## INTRODUCTION

[1] On December 20, 2023 the Landlord filed a first *Landlord Application to Determine Dispute (Form 2(B))* (the “First Application”) with the Residential Tenancy Office (the “Rental Office”) for unpaid December rent and utilities.

[2] On January 2, 2024 the Landlord filed a second *Landlord Application to Determine Dispute (Form 2(B))* (the “Second Application”) with the Rental Office to retain the security deposit.

[3] On January 5, 2024 the Landlord filed a third *Landlord Application to Determine Dispute (Form 2(B))* (the “Third Application”) with the Rental Office. The Third Application was filed also seeking to retain the security deposit plus additional compensation.

[4] The First Application, the Second Application and the Third Application are collectively referred to as the “Applications.”

[5] On April 2, 2024 an original Rental Office hearing was held for determination of the Applications before another Residential Tenancy Officer. The Landlord and two of the tenants were represented at the hearing.

[6] On April 17, 2024 Order LD24-130 was issued. The Landlord was authorized to retain the entire security deposit plus compensation of $1,756.23.

[7] On April 29, 2024 the Landlord appealed Order LD24-130 to the Island Regulatory and Appeals Commission seeking higher compensation.

[8] On May 17, 2024 the Rental Office advised the Landlord and the Tenants that a new Rental Office hearing would be held for determination of the Applications because three of the Tenants were not properly served with the Applications, notice of the April 2, 2024 hearing, documentary evidence and these three tenants did not participate in the earlier hearing. Due to these procedural fairness problems Order LD24-130 is a nullity and the Applications have been considered afresh in this decision.[1]

[9] On May 22, 2024 the Rental Office emailed a 263-page evidence package (the “Evidence Package” or “PDF”) to the parties.

[10] On May 28, 2024 the Landlord and all five of the Tenants (AK, BK, SS, SK and PS) were represented in a new hearing with the Residential Tenancy Officer (the “Officer”). AK represented BK. A witness (“MS”) of one of the Tenants also participated in the hearing. AK, SS and MS joined the teleconference for only part of the three-hour hearing. At the hearing the Landlord and the Tenants confirmed receipt of the Evidence Package.

## ISSUES

i. Were the Tenants in fact tenants of the Landlord as of October 1, 2023? Does the security deposit belong to the Tenants?

ii. Has the Landlord established valid monetary claims against the Tenants? Must the Landlord return the money paid by the Tenants pursuant to Order LD24-130?

## SUMMARY OF THE EVIDENCE

[11] The Unit is a three-bedroom, one-bathroom single family dwelling that the Landlord has owned since May of 2023.

[1] See paragraph 80 of *Chandler v. Assn of Architects* ([1989] 2 SCR 848).

[12] On July 1, 2023 the parties entered into a written, fixed term tenancy agreement for the period of July 1, 2023 to December 31, 2023. A security deposit of $2,550.00 was paid by the Tenants shortly after the tenancy agreement commenced. Rent in the amount of $2,550.00 was due on the first day of the month.

[13] On December 2, 2023 the Landlord served an eviction notice for non-payment of rent by email to AK and MS, one of the occupants of the Unit at that time. The Landlord later delivered a copy of the eviction notice to the Unit.

**Landlord's Evidence and Submissions**

[14] The Landlord's evidence is summarized as follows.

[15] The Landlord is claiming against the Tenants for December 2023 rent, furnace oil, electricity, damage and cleaning.

[16] The Landlord submitted a copy of the written tenancy agreement with the Tenants into evidence. AK, BK, SS, SK and PS are the tenants included in the written agreement.

[17] The Tenants were supposed to set up a furnace oil account and directly pay for this cost. Although this was required by the tenancy agreement the Tenants never made these arrangements. The Landlord directly paid the electricity bill. The parties had an oral agreement that the Tenants would reimburse the Landlord 70% of the electricity cost and the Landlord would cover 30%.

[18] The Landlord submitted into evidence a text message to AK in which they discussed replacement tenants for AK. In a text message dated September 17, 2023 the Landlord wrote as follows: *"I'm making the new lease soon since* [SS] *is replacing herself as well."* After this date the Landlord and AK did not have text message correspondence until December 2, 2023.

[19] AK moved subtenants into the Unit before obtaining the Landlord's permission. The subtenants moved in before knowing their responsibility for furnace oil.

[20] The Landlord did not know that SK and PS moved out at the end of August as the Landlord thought that they moved out the end of September.

[21] AK was originally the Landlord's main contact person for the Tenants. The Landlord saw MS at the Unit shortly after the tenancy commenced and the Landlord is unsure exactly when he moved into the Unit. MS became the Landlord's main contact person as the Tenants moved out of the Unit.

[22] The monthly rent for July and August was collected by SK from the Tenants and SK directly paid the entire rent to the Landlord. The Landlord could not recall who paid the rent in September.

[23] The monthly rent for October and November was collected by MS from the persons living in the Unit and MS directly paid the entire rent to the Landlord. No rent was paid for December.

[24] At the hearing the Landlord stated that she was not concerned about where the rent was coming from as long as it was paid.

[25] The Landlord thought she needed a written tenancy agreement with the replacement tenants for October. There was a first problem signing a new tenancy agreement with MS because he did not want two of the other occupants of the Unit included as tenants in the agreement. At this point the Landlord was not too concerned because MS had paid October's rent.

[26] In November there was a second problem signing a new tenancy agreement with MS because he refused to be responsible for paying for furnace oil. MS told the Landlord that he had spoken with AK and PS about furnace oil. MS told the Landlord that AK and PS did not know that furnace oil

was excluded from the rent. The Landlord thought that MS was communicating with the Tenants regarding the problems delaying the signing of a new tenancy agreement.

[27] MS told the Landlord that the security deposit was for last month's rent and he did not pay December's rent. MS moved two people into the Unit in December, took their rent, and MS did not make any rent payment to the Landlord.

[28] The Landlord submitted into evidence text messages with MS. Part of the Landlord's messages to MS state (PDF100 and 101):

> *"You* [MS] *kept their money instead of paying the rent to me and the household is getting evicted because of that…*
>
> *You're deposit is not rent so unfortunately you are wrong."*

[29] In later message correspondence the Landlord told MS that she did not receive a security deposit from MS and she did not know if MS paid the Tenants a security deposit (PDF103).

[30] The Landlord submitted into evidence correspondence with IK, a person who saw an advertisement from AK and lived in the Unit for October, November and December of 2023. IK had paid a security deposit to AK. The Landlord explained to IK the nature of this payment as follows (PDF112 and 113):

> *"That is the damage deposit and gets returned after everyone moves out so even though it was sent to* [AK] *it isn't the last month's rent. For example I just had one of my housemates move out and her replacement paid me her damage deposit and rent, I gave the damage deposit she sent me to the roommate who moved out to refund her deposit instead of having the landlord return it to me and then send the same amount back to the landlord when the replacement moved in. I hope that makes sense. So the money you gave to* [AK] *was essentially her damage deposit refund and simply kept me out of swapping the money. Otherwise I would've been sending her portion of the deposit back to her and she'd be immediately sending me yours which is pointless in the end since we'd have the same amount of money when we were done."*

[31] At the hearing the Landlord stated that if there was a new signed tenancy agreement she would need a new security deposit from the people signing the agreement and return the security deposit to the Tenants.

[32] The Landlord does not believe that MS was officially her tenant because he did not sign a written tenancy agreement. The Landlord was trying to make things work with MS and the other replacement tenants because the Tenants had not properly replaced themselves.

[33] The Landlord believes that the Tenants remained her tenants as of December 31, 2023. The Tenants moved other tenants into the Unit without her knowledge or permission. The Tenants did not make sublet agreements with these tenants. When the Landlord attempted to have the replacement tenants sign a written agreement they refused because they did not agree to be responsible for furnace oil, which was a term of the original tenancy agreement. The refusal of the new tenants to sign the agreement made the original tenancy agreement remain active. The Landlord stated that, in a way, she feels her claims are the other tenants' responsibility but the Tenants did not properly replace themselves and tell the other tenants the terms of the tenancy agreement.

[34] On December 31, 2023 the Landlord messaged IK, one of the remaining occupants, asking if the Landlord could come clean the Unit to prepare for the next occupants. IK told the Landlord that MS had moved out of the Unit on December 17, 2023.

[35] MS came to the Unit at 5:30 p.m. on December 31, 2023, after the Landlord had already cleaned the Unit. The Landlord submits that MS came to the Unit too late as the deadline was 5:00 p.m.

[36] The furnace oil tank was full when the Tenants moved in. The Landlord had expected that the furnace oil cost would be covered by the security deposit but then the Landlord did not receive December's rent. When the oil ran dry MS called the Landlord and told her that the tank needed to be filled. The Landlord had the tank filled only halfway on December 15, 2023 because of her financial means to pay this cost. The Landlord had the remainder of the tank filled on January 3, 2024. The Landlord's correspondence with MS states that the oil would have been consumed after the Tenants moved out (PDF129).

[37] In Order LD24-130 the Landlord received authorization to retain the security deposit plus compensation of an additional $1,756.20, which was paid by e-transfers from the Tenants to the Landlord. However, in addition to these amounts, the Landlord also seeks an $86.25 emergency fill fee for the furnace oil delivery on December 15, 2023 (PDF167), $708.86 for an additional furnace oil delivery on January 3, 2024 (PDF157), repair costs of $56.11 (PDF163). The Landlord is seeking 70% of the prorated amount of the $182.26 electricity statement (period of December 4, 2023 to January 4, 2024 in the statement; PDF160).

[38] In the previous Rental Office hearing, another occupant of the Unit stated that vehicles got stuck and ripped up the lawn. The lawn has not been repaired because the Landlord has not received funds to pay for this work.

[39] On July 10, 2023 the Landlord bought a new push lawn mower at a cost of $425.49. The Landlord brought the lawn mower to the Unit. No one told the Landlord that the lawn mower was not working. The Landlord thinks that someone ran over something with the lawn mower and damaged it.

**Tenants' Evidence and Submissions**

[40] The Tenants' evidence is summarized as follows.

[41] The Tenants were new to Prince Edward Island and unfamiliar with the rental laws. When the Tenants moved in the Unit was clean, except for a sink, and undamaged, except for a dent on the fridge. The grass was not cut and the Landlord's used push lawn mower was not working well.

[42] When the Tenants moved in, some of the Tenants were aware that they were responsible for the furnace oil cost and some of the Tenants were not aware.

[43] AK and BK moved into the Unit on July 1, 2023 and moved out on August 30, 2023. SS moved into the Unit on July 1, 2023 and moved out the first week of September. SK and PS moved into the Unit on July 1, 2023 and moved out on August 31, 2023.

[44] MS stated that he could not remember the exact date he moved into the Unit but it may have been in September of 2023. MS moved out of the Unit on December 14, 2023. Two other people continued to live in the Unit after MS moved out.

[45] The total rent for July and August of 2023 was sent by SK to the Landlord.

[46] The Tenants submit that the Landlord should have provided a written tenancy agreement to the replacement tenants in September of 2023 and waiting until November was too long. The replacement tenants were not relatives of the Tenants and were instead people that the Tenants met through Facebook.

[47] The replacement tenants directly reimbursed the Tenants for their security deposit. The replacement tenants did not pay rent to the Tenants and instead made payments directly to the Landlord.

[48] The Tenants did not know that the replacement tenants refused to sign a new tenancy agreement with the Landlord. The message correspondence between two of the Tenants and the Landlord shows that after September there was no further correspondence with the Landlord for about two months. The Tenants submit that, if the Landlord had advised the Tenants earlier of the problem, then the Tenants could have tried to resolve the issues.

[49] The Tenants question why the Landlord had the replacement tenants paying her the rent and, now that they refuse to pay, the Landlord is claiming against the Tenants. The Landlord did not tell the Tenants that they would be responsible for the replacement tenants.

[50] The Tenants questioned the additional furnace oil bill from January 3, 2024 because the furnace oil tank had been filled on December 15, 2023 (PDF53).

[51] The Tenants questioned the Landlord's lawn repair cost because the Landlord has not repaired the lawn.

[52] MS went to the Unit on December 31, 2023 and asked the Landlord if he could clean the house. The Landlord told MS *"No worries, I will clean the house."*

[53] The Tenants were unhappy with Order LD24-130 because it required them to pay the costs of other tenants. The Tenants made the payment required by this earlier decision.

[54] The Tenants and MS denied responsibility for damaging the push lawn mower.

**ANALYSIS**

**Purpose of a Security Deposit**

[55] Throughout the correspondence submitted into evidence by the parties there is confusion regarding the purpose of a security deposit.

[56] On Prince Edward Island a security deposit is not limited solely to unpaid rent and can be applied to other claims, such as cleaning and damage.

[57] A security deposit cannot be used as the last month's rent unless a landlord specifically agrees to use the security deposit as rent. Many landlords will refuse to use a security deposit as rent because, at the time the last month's rent is due, the tenant will still be residing in the rental unit. Therefore, the landlord will not usually know the final condition of the rental unit at the time a tenant requests to use the security deposit as rent.

[58] Other jurisdictions, such as Ontario, have divergent provisions regarding a security deposit's use as rent.[2]

**Required Content of Tenancy Agreements**

[59] Landlords are required to prepare written tenancy agreements. When residential rental issues arise, the first place landlords and tenants commonly check is the provisions of their written tenancy agreement (if one exists).

[60] Sections 10 and 11 of the *Residential Tenancy Act* (the *"Act"*) set out the required content of tenancy agreements. In particular, clause 11(2)(a) of the *Act* states:

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[2] See Ontario's *Residential Tenancies Act, 2006, S.O. 2006, c. 17*, sections 105 and 106.

*The landlord shall ensure that the tenancy agreement complies with the requirements of this Act and the regulations and includes*

*(a) the provisions set out in Division 4;*

[61] Landlords are required to include Part 2, Division 4 (sections 19 to 37) in all written tenancy agreements. These provisions inform tenants of their rights and responsibilities regarding many aspects of a typical landlord-tenant relationship during a tenancy. The inclusion of these provisions in tenancy agreements helps prevent confusion regarding the proper processes that landlords and tenants need to follow.

[62] Section 30 addresses rights, responsibilities and procedures for assigning and subletting tenancy agreements.

[63] The Tenants' evidence was that they were new to the Island and unfamiliar with the rental laws. The evidence presented does not establish that the Landlord included Division 4 in the written tenancy agreement. The Landlord did not use the standard form tenancy agreement available on the Rental Office's website.[3]

[64] The parties' tenancy agreement refers to "*the applicable legislation of the Province of Prince Edward Island"* (PDF21) but does not specifically refer to the *Residential Tenancy Act*. The *Act* does not authorize the incorporation of Division 4 by reference, as attempted in clause 25 of the tenancy agreement (PDF24).

[65] Any confusion regarding the Tenants assigning or subletting the Unit may have been avoided had the Landlord included Division 4 as required by the *Act*.

[66] The Landlord submitted that the Tenants had not followed the proper process for finding replacements tenants. However, based upon the evidence presented, it does not appear that the Landlord fulfilled her responsibility to inform the Tenants of their rights and responsibilities regarding subletting or assignment by including Division 4 directly in the written tenancy agreement.

**The End of the Tenants' Tenancy**

[67] The main issue in this case is whether the Tenants were tenants of the Landlord after September of 2023. If the Tenants remained tenants then they are responsible for valid monetary claims proven by the Landlord up to December 31, 2023. If the Tenants' tenancy ended on September 30, 2023, then the Tenant cannot be held responsible for monetary claims occurring after this date.

**Sublet**

[68] It does not appear that the Landlord and the Tenants intended to create a sublet tenancy arrangement. When a sublet arrangement exists there are two distinct tenancy agreements. There is a first tenancy between a landlord and a tenant. There is a second tenancy between the tenant (who is also a sublandlord) and a subtenant. The subtenant pays rent to the sublandlord/tenant who pays rent to the landlord. There is typically a security deposit held by the landlord for the first tenancy agreement and a second separate security deposit held by the sublandlord/tenant for the second tenancy agreement.

[69] In this case the rent payments for October and November were made directly from MS to the Landlord. The rent payments did not flow through any of the Tenants.

[3] Available at: https://peirentaloffice.ca/forms/

[70] The Tenants paid a $2,550.00 security deposit to the Landlord. Although the replacement tenants paid the security deposit amount directly to the Tenants, it appears that the security deposit held by the Landlord was effectively transferred from being for the benefit of the Tenants to being for the benefit of the replacement tenants. This means that the replacement tenants would be entitled to the return of the security deposit directly from the Landlord if the Landlord did not establish valid reasons for retaining the security deposit. This also appeared to be the Landlord's understanding in her correspondence with IK (PDF112 and 113).

[71] The payments by the replacement tenants to the Tenants reimbursed the Tenants for the security deposit that was held by the Landlord. Therefore, the Tenants did not hold a security deposit for any of the replacement tenants. As a result, the treatment of the security deposit also establishes that a sublet arrangement was not intended.

**Assignment**

[72] Based upon the evidence presented, it appears that in September the intent of the parties was to assign the tenancy agreement from the Tenants to at least some of the replacement tenants who were in the Unit around the time the Tenants vacated.

[73] When a tenancy agreement is assigned, the replacement tenants step into the shoes of the former tenants and occupy the rental unit on the same terms and conditions. A direct tenancy agreement occurs between a landlord and the replacement tenants. When an assignment occurs there would be no change of the services excluded from the rent.

[74] The written tenancy agreement between the Landlord and the Tenants specifically provides that furnace oil is a service excluded from the rent. MS refused to sign a written tenancy agreement with the Landlord because he was unwilling to be responsible for the cost of the furnace oil. Although it appears that the intent of the Landlord, the Tenants and the replacement tenants was an assignment, the tenancy agreement was not assigned because it does not appear that the replacement tenants ultimately agreed to all of the same terms and conditions of the Tenants' tenancy agreement.

**New Tenancy Agreement**

[75] Although the tenancy agreement was not sublet or assigned, it appears to the Officer that a new tenancy agreement was created as of October 1, 2023.

[76] Section 1 of the *Act* defines "rent" and "tenancy agreement" as follows:

> *"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include*
> *(i) a security deposit, or*
> *(ii) a fee prescribed under clause 107(1)(j);*
>
> *"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and the provision of services and facilities;*

[77] The term "tenancy agreement" is broadly defined. Although landlords are required to prepare written tenancy agreements, the definition also includes oral, express and implied agreements. Therefore, a person can be a tenant even though they are not named in or have not signed a written tenancy agreement.

[78] Section 74 of the *Act* is not directly applicable to this case because the Landlord was accepting rent directly from MS before any notice of termination was served. Also, after the Landlord issued the Notice on December 2, 2023 there was no further rent payment. However, section 74 provides context regarding the general effect of a landlord accepting rent. This section states:

> *(1) A landlord is entitled to compensation for a former tenant's use and occupation of the rental unit after the tenancy has been terminated.*
>
> *(2) The acceptance by a landlord of arrears of rent or compensation for use or occupation of the rental unit after notice of termination of tenancy has been given does not operate as a waiver of the notice, as reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree in writing.*
>
> *(3) The burden of proof that a notice of termination has been waived or the tenancy has been reinstated or a new tenancy created is on the person so claiming.*

[79] The implication of subsection 74(2) is that, generally speaking, accepting rent can lead to a determination that a new tenancy has been created with the person paying rent.

[80] At the hearing the Landlord stated that she did not care who paid rent as long as the rent was paid. However, accepting rent directly from occupants of a rental unit that are not named in a written tenancy agreement indicates that the occupants may in fact be tenants.

[81] The evidence presented establishes that all of the Tenants moved out of the Unit by early September. MS directly paid rent to the Landlord in October and November of 2023 for possession of the residential rental unit in which he lived. Many of the communications between the Landlord and MS appear to be landlord-tenant in nature. It appears to the Officer that when MS made the rent payments, the Landlord's understanding was that MS was a direct tenant.

[82] Through the actions of the Landlord and MS, particularly the direct payment of rent, as of October 1, 2023 a new tenancy agreement was created between the Landlord and MS. The creation of this new tenancy for the Unit brought the tenancy between the Landlord and the Tenants to an end. Therefore, the Landlord cannot claim against the Tenants for any losses that occurred on or after October 1, 2023.

[83] MS participated in the hearing as a witness and not a party to the dispute. Therefore, the Officer cannot issue a monetary order against MS in this decision. Further, it is unclear to the Officer whether MS can be held responsible for the furnace oil cost because it does not appear that MS was aware that furnace oil was an excluded service when he paid rent for the Unit.

[84] There is insufficient evidence, on a balance of probabilities, to establish in this decision that other persons who lived in the Unit from October to December of 2023 became tenants of the Landlord.

**Monetary Claims**

[85] The Landlord's position is that the Tenants failed to advise the replacement tenants that oil was excluded from the rent. However, as discussed above, the Landlord did not include the required rules regarding subletting and assignment in the tenancy agreement (section 30).

[86] The Landlord was permitted to withhold consent to the intended assignment (subsections 30(1) and (2)). The Landlord was also permitted to charge a fee for the expenses actually incurred in relation to giving consent (subsection 30(4)). These clauses appear to place a burden upon the Landlord to investigate the suitability of any replacement tenant (assignee), which would involve the assignee's willingness and ability to pay rent and excluded services. The refusal of any potential assignee to pay for furnace oil would have been a valid basis for the Landlord refusing consent. As

this investigation is the Landlord's responsibility, the Officer cannot find the Tenants responsible for the furnace oil cost.

[87] The Officer notes that the Landlord could also have attempted to end the tenancy by serving an eviction notice for purporting to assign the tenancy agreement without consent (clause 61(1)(i)).

[88] The Landlord's claims for rent owing, furnace oil, electricity, cleaning and damage have not been established to have occurred before October 1, 2023. Therefore, these claims are denied.

[89] The Applications did not include a claim regarding the push lawn mower. However, even if such a claim were included, the evidence presented does not support a finding that the Tenants caused undue damage to the mower.

[90] The Officer notes that this Order had different hearing participants and some additional documentary evidence than Order LD24-130. These are different decisions rendered on different evidence. Further, the Officer is not bound by the determinations made in Order LD24-130 pursuant to subsection 80(2) of the *Act*.

[91] The Officer notes that the Tenants did not voluntarily pay the Landlord's monetary awards that were determined in Order LD24-130. Instead, the Tenants were ordered to pay funds or risk enforcement proceedings through the Supreme Court of Prince Edward Island and Sheriff Services.

**CONCLUSION**

[92] The Applications are denied.

[93] The Landlord and the Tenants' tenancy agreement ended on September 30, 2023.

[94] The security deposit of $2,550.00, plus interest, held by the Landlord does not belong to the Tenants (AK, BK, SS, SK and PS) because they were already repaid. The Tenants have no claim against the security deposit because it is no longer their security deposit.

[95] The Landlord must return the funds that were paid by the Tenants pursuant to Order LD24-130, as provided below.

**IT IS THEREFORE ORDERED THAT**

1. The Applications are denied.

2. The Landlord and the Tenants' tenancy agreement ended on September 30, 2023.

3. The security deposit of $2,550.00, plus interest, held by the Landlord does not belong to the Tenants (AK, BK, SS, SK and PS) because they were already repaid. The Tenants have no claim against the security deposit because it is no longer their security deposit.

4. The Landlord must pay the Tenants the following amounts by July 30, 2024:
    a) $702.48 to AK;
    b) $351.24 to SS;
    c) $351.24 to SK; and
    d) $351.24 to PS.

**DATED** at Charlottetown, Prince Edward Island, this 10th day of July, 2024.

(sgd.) Andrew Cudmore

Andrew Cudmore
Residential Tenancy Officer

**NOTICE**

**Right to Appeal**

This Order can be appealed to the Island Regulatory and Appeals Commission (the "Commission") by serving a Notice of Appeal with the Commission and every party to this Order within **20 days of this Order.** If a document is sent electronically after 5:00 p.m., it is considered received the next day that is not a holiday. If a document is sent by mail, it is considered served on the third day after mailing.

**Filing with the Court**

If no appeal has been made within the noted timelines, this Order can be filed with the Supreme Court of Prince Edward Island and enforced as if it were an order of the Court.