



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3991

Re: Property at 37 Seaton Walk, Aberdeen, AB24 1SH (“the Property”)

Parties:

Miss Chelsea Burrow, c/o 38 Kings Road, Tranent, EH33 2HB (“the Applicant”)

Mrs Annette Burrow, 38 Kings Road, Tranent, EH33 2HB (“the Applicant’s Representative”)

Kanishka Group Limited, 22 South Chesters Avenue, Bonnyrigg, EH19 3GN (“the Respondent”)

Tarun Dureja, The Property Leasing Company Ltd, 35 King Roberts Way, Bridge of Don, Aberdeen, AB23 8FB (“the Respondent’s Representative”)

Tribunal Members:

Ruth O’Hare (Legal Member) and Jane Heppenstall (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order in the sum of Three hundred pounds (£300) Sterling in favour of the Applicant against the Respondent

Background

1 By application dated 17 December 2019 the Applicant applied to the Tribunal under regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 seeking an order for payment as a result of the Respondent’s failure to lodge her tenancy deposit with a tenancy deposit scheme. In support of the application the Applicant provided the following documentation:-

- (i) Private Residential Tenancy Agreement which commenced on 26 March 2019;

- (ii) Deposit Certificate from MyDeposits Scotland dated 20 August 2019;
 - (iii) Email from the Letting Protection Service Scotland confirming no deposit lodged;
 - (iv) Email from Safe Deposits Scotland confirming no deposit lodged;
 - (v) Email correspondence between the Applicant's Representative and the Respondent's Representative regarding the deposit; and
 - (vi) Statement by Applicant.
- 2 By Notice of Acceptance of Application dated 20 December 2019 the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 14 February 2020.
- 3 On 4 February 2020 the Applicant submitted a response to the application with the following documentation:-
- (i) Excerpt from Future Property Auctions listing the Property for sale;
 - (ii) Email from the Applicant's Representative to the Respondent's Representative dated 23 September 2019;
 - (iii) Invoice from Property Leasing Company in respect of cleaning costs dated 25 September 2019;
 - (iv) Excerpt from TSB bank account;
 - (v) Excerpt from MyDeposits Scotland account;
 - (vi) Deposit Protection Certificate dated 20 August 2019;

The Case Management Discussion

- 4 The Case Management Discussion took place on 4 February 2020. Both the Applicant's Representative, Mrs Burrows, and the Respondent's Representative, Mr Dureja, were in attendance.
- 5 The Tribunal noted a dispute between the parties as to the termination date of the tenancy. The Applicant's position was that the tenancy ended on 18th September 2019. The Respondent's position was that the tenancy ended on 16th September 2019. If the Respondent's position was found to be established then the application would be out with the statutory timescales under Regulation 9 of the 2011 Regulations, which require the application to be lodged within three months of the end date of the tenancy.
- 6 The Tribunal noted the other issue upon which there was no agreement was the reason why the deposit was lodged with a deposit scheme in August 2019. The Applicant was of the view that this was done because the Respondent had indicated that he would be giving the Applicant Notice to Leave the property and required to lodge the deposit with a scheme before proceeding and that the Applicant was taking advice on whether to accept the return of the deposit. The Respondent's position is that they took advice once realising that the deposit had not been lodged and had been advised to lodge it with a scheme. The Respondent fully accepted that due to human error the deposit had not been lodged in a scheme within the statutory timescales.

7 Having noted the above issues to be resolved, the Tribunal fixed a hearing in the matter. A Direction was issued to the parties in the following terms:-

“The Applicant/Respondent is required to provide:-

1. *Written details of any witnesses to be called by parties at the Hearing on 30th March 2020.*
2. *Any productions not yet lodged with the Tribunal and to be relied upon at the Hearing by either party to be lodged with the Tribunal.*
3. *Parties to provide written confirmation as to who their representatives will be at the Hearing.”*

8 In response to the Direction the Applicant submitted a letter dated 9 March 2020 with a summary of the Applicant’s position regarding the matter, together with appendices including copy Notice to Leave dated 20 August 2019, excerpt from Tenancy Agreement confirming the Applicant’s new tenancy had commenced on the 18th, email correspondence between the Applicant and the Respondent’s Representative, excerpt Text Messages between the Applicant and the Respondent’s Representative, excerpt from bank statement and excerpt from Aberdeen Considein with sale particulars for the property. By email dated 4 March 2020 the Respondent submitted excerpt from text messages between the Applicant and Respondent’s Representative, copy Notice to Leave and copy bank statements. He also narrated the chronology of the tenancy and confirmed his belief that the termination date was 15th September 2019.

The Hearing

9 The Hearing took place on 19 August 2020. Due to the restrictions imposed by the Covid-19 pandemic, the Hearing took place by tele-conference. Both the Applicant’s Representative, Mrs Burrows, and the Respondent’s Representative, Mr Dureja, were in attendance. There were no other parties present.

10 The Tribunal explained the purpose of the Hearing and confirmed that all parties were in receipt of the documentation submitted following the Case Management Discussion and that there were no other witnesses other than those parties present. The Tribunal then heard evidence from the parties on the issues to be resolved which can be summarised as follows:-

11 *On what date did the tenancy terminate?*

- (i) Mrs Burrows advised that the Applicant had been served with a Notice to Leave by email on 20 August 2019. Having calculated the required period of notice under the Private Rented Housing (Tenancies) (Scotland) Act 2016, the Applicant had concluded this to be 18 September 2019, which was the date specified in the Notice. Mrs Burrows confirmed that the Applicant had moved out of the property on the 18th September and into her new tenancy. The Respondent had initially suggested that the Applicant had to leave on the 15th September, however the Applicant did not agree that was accurate. The Applicant

had asked for a couple more days, due to her being ill at the time and unable to move out within the timescales. However she had subsequently found somewhere else to move to and accordingly had left the property on the 18th in accordance with the requirements of the Notice.

- (ii) Mr Dureja accepted that the Notice to Leave had been emailed to the Applicant on 20 August 2019 and stated that proceedings would not be raised any earlier than 18th September 2019. Notwithstanding it was the Respondent's position that the tenancy terminated on the 15th September 2019. This was calculated as 28 days from the date the Notice was emailed to the Applicant. Mr Dureja accepted that the Applicant had moved out of the property on 18th September 2019. However he maintained that the tenancy had in fact terminated on 15th September 2019. The Applicant had asked for a few more days to move out of the property which the Respondent had agreed to, rent free.
- (iii) Mrs Burrows highlighted the text messages between the Applicant and Mr Dureja which referred to a termination date of 18th September 2019 and sought extra time for the Applicant to move out. She noted that this had not been challenged by Mr Dureja at the time. Mr Dureja accepted that those text messages had been sent, but considered this was the request for the extra days that he had referred to and maintained his position that the tenancy terminated on the 15th September.
- (iv) The Tribunal then directed Mr Dureja to section 50(2) of the Private Rented Housing (Tenancies) (Scotland) Act 2016, noting that it appeared from the evidence that the date specified on the Notice to Leave and the date the tenant had removed from the property were both the 18th September 2020. Mr Dureja confirmed the Respondent's position that there was no rent accepted for the tenancy after the 15th September 2019, and taking into account the 28 day period for serving notice, he had concluded that the tenancy terminated on that date.

12 *What were the reasons for lodging the deposit in August 2019?*

- (i) Mrs Burrows confirmed that she and the Applicant had taken advice in August 2019 and were aware that the deposit had not been lodged with a tenancy deposit scheme. They had been communicating with Shelter and the Citizens Advice Bureau. They had been due to get a call back with advice and Mr Dureja was aware of that. In the meantime Mr Dureja had gone ahead and lodged the deposit in a tenancy deposit scheme without awaiting any further instruction. It was the Applicant's belief that he had done so because Mrs Burrows had advised him that it would be more difficult to evict the Applicant if the deposit hadn't been placed in a scheme. Mrs Burrows made reference to email correspondence produced where she had highlighted that point to the Applicant. She was confused as to why Mr Dureja would have lodged the deposit with a scheme when the Applicant was awaiting advice from the aforesaid agencies. The Applicant had received confirmation that

the deposit had been lodged in a scheme, in the form of a certificate from MyDeposits Scotland, on the same day the Notice to Leave was emailed to her.

- (ii) Mr Dureja explained that the failure to lodge the deposit in a scheme was down to human error. He was made aware of the error following email correspondence from the Applicant. Once he became aware that the deposit had not been lodged, he took advice from the Scottish Association of Landlords, of which he was a member, and was advised to lodge it in a scheme straight away, which he did on 20th August. He took full responsibility for the failure to lodge the deposit.

13 *If the Tribunal was to find that the application has been made timeously, what level of sanction would be appropriate, having regard to the circumstances of the breach*

- (i) With regard to the sanction, Mrs Burrows advised that the Applicant would be happy with whatever the Tribunal deemed appropriate. If the Tribunal were to accept Mr Dureja's position that the failure to lodge the deposit was a genuine mistake, perhaps a sum equivalent to the deposit would be fair and reasonable in the circumstances. Mrs Burrows confirmed that the Applicant had received the deposit back in full from the deposit scheme. Mr Dureja confirmed this to be the case, and advised that the Respondent had not sought to make any claim against the deposit as a goodwill gesture, albeit there were some cleaning costs that could have been claimed.
- (ii) Mr Dureja advised that the Respondent would fully honour the decision of the Tribunal. He advised that the Applicant had been offered a few free nights along with the cleaning charges which equated to a few hundred pounds. Mr Dureja confirmed that the Respondent had engaged him to manage the property, and he had done so since late 2018, early 2019. The Respondent had a number of properties that Mr Dureja managed on his behalf. Mr Dureja himself manages around 100 properties on behalf of landlords. He regularly consults the Scottish Association of Landlords, for professional advice on letting standards. He explained that this situation had been a good learning curve. With every tenancy since, he now had a process in place whereby a full tenancy pack is sent to the tenancy, with all documentation including the deposit certificate, as opposed to documents being sent in a piecemeal fashion. That would hopefully prevent such a situation from happening again.

14 Both parties were given the opportunity to summarise their respective positions before the conclusion of the hearing. Mrs Burrows advised that the Applicant would have disputed the cleaning costs if she had been given the opportunity and challenged the Respondent's position that this was a gesture of goodwill. Mr Dureja advised that he had no further points to make. The hearing was therefore concluded.

Relevant Legislation

- 15 The relevant legislation is contained with the Tenancy Deposit Scheme (Scotland) Regulations 2011 which provide as follows:-

“3.—(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy—

(a) pay the deposit to the scheme administrator of an approved scheme; and

(b) provide the tenant with the information required under regulation 42.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “relevant person” and “unconnected person” have the meanings conferred by section 83(8) of the 2004 Act.”

“9.—(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended.”

“10. If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff—

(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and

(b) may, as the sheriff considers appropriate in the circumstances of the application, order the landlord to—

(i) pay the tenancy deposit to an approved scheme; or

(ii) provide the tenant with the information required under regulation 42.”

- 16 The Tribunal also took into consideration the provisions of section 50 of the Private Housing Tenancies (Scotland) Act 2011 which provide as follows:-

50 Termination by notice to leave and tenant leaving

(1) A tenancy which is a private residential tenancy comes to an end if—

(a) the tenant has received a notice to leave from the landlord, and

(b) the tenant has ceased to occupy the let property.

(2) A tenancy comes to an end under subsection (1) on the later of—

*(a) the day specified in the notice to leave in accordance with section 62(1)(b),
or*

(b) the day on which the tenant ceases to occupy the let property.

*(3) For the avoidance of doubt, a tenancy which is to come to an end under
subsection (1) may be brought to an end earlier in accordance with section 48*

Findings in Fact

- 17 The Applicant and Respondent entered into a Private Residential Tenancy Agreement which commenced on 26 March 2019.
- 18 The said Tenancy Agreement provides for a deposit of £300 to be paid by the Applicant to the Respondent.
- 19 The Applicant paid the deposit of £300 to the Respondent on or around 26 March 2019.
- 20 The Respondent's Representative paid the deposit of £300 into an approved tenancy deposit scheme, namely MyDeposits Scotland, on 20 August 2019.
- 21 The Respondent's Representative provided the Applicant with the deposit protection certificate from MyDeposits Scotland on 20 August 2019.
- 22 The failure to lodge the tenancy deposit in an approved deposit scheme within the statutory timescales was a result of human error on the part of the Respondent's Representative.
- 23 The Respondent's Representative emailed a Notice to Leave, as defined by section 62 of the Private Housing Tenancies (Scotland) Act 2016 to the Applicant on 20 August 2019. The said Notice to Leave confirmed that proceedings for possession would not be raised any earlier than 18 September 2019.
- 24 The Applicant vacated the property on 18 September 2019.

Findings in Law

- 25 The date of termination of the tenancy is 18th September 2020.

- 26 The application has been made in accordance with Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.
- 27 The Respondent is in breach of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 by virtue of their failure to lodge the deposit within an approved tenancy deposit scheme and provide the Applicant with the prescribed information within thirty working days of the commencement of the tenancy.

Reasons for Decision

- 28 The Tribunal determined the application having regard to the application paperwork, the written representations from both parties and the evidence heard at the hearing. The Tribunal considered it had sufficient information upon which to make a proper determination of the application.
- 29 The Tribunal had to first consider the termination date of the tenancy in order to establish whether the application had been made timeously. Section 50(2) of the Private Housing Tenancies (Scotland) Act 2016 makes clear provision for the termination date of a private residential tenancy, where the tenant has received a Notice to Leave. The termination date will either be the date specified in the Notice to Leave, or the date the tenant ceases to occupy the property, whichever is the later. It was evident in this case that the established date in both scenarios was the 18th September 2019. That was the date specified on the Notice to Leave, and the date on which the Applicant had vacated the property. Mr Dureja had conceded both points during his evidence. There was nothing to suggest an earlier date had been agreed under section 50(3) of the 2016 Act. Whilst the Respondent's position is that the tenancy in fact terminated on the 15th September 2019, he had put forward no legal basis for this conclusion that would contradict the clear provision in the 2016 Act. The fact that the Respondent may not have charged rent up until the 18th September 2019 was irrelevant.
- 30 The Tribunal was therefore satisfied that the application had been made within three months of the termination date of the tenancy, having been lodged on 17th December 2019, and therefore that the requirements of Regulation 9 of the 2011 Regulations had been complied with.
- 31 Non-compliance with Regulation 3 was admitted by the Respondent in this case, and therefore Regulation 10 was engaged. On that basis the Tribunal had to consider what level of sanction would be appropriate having regard to the particular circumstances surrounding the breach.
- 32 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained

unprotected for nearly the entire term of the tenancy, it being a matter of agreement that the Respondents had not paid the deposit into an approved deposit scheme until the date the Notice to Leave was served on 20 August 2019. The lodging of the deposit would, however, have given the Applicant the necessary access to the independent dispute resolution mechanism provided by the scheme at the end of the tenancy, had the Respondent sought to make a claim against the deposit. The Tribunal noted that the Respondent had not made any claim and the Applicant had received her deposit back in full.

- 33 The Tribunal also had cognisance of the Respondent's candid acceptance of non-compliance, which had been consistent throughout their correspondence with the Applicant and in the proceedings before the Tribunal. The Tribunal accepted the evidence from the Respondent's Representative that this was a result of human error, and found his position to be credible in that respect. The Tribunal also accepted that he had sought advice from a professional body and had subsequently lodged the deposit in a scheme on the back of that advice, which seemed in the view of the Tribunal to be entirely sensible. The Tribunal noted the measures that had been put in place by the Respondent's Representative in order to mitigate against a similar error occurring in future.
- 34 The Tribunal could not however ignore the purpose of the 2011 Regulations, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The provisions of Regulation 10 leave the Tribunal with no discretion where a landlord is found to have failed to comply and permit an award of up to three times the deposit. In this case, the Tribunal did not consider an award at the higher end of the scale was warranted, particularly as the breach arose from simple human error. Balancing the competing factors in the particular facts and circumstances of this case, the Tribunal considered therefore that a sanction in the sum of £300 would be appropriate, being a sum equivalent to the deposit.
- 35 The Tribunal therefore made an order against the Respondents in the sum of £300

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.



19 August 2020

Legal Member/Chair