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 88 of the Rent (Scotland) Act 1984

Chamber Ref: FTS/HPC/PR/19/3024

Re: Property at Second floor left, 120 King Street, Aberdeen, AB24 5BB ("the Property")

Parties:

Mr John Paul Floyd, 5E Raeburn Place, Aberdeen, AB25 1PP ("the Applicant")

Mr Geoffrey George Gettka, 27 Watson Street, Aberdeen, AB25 2QB ("the Respondent")

Tribunal Members:

Ruth O'Hare (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) determined to make no order.

Background

1 By application dated 23 September 2019 the Applicant sought the sum of £1399.13 from the Respondent as unlawful premiums in terms of section 88 of the Rent (Scotland) Act 1984. Following a Case Management Discussion at which both parties were present the Tribunal determined to refuse the application.

2 By email dated 12 March 2020 the Applicant sought a review of the Tribunal's decision of 6 March 2020. In accordance with Rule 39(1) the Tribunal determined to review its decision of 6 March 2020 and to set the decision aside. Thereafter in terms of section 44(2)(c) of the Tribunals (Scotland) Act 2014 the Tribunal determined to fix a hearing in the matter.

Issues to be Resolved

3 The issues to be resolved by the Tribunal were identified as follows:-

(i) Whether the payment of Council Tax in the sum of £1399.13 by the Applicant to the Respondent under the terms of Clause 7 of the Tenancy Agreement between the parties is a premium as defined by section 90(1) of the Rent (Scotland) Act 1984; and

(ii) Whether the sum of £1399.13 is therefore due to the Applicant by the Respondent under section 88(1) of the Rent (Scotland) Act 1984.

The Hearing

4 The Hearing took place by tele-conference on 23 September 2020. Both parties were in attendance.

5 The Tribunal noted the written representations received to date and determined that the substantive matters between the parties were largely agreed, namely:-

(i) The Applicant and Respondent entered into a Tenancy Agreement in respect of the property which commenced on 1 November 2017.

(ii) Clause 7 of the said Tenancy Agreement provides "*The Tenant will be responsible for advising the Local and any other relevant Authorities of the Entry Date and his occupation of the Property and for ensuring prompt payment of any Council taxes, charges or costs which may be levied by said Authorities in respect of the Property during the term of this Agreement. In the event that the Landlord is required to make payment of any such sums the Tenant will immediately reimburse the Landlord of same on being sent notification thereof.*"

(iii) The Applicant made payment to the Respondent of the sum of £1399.13 as reimbursement for council tax charges incurred by the Respondent and in terms of Clause 7 of the said Tenancy Agreement.

6 The Tribunal heard submissions from the parties at the hearing which can be summarised as follows:-

(i) Mr Floyd highlighted the relevant sections of the 1984 Act and the definition of a premium. It was clear that the payment he sought fall within this definition. It was impossible to say that the definition did not apply on the facts of the case before the Tribunal. The issue did not require any detailed legal interpretation or construction. In support of his position, Mr Floyd pointed to subsequent legislation that had to be introduced by the Scottish Government to specifically state that green deal payments were not a premium, which was precisely a result of the absolute ban on premiums, being any payments over and above the rent and deposit. A

landlord has to do things by lawful means and Mr Gettka had not done so in this case.

(ii) In response to questions from the Tribunal, Mr Floyd stated that any payments in relation to the Council Tax should have been included in the overall rent. He noted that the ban on premiums had been introduced under a restricted rent regime, likely with the intention to prevent landlords from getting around a fixed rent. If landlords were advertising properties with hidden charges it would be confusing for tenants. It was a straightforward situation in Mr Floyd's view, the landlord cannot charge anything other than a rent and deposit. The Tribunal asked what had occurred at the start of the tenancy. Mr Floyd advised that he had been happy to pay rent with the council tax in addition. He knew it was an HMO as there were two other tenants. The property had been advertised on the basis that council tax would be split amongst the three of them. Mr Floyd had previously been entitled to council tax reduction. He informed the Aberdeen City Council of his change of address in order to commence payments. However he was advised by the Local Authority's officers that the property was an HMO and therefore Mr Gettka was liable for the council tax. At that point Mr Floyd had drawn Mr Gettka's attention to Clause 7 in the Tenancy Agreement which required Mr Floyd to reimburse him for Council Tax payments. He had taken it for granted that he would require to reimburse Mr Gettka as a consequence of the existing contractual relationship. The third tenant had subsequently left the property which had prompted an opportunity to review the tenancy agreement and sign Mr Floyd and the remaining tenant up to a joint tenancy agreement. Mr Floyd had no objection to this in principle but had concerns as the other tenant was in rent arrears. That had fallen by the wayside and the existing single tenancy agreement had continued as a result. Mr Floyd explained that he would have been entitled to council tax reduction if he had been liable for the council tax directly however was unable to do so as the bill was going to Mr Gettka.

(iii) Mr Gettka addressed the Tribunal. He advised that there had never been any mention of Mr Floyd requiring a council tax reduction. Mr Floyd had known the council tax was payable on top of the rent. Mr Gettka didn't consider the payment to be a premium. Council tax should be paid by the tenant. Mr Gettka explained that the tenancy agreement had been downloaded from a solicitor and he therefore doubted it would be in breach of the law. Mr Floyd had been happy to reimburse him for the payments he had made in respect of the council tax. He was only paying for his own share of the council tax bill and it was always clear that would be the case. It had subsequently transpired that the property met the definition of a House in Multiple Occupation (HMO) for Council Tax purposes, and the owner of the property remains liable at all times. This had therefore invoked the provisions of Clause 7 whereby Mr Gettka paid the bill and Mr Floyd reimbursed him.

(iv) In response to questions from the Tribunal Mr Gettka explained that he had not understood that the property was considered as an HMO for

council tax purposes. Nor did he appreciate that he required a licence for an HMO where a property is rented to three (or more) people. Once he discovered that, the third tenant had moved out leaving only two in the property, including Mr Floyd. Mr Gettka did not seek a third tenant so he would not need to apply for an HMO licence.

(v) Mr Floyd was given the opportunity to challenge Mr Gettka's evidence. He explained that Mr Gettka was an experienced landlord and he didn't accept his ignorance as to the responsibilities in relation to the tenancy. The property was an HMO for council tax purposes and the bills were in Mr Gettka's name. Mr Floyd again made reference to the provisions in the 1984 Act. It was clear that the payments he had made to reimburse Mr Gettka were fell within the definition of a premium. Mr Gettka was given the opportunity to respond, and again maintained his position that Clause 7 was lawful. In response to questions from the Tribunal Mr Floyd explained that the rent of £260 per month was perfectly acceptable when he entered into the tenancy, with the knowledge that the council tax would be payable in addition to that.

(vi) In closing submissions Mr Floyd explained that this was a straightforward application. Mr Gettka had chosen to recoup the payments of council tax in such a way that was not lawful. He could have included it within the rent, and if that had been the case Mr Floyd would have been content with that. The law was clear in that any payment in addition to the rent or deposit, or green deal payment, was a premium. Mr Gettka declined to make any further submissions, concluding that he was content with what had been discussed.

Relevant Law

7 The relevant legislation applicable to this case is contained within the Rent (Scotland) Act 1984:-

82 Prohibition of premiums and loans on grant of protected tenancies.

(1)Any person who, as a condition of the grant, renewal or continuance of a protected tenancy, requires... the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section.

(2)Any person who, in connection with the grant, renewal or continuance of a protected tenancy, receives any premium... shall be guilty of an offence under this section.

(3)A person guilty of an offence under this section shall be liable to a fine not exceeding level 3 on the standard scale.

(4)The court by which a person is convicted of an offence under this section relating to requiring or receiving any premium may order the amount of the premium to be repaid to the person by whom it was paid.

88 Recovery of premiums and loans unlawfully required or received.

(1)Where under any agreement (whether made before or after 12th August 1971) any premium is paid after 12th August 1971 and the whole or any part of that premium could not lawfully be required or received under the preceding provisions of this Part of this Act, the amount of the premium or, as the case may be, so much of it as could not lawfully be required or received, shall be recoverable by the person by whom it was paid.

(2)Nothing in section 82 or 83 above shall invalidate any agreement for the making of a loan or any security issued in pursuance of such an agreement but, notwithstanding anything in the agreement for the loan, any sum lent in circumstances involving a contravention of either of those sections shall be repayable to the lender on demand.

90 Interpretation of Part VIII.

(1) In this Part of this Act, unless the context otherwise requires—

"furniture" includes fittings and other articles;

"premium" means any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge;

"registered rent" means the rent registered under Part V of this Act; and

"rental period" means a period in respect of which a payment of rent falls to be made.

(2) For the avoidance of doubt it is hereby declared that nothing in this Part of this Act shall render any amount recoverable more than once.

(3) For the avoidance of doubt, it is hereby declared that a deposit returnable at the termination of a tenancy or of a Part VII contract given as security for the tenant's obligations for rent, for accounts for supplies of gas, electricity, telephone or other domestic supplies and for damage to the dwelling-house or contents is not a premium for the purposes of this Part of this Act provided that it does not exceed the amount of two months' rent payable under the tenancy or under the Part VII contract, as the case may be.

Findings in Fact and Law

8 The Applicant and Respondent entered into a Short Assured Tenancy Agreement in respect of the property which commenced on 1 November 2017.

9 The tenancy between the parties terminated on 30 April 2019.

10 Clause 7 of the said Tenancy Agreement provides "*The Tenant will be responsible for advising the Local and any other relevant authorities of the Entry Date and his occupation of the Property and for ensuring prompt payment of any Council taxes, charges or costs which may be levied by said Authorities in respect of the Property during the term of this Agreement. In the event that the*

Landlord is required to make payment of any such sums the Tenant will immediately reimburse the Landlord of same on being sent notification thereof."

11 The Applicant made payment to the Respondent of the sum of £1,399.13 as reimbursement for council tax charges incurred by the Respondent and in terms of his contractual obligation under Clause 7 of the said Tenancy Agreement.

12 The Respondent was liable to make payment of council tax to the local authority in terms of section 76(3) of the Local Government Finance Act 1992 and Section 3 of the Schedule to The Council Tax (Liability of Owners) (Scotland) Regulations 1992.

13 The sum of £1,399.13 was not paid by the Applicant to the Respondent as a condition of the grant, renewal or continuance of the tenancy between the parties and does not fall within the definition of a premium under 90(1) of the 1984 Act.

14 The sum of £1,399.13 paid by the Applicant to the Respondent is not recoverable under section 88 of the 1984 Act.

Reasons for Decision

15 The Tribunal based its decision on the written representations received from both parties since the application was lodged together with the verbal submissions at the Hearing. For the avoidance of doubt, there were a number of matters raised throughout the proceedings which were not relevant to the Tribunal's determination of the matter and are not therefore referenced in this statement of decision. As noted above, the substantive facts upon which the Tribunal's determination of the application is based upon were agreed between the parties.

16 The Tribunal carefully considered the Applicant's interpretation of the relevant provisions of the 1984 Act but ultimately did not accept it. In particular, the Tribunal did not accept that the payments made by the Applicant to the Respondent to reimburse the Respondent for Council Tax under Clause 7 of the Tenancy Agreement were imposed as a condition of the grant, renewal or continuation of the tenancy. These were not payments that were required of the Applicant in order to secure the tenancy, or its continuation or renewal thereafter. They were payable as an ongoing obligation under the terms of the lease and were in the view of the Tribunal a lawful charge arising from the Applicant's own use and occupation of the property. It was clearly accepted by the Applicant at the commencement of the tenancy and throughout its terms that he would require to pay Council Tax as an occupant of the property, regardless of whether he was paying it directly to the Council, or reimbursing the Respondent under the terms of Clause 7. The provisions of the tenancy agreement made this clear.

17 The Tribunal did not consider that the inclusion of the Council Tax within the overall rental payment, as opposed to under a separate obligation, would have led to any greater transparency regarding the overall cost of the tenancy. The Applicant would have been in the same position regardless. As noted above the

terms of the tenancy were clear in setting out what would be payable, and the Applicant had confirmed his acceptance of this.

18 The Tribunal therefore concluded that the payments did not fall within the definition of a premium under section 90(1) of the 1984 Act and were thus not recoverable under section 88 of that Act. Having made that finding the Tribunal determined to make no order.

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.

Ruth O'Hare

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Legal Member **Date: 23/09/2020**