



**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 Rules of Procedure 2017**

**Chamber Ref: FTS/HPC/CV/20/2118**

**Re: Property at 52 Erskine Street, Aberdeen, AB24 3NQ (“the Property”)**

**Parties:**

**Mr Fraser Crawford, Mr Andrew Lannon, Mr Luis San Martin, Mr Jared Peter White, 3 Hilton Street, Aberdeen, AB24 4QT (“the Applicant”)**

**Mr Robert Wilson, 52 Erskine Street, Aberdeen, AB24 3NQ (“the Respondent”)**

**Tribunal Members:**

**Fiona Watson (Legal Member) and Ahsan Khan (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for payment of the undernoted sum to the Applicant(s):**

**Sum of ONE THOUSAND FOUR HUNDRED AND NINETEEN POUNDS AND TWENTY-ONE PENCE (£1,419.21) STERLING**

**Background**

1. An application dated 6 October 2020 was submitted to the Tribunal under Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), seeking a payment order against the Respondent in relation to repayment of rent paid under a private residential tenancy agreement.

**The Case Management Discussion**

2. A Case Management Discussion (“CMD”) took place on 8 February 2021. The Applicants and the Respondent were personally present. A Note was produced

following the CMD and issued to both parties. In terms of the Note, the following facts were not in dispute:

(a) The respondent is the heritable proprietor of the property. The parties to this application entered into a private residential tenancy agreement on 31st July 2020. The date of entry was 15 September 2020.

(b) The respondent used a letting agent called Winchesters Lettings Ltd to arrange the private residential tenancy agreement. Mr Chris Minchin is a director of Winchesters Lettings Ltd. Before taking entry to the property, the applicants paid a tenancy deposit of £1000. The agreed monthly rental was £1000. On the 14-09-2020 Winchesters Lettings received a total of £1526.03 from the tenants in relation to the rent for the period of 15-09-2020 to 31-10-2020 (a period of 47 days)

(c) On 16 September 2020, one day after taking entry, the applicants emailed the respondent's letting agent complaining about the condition of the property and saying that the property was not habitable. One of the complaints made was that the oven and hob in the kitchen did not work, so that there were no cooking facilities.

(d) On 17 September 2020, the respondent's letting agent visited the property and agreed that the oven and hob in the kitchen did not work. The same day the respondent's letting agent reported to the respondent. The respondent's letting agent advised the respondent that if repairs were carried out the applicants might remain as tenants.

(e) The applicants vacated the property on 19 September 2020. They moved into a property which belongs to the director of Winchesters Lettings Ltd. On 21 September 2020 the respondent's letting agent asked the respondent to refund the sums paid by the applicants.

(f) On 22 September, the respondent visited the property. He removed the faceplate of the cooker switch and found a displaced screw and a loose wire. It is the respondent's position that that is the fault that prevented the cooker and hob from working. The respondent believes that the electrical supply to the cooker had been deliberately tampered with since he had last visited the property on 13 September 2020.

(g) On 23 September 2020 one of the applicants (Mr Lannon) entered the property using a key to the front outside door. He encountered the respondent in the property.

(h) On 24 September 2020 the respondent told his letting agent that he believed he had been deliberately misled by the applicants.

3. The central area in dispute was whether the Respondent agreed to refund the sums paid when the Applicants took entry to the property.

4. The CMD note sets out questions to be resolved at a hearing:
  - (a) Was the private residential tenancy agreement brought to an end between 17 and 20 September 2020?
  - (b) Did the Respondent agree to refund the Applicants the sums they had paid on taking entry?
  - (c) Did the Applicants damage the fixtures and fittings within the property?
  - (d) Did either the Applicants or Mr Chris Minchin, director of the letting agents, mislead the Respondent to bring the private residential tenancy to a premature end?
  - (e) Is the Respondent entitled to retain the sums paid by the Applicants on taking entry?
  - (f) Is the Respondent entitled to deduct the fees and expenses charged by the letting agency instructed from the sums claimed by the Applicants?

#### The Hearing

5. The Hearing took place on 22 March 2021 by way of tele-conference. The Applicants were present and Mr Lannon spoke on their behalf. The Respondent, Mr Wilson, was also present and representing himself.
6. Mr Wilson raised a preliminary issue with the Tribunal. He submitted that he did not consider that the Applicants should be permitted to lead evidence from their witness, Mr Minchin from Winchesters, at the Hearing. He submitted that they had not intimated a witness list disclosing him as a witness 14 days prior to the Hearing. He objected on this basis. The Tribunal adjourned to consider Mr Wilson's objection.
7. Mr Wilson did not specify which Rule he considered had been breached. Rule 22 states as follows:

*Lodging of documents etc. 22.—(1) Except as otherwise provided in these Rules, or as otherwise specified by the First-tier Tribunal, a party must send to the First-tier Tribunal no later than 7 days prior to any hearing notified under rule 24(1)— (a) a list of any documents and copies of the documents that the party wishes to rely upon; and (b) a list of any witnesses that the party wishes to call to give evidence. (2) Before allowing a document to be lodged late, the First-tier Tribunal must be satisfied that the party has a reasonable excuse.*

8. The Tribunal also noted that the CMD note stated at point 10 that “*both applicants and respondent must consider what evidence they intend to lead. If either the applicants or the respondent intends to call witnesses, they must provide the tribunal with a list of the witnesses, giving details of the witnesses’*

*names and addresses, not later than 14 days before the date of the next hearing.”*

9. The Tribunal determined that the Applicants were permitted to call Mr Minchin as a witness to the Hearing. The Applicants had emailed the Tribunal on 4 March 2021 to lodge their witness list (which disclosed Mr Minchin as their witness) and to lodge email correspondence as a production. The Tribunal clerk confirmed from checking the administration log that this email was intimated to Mr Wilson on 5 March 2021. This gave at least 14 days' notice to Mr Wilson in terms of the CMD note, and certainly gave 7 days' notice in terms of Rule 22.
10. Furthermore, it was noted by the Tribunal that the CMD note specifically stated at point 5 that *“the applicants produce emails written by Chris Minchin, director of Winchesters Lettings. The applicants will need to lead oral evidence from Mr Minchin.”* This was clearly something which had been considered at the CMD and of which Mr Wilson was aware of prior to the Hearing.
11. The Tribunal considered that the evidence of Mr Minchin was essential to the case, and that intimation of the Applicants' intention to call him as a witness was made timeously, and accordingly Mr Wilson's objection was not upheld.
12. Mr Lannon sought a payment order in the sum of £1419.21. The total rent paid at the outset by the Applicants was £1526.03. Winchesters had refunded to the Applicants already the sum of £106.82. The deposit had already been repaid to them by the tenancy deposit scheme.
13. Mr Minchin of Winchesters Lettings gave evidence. His evidence can be summarised as follows:
  - (i) Mr Minchin has been involved in the property market in Aberdeen and Aberdeenshire for 16 years. He is a landlord as well as a letting agent with Winchesters. Winchesters are a registered letting agent. They have approximately 600 managed lets through Aberdeen City and Aberdeenshire.
  - (ii) The Applicants had reported to him following taking entry to the Property that there were a number of issues. They intimated their intention to leave after 28 days' notice.
  - (iii) Mr Minchin attended at the Property the following morning to discuss matters with the Applicants. They indicated that they would be happy to stay if the issues were resolved.
  - (iv) Mr Minchin did not think that the Applicants were just looking for an excuse to get out of the lease. They told him they would be happy to stay if the issues were resolved.
  - (i) Mr Minchin told Mr Wilson that the Applicants had raised issues with the Property. The main issue was the oven not working. Mr Wilson's response to him was that there was a kettle and a microwave for them to use.

- (ii) Mr Wilson had said that he wanted to think about things initially. He said that he did not want Mr Minchin to send an electrician and that he'd look at it himself.
- (iii) Mr Wilson then asked that the tenancy be brought to an end as soon as possible. Discussions were had over the telephone with Mr Wilson and Mr Minchin advised him that he would not be able to force the Applicants to leave earlier than the 28-day notice period. If he wanted them to leave earlier, he'd have to offer an incentive. Mr Wilson gave a deadline of the upcoming weekend (being 19/20 September 2020) for them to leave and he offered to return the Applicants' rental payment in full in this basis and the tenancy would be terminated at that point. Mr Minchin told Mr Wilson that alternatively, if he wanted the Applicants to remain for the 28 days period, he would still require to get an electrician out to the property to rectify the issues with the oven meantime.
- (iv) The Applicants agreed to remove themselves and their belongings from the property over the weekend of 19/20 September 2020 in return for their whole rent being returned to them.
- (v) Mr Minchin emailed Mr Wilson following their departure to confirm that they had gone and to confirm that the payment should now be made.
- (vi) Mr Wilson reneged on this agreement following the Applicants leaving the property.
- (vii) Mr Wilson thereafter suggested that a lower figure of £400 should be paid over to them.
- (viii) Mr Wilson told him that he had changed the locks shortly after the Applicants left the Property.
- (ix) Mr Minchin set out the position in writing to Mr Wilson and thereafter withdrew from acting on his behalf.
- (x) He had no reason to believe that the Applicants had tampered with the switch pertaining to the oven. The Electrical Installation Condition Report had been done shortly prior to the start of the lease and it may have been that the electrician had failed to secure the screws on the plate properly following that.
- (xi) Mr Minchin did not consider that the tenancy had terminated that weekend as the condition of the Respondent returning their rental wasn't met.
- (xii) The Applicants were offered a choice of approximately four other properties available for rent at short notice. One of those was owned personally by Mr Minchin but this was not disclosed to the Applicants. After carrying out viewings, they chose the property which was owned by Mr Minchin. They only became aware of this after the tenancy started.

14. Mr Lannon's submissions can be summarised as follows:

- (i) The Applicants had given 28 days' notice in writing to Winchesters due to issues in the Property. This written notice had not been lodged as evidence with the Tribunal because he did not consider it relevant. The issue which the Applicants sought to be determined by the Tribunal was whether or not agreement had been made for the Respondent to pay to

the Applicants the sum of £1526.03, and if so, that the Respondent had not done so.

- (ii) The Applicants would have stayed in the Property had the issues been addressed, and in particular, the oven fixed. This was not done.
- (iii) They were told that the Respondent would return their full rent to them if they agreed to move out of the Property over the weekend of 19/20 September 2020. They removed from the property as promised. The rent was not returned to them. This was a verbal agreement.
- (iv) When the payment was sought from the Respondent, they were offered a lower sum of £400, which they refused.

15. Mr Wilson's submissions can be summarised as follows:

- (i) He had given his current Portuguese address to Winchesters so there was no reason as to why service of the application had to be made by way of website advertisement.
- (ii) Mr Wilson only received payment in the sum of £890.61 from Winchesters. They deducted their fees and outlays from the rent received from the Applicants.
- (iii) He has been renting property out in Aberdeen for 40 years. This is his first involvement with the First-tier Tribunal. He has used the services of Winchesters for approximately 6 years.
- (iv) When Mr Minchin first called him on 17 September, he was shouting at him. He told him that the Applicants had handed in their 28 days' notice as they were unhappy with the Property. He was taken aback and said that he needed time to consider matters. He was in the middle of packing up to move to Portugal and had a lot going on. He said he would call Mr Minchin back.
- (v) Mr Minchin normally reports any repairs to him and he goes round himself to deal with them within 24 hours. Mr Minchin told him on this occasion that he only had an hour to get the repair done. Mr Minchin told him he couldn't get an electrician for him in that time and it would take 2 or 3 days.
- (vi) Mr Wilson told Mr Minchin that he owned the property on the bottom floor which was empty, and the Applicants could use that for cooking facilities meantime. Mr Minchin told him this was not possible.
- (vii) Mr Wilson told Mr Minchin that he wanted to negotiate with the tenants. He offered only £400 to the Applicants. He knew that he would struggle to get more students in if they left.
- (viii) Mr Wilson went to the bottom flat to do repairs and saw that the tenants were in the back garden. He went out to chat to them but there were 8-10 of them there and they were drinking beer, and they did not want to speak to him.
- (ix) After the tenants left, Mr Wilson attended at the Property to check himself. When he took the plate off the cooker main switch, a screw fell out. He and his partner had been in the property on 13 September 2020 to do a final clean and check over of the property prior to the lease

starting. His partner had cleaned the oven and the only way she could have seen it was clean was if the light had been on. He did not see how it could have come loose between 13 and 17 September.

- (x) He called Mr Minchin and asked when the tenancy had terminated. Mr Minchin could not tell him the exact date.
- (xi) There had been no notice in writing sent to him from the Applicants and it had not been lodged as evidence.
- (xii) There had been no agreement to the return of the full rent to the Applicants.
- (xiii) He indicated to Mr Minchin that he wished to negotiate, and only wished to offer £400.
- (xiv) Mr Wilson had never had any issues with Winchesters prior to this application. He thinks that Mr Minchin has a few properties that he owns and has been struggling to rent them out due to covid. It was too convenient that the tenants ended up in a property owned by Mr Minchin.

### Findings in Fact

16. The Tribunal made the following findings in fact:

- (i) The parties entered into a Private Residential Tenancy Agreement (“the Agreement”) which commenced 15 September 2020;
- (ii) The Applicants made payment in the sum of £1,526.03 in terms of Clause 8 of the Agreement at the commencement of the Agreement;
- (iii) The Agreement was terminated over the weekend of 19 and 20 September 2020;
- (iv) The Respondent agreed to return the Applicants’ rent in the sum of £1526.03 and has failed to do so.

### Reasons for Decision

17. The Tribunal found the evidence of Mr Minchin to be entirely credible and reliable. Mr Minchin was clear in his answering of all questions asked of him. Whilst Mr Wilson often became heated and argumentative in his cross-examination of both Mr Minchin and of Mr Lannon, he was calm and clear in his own evidence.

18. The Tribunal were persuaded by the evidence of Mr Minchin that he was instructed by Mr Wilson to offer the return of the Applicants’ full rent payment and for them to remove themselves from the Property as soon as possible that following weekend of 19 and 20 September 2020.

19. Mr Wilson focussed on the issue of when the Agreement was terminated in much of his questioning, but he gave no explanation as to the relevance of that to the question of how much rent had been agreed to be refunded to the Applicants. Mr Wilson submitted that he had never been shown the written notice referred to by Mr Minchin as having been issued by the Applicants. This was not lodged by the Applicants with their application as evidence. When asked by the Tribunal what the basis was of his offer of payment in the sum of £400, and whether this was in return for the Applicants removing the following

weekend or if this was in return for them living out their 28-day notice period, Mr Wilson's response was "neither." No submissions were made by Mr Wilson as to when he considered the Agreement had ended.

20. Taking the questions posed by the Legal Member in the CMD in turn (and referred to in paragraph 4 above) the Tribunal considered matters as follows:

(a) Was the private residential tenancy agreement brought to an end between 17 and 20 September 2020?

The Tribunal held that the Agreement was terminated at the end of the weekend of 19 and 20 September 2020. No written termination by the Applicants giving 28 days' notice was lodged by the Applicants as evidence. The Tribunal was persuaded by the evidence of both Mr Lannon and Mr Minchin that discussions took place between the parties which resulted in a verbal agreement for the Agreement to terminate at the earlier date of the weekend of 19 and 20 September following removal of the Applicants from the Property. The Tribunal is satisfied that parties can agree an earlier termination date by mutual agreement, and this can be both verbal or in writing. However, the Tribunal also finds that this issue is secondary to the issue of whether or not payment was due as sought by the Applicants.

(b) Did the respondent agree to refund the applicants the sums they had paid on taking entry?

The Tribunal held that the Respondent did agree to refund the Applicants the sums they had paid on taking entry to the Property. The Tribunal was persuaded by the evidence of Mr Minchin that he was instructed by the Respondent to make this offer to the Applicants, and that the Respondent reneged on this agreement shortly after the Applicants removed themselves, as had been agreed. It was clear from the evidence of Mr Minchin that the position taken by the Respondent following the departure of the Applicants was so concerning to the letting agency, that they withdrew from acting as a result of the Respondent's actions.

(c) Did the applicants damage the fixtures and fittings within the property?

No submissions were made by either party, nor any evidence led on this point. No determination was made by the Tribunal. The Tribunal did not consider that this was pertinent to the claim made by the Applicants in any event.

(d) Did either the applicants or Mr Chris Minchin, director of the letting agents, mislead the respondent to bring the private residential tenancy to a premature end?

The Tribunal did not find that either the Applicants or Mr Minchin misled the Respondent to bring the Agreement to a premature end. The explanation given by Mr Minchin as to why the Applicants ended up renting a property which was owned by him personally was entirely plausible. Whilst the



Respondent inferred that the situation was engineered by Mr Minchin, there was no evidence which pointed to this. The Tribunal was satisfied that on the basis of the evidence before it, the Applicants were given a choice of available properties to move to, and they took the one they thought best for them. The Tribunal was satisfied that they did not know at the time that it was personally owned by Mr Minchin. The Tribunal was persuaded by the evidence of both Mr Lannon and Mr Minchin that had the issues complained of been rectified, they would have been happy to remain in the Property. The Applicants only moved out on the weekend of 19/20 September due to the Respondent failing to carry out the necessary repair, and due to him offering this as an option to them .

(e) Is the respondent entitled to retain the sums paid by the applicants on taking entry?

The Tribunal held that the Respondent was not entitled to retain the sums paid by the Applicants upon entry. An agreement was entered into, on a verbal basis, between the parties that the sums would be repaid to the Applicants upon them vacating the Property over the weekend of 19 and 20 September, and the Respondent reneged on that agreement following the Applicants' departure.

(f) Is the respondent entitled to deduct the fees and expenses charged by the letting agency instructed from the sums claimed by the applicants?

The Tribunal held that the Respondent is not entitled to deduct the fees and expenses charged by the letting agency instructed from the sums claimed by the applicants. Any such fees and outlays are the Respondent's liability solely. The Applicants made payment in the sum of £1526.03 at commencement of the Agreement and this is what they are entitled to repayment of. The fees and outlays deducted by the letting agent were separate liabilities on the part of the Respondent to cover his costs of marketing the Property and putting appropriate safety certificates in place. Such certificates which the Respondent may continue to benefit from in a future let. Such deductions are made under a separate contractual agreement entered into between the Respondent and his letting agent, and they are not in the knowledge of, nor the liability of, the Applicants.

## Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) granted an order against the Respondent(s) for payment of the undernoted sum to the Applicant(s):

Sum of ONE THOUSAND FOUR HUNDRED AND NINETEEN POUNDS AND TWENTY-ONE PENCE (£1,419.21) STERLING

## 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.**

Fiona Watson

**Legal Member/Chair**

**Date: 22 March 2021**