



Written Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) and Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).

Chamber Ref: FTS/HPC/PR/23/1774

Re: Property at Flat 15, 50 Milnpark Gardens, Glasgow, G41 1DP (“the Property”)

Parties:

Ms Miranda Hersco, Flat 15 50, Milnpark Gardens, Glasgow, G41 1DP (“the Applicant”)

Andras Vig and Agnes Vig, Szent László út 176, 46, Budapest, Hungary (“the Respondents”)

Tribunal Members:

Karen Moore (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”), having found that the Respondents did not comply with Regulation 3 of the Regulations, determined that an Order for Payment in the sum of ONE HUNDRED POUNDS (£100.00) Sterling be granted.

Background

1. By application received on 31 May 2023 (“the Application”), the Applicant applied to the Tribunal for an Order in terms of Regulation 10 of Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”).
2. The Application comprised a copy of an occupancy agreement headed “Flat Share Agreement” between the Parties dated 18 December 2021, copy amendment to that agreement dated 1 April 2023, evidence that a tenancy deposit of £1,000.00 had been paid by the Applicant to the Respondents, copy correspondence from all three approved schemes confirming that the tenancy deposit had not been lodged in accordance with them, copy correspondence between the Parties and photograph evidence in support of the Application. The Application was accepted by the Tribunal and a Case Management Discussion (the “CMD”) was fixed for 7 August 2023 at 14.00 by telephone conference and intimated to the Parties.

3. Prior to the CMD, both Parties submitted written representations. The Respondents submitted representations that the deposit was lodged with an approved scheme on 12 July 2023 and that they had applied for registration as landlords on that date. The Applicant submitted representations in support of her view that her occupation of the Property had always been as a tenant and that the agreement between the Parties ought to have been a private residential tenancy and not a “flat share”.

CMD

4. The CMD took place on 7 August 2023 at 14.00 by telephone conference. The Applicant was present and was not represented. The Respondents took part and were not represented. The Applicant strongly maintained that although the agreement is headed “Flat Share Agreement”, it ought to have been a tenancy agreement as the Respondents had not shared the Property with her at any time. The Respondents advised that they had retained an interest in the Property as their residence, had charged rent based on the Property being shared and had paid the Council Tax as occupiers. The Respondents accepted that the status of the occupancy had changed on 1 April 2023 and accepted that deposit paid by the Applicant had been lodged on 12 July 2023, outwith the statutory timescale.
5. The outcome of the CMD was that it was adjourned to a Hearing of evidence in respect of:
 - i) Was the Flat Share Agreement an occupancy agreement or a tenancy agreement;
 - ii) Was the occupancy agreement or tenancy agreement exempt for the Regulations;
 - iii) At which date did the Respondents’ obligations in terms of the Regulations come into being and
 - iv) What factors should the Tribunal take into account in assessing the amount of the Order it should make.

Hearing

6. The Hearing took place on 27 October 2023 by video conference. The Applicant, Ms. Heresco, was present and was not represented. The Respondents took part and were not represented.
7. The Tribunal advised that the purpose of the Hearing was to establish the status of the occupancy before 1 April 2023 and the amount of the Order to be made in respect of the Respondents failure to lodge the tenancy deposit in an approved scheme within the statutory time limit of 30 days.

Evidence of the Applicant.

8. Ms. Heresco gave evidence by way of making a statement. Ms. Heresco spoke at length, stressing that the Respondents had acted in bad faith from the outset. She maintained that the Respondents had deliberately, fraudulently, recklessly and intentionally had her sign a flat share occupancy agreement and not a private

residential tenancy agreement. Ms. Heresco maintained that this had been a wilful deception on their part to avoid their responsibilities as landlords.

9. With reference to the flat share agreement, Ms. Heresco pointed out that the Respondents did not give their address as they had been aware that they had no intention of residing in the Property. She stated that the agreement was deliberately false as, at page 3, it stated that it was not a tenancy agreement, when it clearly was or should have been a tenancy agreement. She submitted that the Respondents deliberately flouted the Regulations for their own benefit and submitted that their attempts to show a lack of knowledge of the law was false and was not relevant. Ms. Heresco cited the Respondents' ability to register as landlords in April 2023, to lodge the deposit in July 2023 and to issue a Notice to Leave as evidence that the Respondents were aware that they had been landlords throughout but deliberately evaded their responsibilities.
10. Ms. Heresco explained that one of the two bedrooms in the Property was used to store their goods and that there was no bed or other items which a couple and a child could use to evidence their residency. She maintained that they deliberately claimed residency to circumvent the Regulations and the law. She disputed that their paying the Council Tax as occupiers was evidence of residency as a main home and that the Respondents had created a bogus situation for their own financial benefit so that they did not have to comply with the legal obligations of landlords. She maintained that they benefited financially in terms of income tax and landlord costs and did everything possible to cover up the fact that they are resident in Hungary.
11. In cross-examination by Mr. Vig of the Respondents, Ms. Heresco maintained that the Respondents had been aware from the outset that the flat share was never their intention and that their intentions could be inferred from the fact that they had never resided in the Property. She did not accept that the flat share agreement had been downloaded from the internet and maintained it was a deliberate deception and that she had been misled by their absolute lies.
12. In response to questions from the Tribunal, Ms. Heresco accepted that she had signed the flat share agreement although she was aware that it was not the correct agreement. She stated that she signed it because she needed an accredited address and stated that she was aware that there was a difference between the wording in the document and the reality of the situation as she had educated herself in respect of her rights. She did not answer when asked if she had acted in the same fraudulent or deceptive manner that she had accused the Respondents of acting.
13. In response to questions from the Tribunal, Ms. Heresco explained that she did not raise the issue of the occupancy being a tenancy for 15 months as she had had exclusive use of the Property and she did not question the arrangement until the Respondents raised the matter of her paying an increased rent or having another paying flat-mate in the Property. She referred to an email from the Respondents referring to her "de facto exclusive use" of the Property as evidence that the Respondents had granted a tenancy to her and stated that for her to agree to a flat

share at that point was a significant disadvantage to her as she was being denied her true status and rights.

14. Again in response to questions from the Tribunal. Ms. Heresco stated that the Respondents had advantages because they were not paying tax, did not have the management costs of a landlord and were storing their goods in the Property. She stated that, because of the amount of the Respondents' belongings it would not be possible to have a flat-mate.

Evidence of the Respondents.

15. Mr. Vig gave evidence on behalf of the Respondents and submitted that they had purchased the Property as their home, and when their son was born, decided to split their time between Glasgow and Hungary. He stated that they did not rent the Property out as a tenancy as they intended to reside in it when in Glasgow and retained the furniture and their goods in the Property. Mr. Vig stated that this plan did not work out as they had to remain in Hungary more. He stated that it was costly to the Respondents as they could have realised more income if the Property had been rented out as a sole tenancy, estimating £300.00 per month more, and the Respondents would not have had to pay Council Tax.
16. Mr. Vig stated that the Respondents realised in November 2022 that they were not likely to reside in Glasgow and so they contacted Ms. Heresco to enquire if she wanted to take on a full tenancy or to find a flat-mate. He stated that it was at this point when Ms. Heresco raised the issue of the occupancy being a tenancy and the deposit not being lodged. Ms. Heresco agreed to an increased rent but not having a flat-mate and the Respondents became aware that the flat-share might now be a tenancy. He stated that, therefore, the Respondents took steps to register as landlords and lodge the deposit with an approved scheme. Mr. Vig explained that the deposit could not be lodged until the Respondents had registered as landlords. He stated that the Respondents could not register as landlords until Ms. Heresco allowed access for the electrical safety inspection to be carried out and that that delay meant the deposit was not lodged until July 2023.
17. Mr. Vig stated that the Respondents had been of the opinion that that everyone was happy with the flat-share arrangement and that all had acted in good faith. He stated that the Respondents had carried out any repairs and renewed items when asked to do so by Ms. Heresco.
18. With regard to the amount of an order, Mr. Vig asked the Tribunal to take into account the facts that Ms. Heresco had not paid rent for the last 5 months of her tenancy and had removed the Respondents' furniture from the Property and that this was now a police matter.
19. In repetitive cross-examination by Ms. Heresco, Mr. Vig maintained that the Respondents had resided in the Property as their home before Ms. Heresco's occupancy and had fully intended to continue to reside there on a part-time basis until it became clear to them that they were likely to remain in Hungary. Mr. Vig

agreed that Ms. Heresco raised the issue of a tenancy in February 2023 and raised the issue of the deposit around that time. He stated that, had she done so before or raised any concerns, the Respondents would have acted quickly to remedy matters just as they had acted quickly when she raised the issue. Mr. Vig accepted that it was not for Ms. Heresco to tell him his obligations, but maintained that there had been no intention of wrong-doing on the part of the Respondents and that there had never been any intention to dupe or deceive Ms. Heresco. Mr. Vig was aware that Ms. Heresco's job is as an international student advisor and so she has knowledge of housing matters.

20. With regard to the flat share agreement, Mr. Vig stated that he had downloaded this as it was the correct template for the shared accommodation. He denied that he had acted sneakily in this respect and denied that he had refused to provide a private residential tenancy agreement.
21. In response to questions from the Tribunal, Mr. Vig stated that the deposit had been held by the Respondents untouched in their bank account as they knew it would have to be returned at some point. He stated that it was lodged as soon it could be done, which was on the same day as they had registered as landlords.
22. The Tribunal explained to Ms. Heresco that the Tribunal's assessment of the evidence would be based on credibility and reliability, and, as Ms. Heresco had attacked the character of the Respondents, the Tribunal asked if she wished to respond to the theft and unpaid rent allegations made by Mr. Vig. Ms. Heresco stated that she did not want to comment as she wanted the Tribunal to deal only with the Regulations and the Respondents breach of them and not with other matters

Summing Up

23. Both Ms. Heresco and Mr. Vig summed –up by restating their keys points.

Assessment of the Evidence

24. The Tribunal's impression of Ms. Heresco is that she over-exaggerated her position and her opinion of the Respondents as acting in deliberate bad faith. Although she spoke at length of the duplicitous ways in which she alleged the Respondents behaved, she produced no direct or indirect evidence of this. Ms. Heresco proved herself to be unreliable as she clearly entered into the flat share agreement in the knowledge that it might be a private residential tenancy, and so, took advantage of the lower rent offered to her and to the fact that there would be times when she would have full use of the Property. She accepted the position until it became apparent to her that either she would have to pay a higher rent or share the Property with a flat –mate. Her intentions and actions were not open and honest and, by remaining silent about her perceived status as a tenant, she acquiesced to the flat share arrangement.

25. The Tribunal found Mr. Vig to be straightforward and credible. The Tribunal accepted that the Respondents' intention was to reside partly in Glasgow and partly in Hungary and that they took action to register as landlords and comply with the Regulations at the earliest opportunity. The Tribunal had no doubt that the arrangement had been a flat share agreement until the Respondents formed the opinion that they no longer intended to return to reside in the Property.
26. From the Application, the written submissions and productions, the Tribunal noted that Mr. Vig of the Respondents contacted Ms. Heresco in November 2022 to offer her an amendment to the flat share agreement and the option to become a sole tenant at a higher rent or to have a flat-mate. Ms. Heresco refused the flat-mate option and the Respondents accepted her choice by 30 January 2023 and issued an amendment to the flat share agreement to commence from 1 April 2023. The effect of the amendment created tenancy agreement.

Findings in Fact and Law

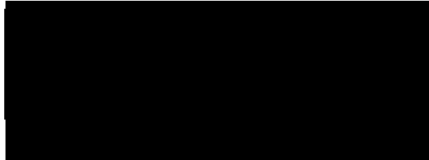
27. From the Application, the written submissions and the Hearing, the Tribunal made the following findings in fact: -
- i) There had been a flat share agreement of the Property between the Parties from 1 December 2021;
 - ii) A deposit of two months' rent was paid by the Applicant to the Respondents at that time;
 - iii) The flat share agreement was exempt from the Regulations by virtue of Section 83(e) of the Antisocial Behaviour etc (Scotland) Act 2004,
 - iv) A tenancy agreement was created on 1 April 2023;
 - v) The tenancy agreement was subject to the Regulations;
 - vi) The tenancy deposit ought to have been lodged with an approved scheme by 17 May 2023, being 30 working days from 1 April 2023;
 - vii) The tenancy deposit was lodged with an approved scheme on 12 July 2023, being 40 working days late;
 - viii) The Respondents could not lodge the deposit until they had registered as landlords;
 - ix) The Respondents could not register as landlords until they were in possession of the electrical safety certificate;
 - x) The Applicant prohibited or delayed the issue of the electrical safety certificate;
 - xi) The Applicant prohibited or delayed the Respondents' ability to register as landlords;
 - xii) The Applicant prohibited or delayed the Respondents' ability to lodge the deposit in an approved scheme earlier than 12 July 2023;
 - xiii) The deposit was held by the Respondents in a bank account from 1 December 2021 until it was lodged on 12 July 2023;
 - xiv) The deposit was not at risk.

Decision

28. Having made those findings, the Tribunal had regard to Regulation 10(a) which is mandatory and states that if the Tribunal is satisfied that the landlord did not comply with any duty in Regulation 3, the Tribunal **must** order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Therefore, the Tribunal is bound to make an Order.
29. With regard to the amount of the Order, the Tribunal considered the breach of Regulation 3 by the Respondents to be insignificant and at the lowest end of the penalty scale. The Tribunal took account of the fact that the Applicant herself contributed to the extent of the breach. Had the Applicant cooperated with the Respondents in respect of the issue of the electrical certificate there might not have been a breach of the Regulations at all. Therefore, the Tribunal took the view that a minimum amount be awarded to the Applicant and made an Order for Payment in the sum of £100.00, being 100% of the amount of the deposit.

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.



Legal Member/Chair

6 November 2023

Date