondent relies upon (i) the terms of the lease and the termination provision, which failing (ii) the terms of sections 48 and 49 of the 2016 Act as to notice periods for termination of a Private Residential Tenancy as justification for retaining the deposit.

(i) The lease

The lease did not conform with the terms of the Model Tenancy Agreement published by the Scottish Government in terms of the Private Residential Tenancies (Information for Tenants)(Scotland) Regulations 2017. However, had the tenancy commenced, it would have been a Private Residential Tenancy by virtue of section 1 of the Act.

Clause 2 of the lease provides the notice periods to be given by the parties to terminate the lease. The clause states that:

> "*the lease shall be for a period of 12 months (hereinafter referred to as "the set period") from and after the first day of March 2019... until terminated by either party. The landlord is required to give the Tenant two months notice in writing. The Tenant is required to give least one month's notice in writing. Notwithstanding the forgoing should the Tenant terminate the Lease before the expiry of the set period then they will require to pay the full rent for each month the said set period is reduced by themselves.*"

The Tribunal considers that the ordinary interpretation of clause 2 is that the termination periods set out in clause 2 apply only once the lease is commenced. The clause applies "from and after" 1 March, being the start of the tenancy, "until terminated" by either party. The Tribunal therefore finds that the Respondent cannot rely upon clause 2 in relation to the retention of the deposit.

(ii) The 2016 Act

The Respondent's position is that, even if the lease is not formally valid, the Applicant should have given notice to terminate the lease in accordance with sections 48 and 49 of the 2016 Act.

Section 48 provides that "*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.*"

Section 49 sets out the formal requirements for such a notice, including that a period of 28 days' notice should be given.

The Tribunal considers that the termination provisions set out in section 48 of the 2016 Act do not apply in the circumstances of the parties.

Those provisions apply when a tenancy has commenced. No tenancy was in existence and therefore, could not be brought to an end. While the parties intended the tenancy to start on 1 March, which would have constituted a Private Residential Tenancy between the parties, the lease did not in fact commence and therefore, the termination provisions of the Act are not relevant to the issue.

The Tribunal also notes that the Respondent's own submissions relied upon the lease having not commenced to explain why he had not paid the deposit into a tenancy deposit scheme in accordance with the Tenancy Deposit Schemes (Scotland) Regulations 2011. As the Respondent was aware, if the tenancy had commenced, this Tribunal could have made an award against the Respondent in the sum of up to three times the value of tenancy deposit (up to £1,299).

Other terms of the lease

The Tribunal has also taken into account clause 5 of the lease which provides for the payment of a deposit. It states, amongst other things:

"At entry the Tenant will pay a deposit of Four Hundred and Thirty-three pounds (£433) as security against any damages being caused to the subjects, Landlord's fitting and fixtures…"

The Applicant paid the deposit in advance of the date of entry. The lease provided that the deposit was security against damage caused to the property. However, the tenancy was cancelled before it started and therefore no damage was caused by the Applicant to the property. This clause did not provide any basis for retention of the deposit paid by the Applicant.

There were no other terms of the lease which provided for retention of the deposit in the event that the lease was cancelled before the date of entry.

The Tribunal therefore finds that there was no legal basis for the Respondent having retained the deposit and orders the Respondent to pay £433 to the Applicant.

Order

The Tribunal orders the Respondent to pay £433 to the Applicant.

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.

Lesley Johnston — 09/12/2019

Legal Member/Chair — **Date**