



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under section 48 of the Housing (Scotland) Act 2014 and Rule 36 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017**

**Reference number: FTS/HPC/LA/22/1362**

**The Parties:**

**Miss Elaine Curran, 52 Wildflower Crescent, Ormiston, East Lothian, EH35 5AF (“the Applicant”)**

**Cox & Co, 12 Castle Terrace, Edinburgh, EH1 2DP (“the Respondents**

**Tribunal Members:**

**David Preston (Legal Member) and Mrs Sandra Brydon (Ordinary Member)**

**Decision**

**The respondents had failed to comply with sections 16 and 123 of the Letting Agent Code of Practice (“the Code”) in terms of section 46 of the Act. The tribunal determined that no further order should be made.**

**Background**

1. By application dated 6 May 2022, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) for a determination that the respondents had failed to comply with paragraphs 16, 66 and 123 of the Letting Agent Code of Practice (“the Code”).
2. The application comprised: the application form dated 6 May 2022 together with supporting documents comprising: email correspondence between the applicant and the respondents in March 2022; Prescribed Information about the tenancy deposit; email from Safe Deposits Scotland to the applicant dated 25 February 2022.
3. By Decision dated 20 May 2022, a Convener of HPC having delegated power for the purpose, referred the application to the tribunal for determination.
4. In advance of the Case Management Discussion (“CMD”) on 26 July 2022 the respondents submitted representations on 4 July 2022.

5. At the CMD, the respondent's representative said that he was not fully familiar with the firm's process for dealing with deposits paid to them by tenants. Subsequently and in response to the Direction of 26 July 2022 he produced a statement from Mr John Cox, Managing Director to explain the process. Mr Cox conceded that the process had not been sufficient as it allowed for a deposit to be paid late as had happened in this case. He advised that the process had been amended and a check is carried out weekly and any due payments are made to the scheme. He advised that they were also adopting a further system to automatically lodge the deposits within the necessary timescales.
6. Following the CMD the tribunal issued a Note and a Direction dated 26 July 2022 and a hearing was scheduled for 29 November 2022. By email dated 2 November 2022 the applicant sought a postponement of the scheduled hearing to which the respondent had no objection. She offered to submit further representations to enable the application to be dealt with by written submission which would remove the need to reschedule a hearing. The respondents confirmed that they were happy to proceed by way of written submission. Further representations were lodged by both parties on 16 November 2022, which were cross copied. No further representations were received by the tribunal.

### **Findings in Fact**

7. The applicant, along with her partner, Lee Paterson entered into a Private Residential Tenancy Agreement ("PRT") in respect of the property at 13 Edenhall Crescent, Musselburgh, East Lothian EH21 7JP with effect from 1 June 2021.
8. The respondents acted as letting agents on behalf of the landlords.
9. In advance of the commencement of their occupation of the property, the applicant paid the sum of £775 being the deposit in terms Clause 11 of the PRT to the respondents on 18 May 2021.
10. On 23 July 2021 it came to the attention of the respondents that the deposit had not been lodged with an approved tenancy deposit scheme in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"). On that date they lodged the deposit with SafeDeposits Scotland.
11. The tenancy came to an end on 25 February 2022 at which time the applicant and her partner vacated the property. On that date the applicant received an email from SafeDeposits Scotland advising that the deposit had not been lodged with them until 23 July 2021 and explaining that she was entitled to make an application to the Tribunal for sanctions against the landlord under the Tenancy Deposit Schemes (Scotland) Regulations 2011.
12. Notwithstanding the advice from SafeDeposits Scotland the applicant intimated a complaint to the respondents and proceeded with the present application to the tribunal.

13. In response to the applicant's complaint the respondents acknowledged the late lodging of the deposit and apologised for their oversight.
14. The applicant rejected the apology and proceeded to make the application to the tribunal. She conceded that she had suffered no financial loss but sought compensation for the time and emotional stress in dealing with the situation.
15. As a result of the circumstances arising from this case, the respondents have amended their process for dealing with payment of deposits to the scheme to avoid a repetition of their error.
16. The deposit was returned in full to the applicant at the end of the tenancy.

### **Reasons for Decision**

17. The tribunal carefully considered the representations submitted by both parties. There was no dispute that there had been an error on the part of the respondents and that the deposit had been paid to the scheme out-with the 30 days required by the Regulations.
18. It is self-evident that this amounts to a failure to comply with section 16 of the Code in relation to the Regulations.
19. The application referred to section 66 of the Code, but the tribunal considers that this relates to the relationship between the letting agents and the landlord and not with the tenant. The section specifically refers to lodging deposits "on a landlord's behalf". The Regulations impose the obligation to lodge the deposit firmly on landlords and not letting agents. It may be, and probably usually is, the case that a landlord agrees with the letting agents that they should deal with the deposits. That is a matter entirely between the landlord and his agents. Clause 11 of the PRT which deals with deposits, requires the tenant to make payment to the landlord. Even if a tenant is instructed to make payments to the letting agents via a tenancy agreement, the legislation relating to tenancy deposits refers to the landlord's duty and not the letting agent. From a tenant's point of view, it is the obligation of the landlord to lodge the deposit and not the letting agents regardless of any different arrangements the landlord may make with anybody else.
20. The remedy for a tenant in the event of a failure to deposit funds in a tenancy deposit, lies against the landlord and not against the letting agent. The landlord cannot delegate that legal obligation.
21. The applicant was advised on two occasions, once by SafeDeposit Scotland in their email of 25 February 2022 and once by the Tribunal in its email of 16 May 2022 about the Regulations and her right to make application thereunder against

the landlord. Unfortunately, she chose to pursue the letting agents, which the tribunal finds was misconceived,

22. Accordingly in the context of this application the tribunal does not find a failure to comply with section 66 of the Code.
23. Whilst the tribunal finds that there was a failure by the respondents to comply with section 123 of the Code, we are satisfied that the respondents acknowledged this at the time and have taken steps to rectify their process to avoid a repetition. Were we to make a Letting Agent Enforcement Order, we could only require them to do what they have already done and accordingly we do not make an Order.
24. In any event, by way of observation the tribunal noted that the deposit was lodged as soon as the oversight came to light which was 22 days late in terms of the Regulations, which the tribunal regards as minimal. The applicant included a claim for emotional distress, but she was entirely unaware that the deposit was unprotected for a short time until well after it had been lodged and, indeed the deposit had been returned to her in full.

11 December 2022