



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014 and Regulations 3 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/21/2184

Re: Property at Flat 3/1, 40 Cobury Street, Glasgow, G5 9JF (“the Property”)

Parties:

Mrs Iveta Purina, C/O 2/2, 300 Possil Road, Glasgow, G4 9SX (“the Applicant”)

Ms Elena Zaharchenko, 0/1 323 Archerhill Road, Glasgow, G13 4PL (“the Respondent”)

Tribunal Members:

George Clark (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be determined without a Hearing, that the Respondent had failed to comply with the duty imposed on him by Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and made an Order for Payment by the Respondent to the Applicant of the sum of £500.

Background

1. By application, received by the Tribunal on 7 September 2021, the Applicant sought an Order for Payment in respect of the Respondent’s failure to comply with the requirement to lodge a tenancy deposit in an approved Tenancy Deposit Scheme, as required by The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”).
2. The application was accompanied by a partial copy of a Private Residential Tenancy Agreement between the Parties commencing on 17 May 2020, which provided for a tenancy deposit of £325 and evidence of payment of the deposit in three instalments, on 26 May (£100), 18 June (£100) and 24 August

2020 (£125). The Applicant stated that the tenancy had ended on 9 June 2021 and that, on that date, the Respondent had given her a cheque in full refund of the deposit and partial refund of rent but had then stopped payment on the cheque. The Applicant provided a copy of a bank statement showing the lodging of a cheque for £400.83 on 10 June 2021 and an entry "Returned cheque" in respect of the same amount on 11 June 2021.

3. On 5 October 2021, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations to the Tribunal by 26 October 2021.
4. The Respondent submitted written representations to the Tribunal, received on 19 October 2021. These, however, related solely to the conduct of the Applicant during the tenancy and the condition of the Property when she left. They did not provide any evidence either of the tenancy deposit having been lodged with an approved Tenancy Deposit Scheme or of any reason for the failure to lodge it. Further representations were received from the Respondent's representative, who requested that the Case Management Discussion be postponed until a hearing could be held in a court room. This request was refused by the Tribunal, as there was no way of estimating when such a procedure could take place. On 4 November 2011, Mr Wishart advised the tribunal that he would be calling a witness as to the Applicant's behaviour during the tenancy and on 8 November advised that he would be calling a witness who was present when the Applicant left the Property.
5. On 5 November 2021, the Applicant's solicitor provided the Tribunal with copies of emails from all three approved Tenancy Deposit Schemes confirming that her deposit had never been secured with them.

Case Management Discussion

6. A Case Management Discussion was held by means of a telephone conference call on the afternoon of 9 November 2021. The Applicant was present and was represented by Ms Maureen Smith, Senior Solicitor, of Castlemilk Law & Money Advice Centre. The Respondent was also present and was represented by Mr John Wishart. At the request of the Respondent, a Russian translator was also present to interpret for the Respondent, should it be required. In the event, that was not necessary, and Mr Wishart was able to assure the Tribunal at the end of the Case Management Discussion that the Respondent had fully understood everything that had been said.
7. The Legal Member of the Tribunal began proceedings by telling the Respondent's representative that the Case Management Discussion was strictly limited to the one matter in the application, namely that the Respondent had failed to lodge the tenancy deposit in an approved tenancy deposit scheme, and that he would not be permitted to present evidence relating to matters which occurred during the tenancy or to the condition of the Property when the Applicant vacated it. Any dispute as to whether the Respondent was entitled to retain all or part of the deposit moneys would

have to be determined by a separate application by the present Applicant for repayment of the deposit, should she choose to make such an application.

8. Mr Wishart drew the attention of the Tribunal to the Scottish Government website *mygovscotland* which, in relation to tenancy deposits, states that there is an exception to the requirement to lodge a tenancy deposit if the landlord is also a resident in the property. He contended that the Respondent was resident in the Property, as the Applicant did not have a tenancy of the whole flat, the Respondent had belongings there and regularly visited the Property. He also indicated that the Respondent did, on occasions, sleep overnight in the flat. This was denied by the Applicant.
9. Mr Wishart also pointed to the statement on the website that the deposit must be lodged within 30 working days of the beginning of the tenancy. This, he said, could not apply in the present case, as the deposit had been paid over three instalments, the last of which had not been made until 24 August 2020, by which date the 30-working-day period had elapsed. He told the Tribunal that there had been no agreement on the part of the Respondent that the deposit could be paid in instalments. Again, this was denied by the Applicant.
10. For the Applicant, Ms Smith argued that the Respondent was not a resident landlord. The Respondent had failed in her duties under the 2011 Regulations, and she was seeking an Order under Regulations 9 and 10 for payment by the Respondent to the Applicant of three times the amount of the deposit or such sum as the Tribunal thought fit. The failure had extended over a lengthy period and the Applicant had been denied a fair and efficient means for seeking return of the deposit, as was evidenced by the fact that the Respondent had stopped the cheque that she had given the Applicant when she vacated the Property. Ms Smith understood that the Respondent had let out the Property before.

Reasons for Decision

11. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.
12. Under Regulation 3(1)(a) of the 2011 Regulations, a landlord must within 30 working days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme and provide the tenant with the information required under Regulation 42. Under Regulation 10 of the 2011 Regulations, if satisfied that the landlord did not comply with any duty in Regulation 3, the Tribunal must order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit.

13. The Tribunal considered the arguments put forward by Mr Wishart on behalf of the Respondent. He had argued that she was resident in the Property, as she had belongings there and had, on occasion, stayed there overnight. The 2011 Regulations apply to landlords, within the meaning of the Housing (Scotland) Act 2006 (“the 2006 Act”). Section 194((1) of the 2006 Act defines “landlord” as “*any person who lets a house under a tenancy*” and defines “house” as “*any living accommodation which is, or is capable of being, occupied as a separate dwelling*”. “Separate dwelling” is not defined in the 2006 Act, but there is a helpful definition in Section 2 of the Private Housing (Tenancies) (Scotland) Act 2016, which, in essence, repeats the definition in the Housing (Scotland) Act 1988 and states that “*A tenancy is to be regarded as one under which a property is let as a separate dwelling if, despite the let property lacking certain features or facilities, the terms of the tenancy entitle the tenant to use property in common with another person (“shared accommodation”), and the let property would be regarded as a separate dwelling were it to include some or all of the shared accommodation.*”
14. It appeared to the Tribunal that the subjects let in the present case fell within the definition of a separate dwelling, with the Applicant having the right to occupy some of the accommodation and to share facilities such as a bathroom. The Property fell, therefore, within the definition of “house” in the 2006 Act and the Respondent was, therefore, a landlord for the purposes of the 2011 Regulations and was bound by those Regulations to lodge the tenancy deposit with an approved scheme. The Tribunal was not, in any event, persuaded that the Respondent’s use of the flat was sufficient to entitle her to assert that she was resident there. It could not be described as her only or principal home.
15. Mr Wishart had appeared to argue that, because the deposit was not fully paid up within 30 working days of the commencement of the tenancy and, as a result, the Respondent was unable to lodge it in an approved scheme within the timescale specified in the Regulations, she was not under an obligation to lodge it thereafter. The view of the Tribunal was that this could not have been the intention of the Scottish Parliament. It would be a stateable defence to a complaint that a deposit had been lodged late, but Parliament can never have intended that the obligation to lodge tenancy deposits did not apply at all if the deposit itself was paid late. The Tribunal accepted that the situation was not covered by the 2011 Regulations and determined that the only reasonable interpretation of the intention of Parliament was that, if a deposit was not paid until after the expiry of the 30-working-day period, then that period commenced on the day the deposit was paid, rather than the date of commencement of the tenancy.
16. The Tribunal noted that the tenancy commenced on Tuesday 17 May 2020, but that the final instalment of the deposit was not paid until 24 August and calculated that the last date for lodging the deposit in an approved tenancy deposit scheme was 5 October 2020. It had, however, never been lodged, so the Respondent had failed to comply with Regulation 3(1)(a) of the 2011 Regulations and the Tribunal was bound to make an Order for Payment against her.

17. The Tribunal accepted the argument made on behalf of the Applicant that, as the tenancy had now ended, the failure by the Respondent to lodge the deposit had denied her the opportunity of an independent assessment as to whether the deposit should be returned to her or whether any or all of it should be retained by the Respondent. The Respondent was still holding the deposit and the only way by which the Applicant could seek to have it refunded to her was by means of a separate application to the Tribunal. The Tribunal could not, of course, speculate as to the outcome of any such application, but was satisfied that the failure on the part of the Respondent had caused concern and inconvenience to the Applicant.
18. The Tribunal had determined that the deposit should have been lodged in an approved scheme by 5 October 2020 and the tenancy ended on 9 June 2021. Accordingly, the Applicant's money was at risk for a period of 8 months.
19. The Tribunal did not regard the Respondent's failure as being egregious, but it was deliberate. She had not suggested in evidence that it was an accidental omission, and the Tribunal did not regard it as credible that she could have formed the view at the time that the 2011 Regulations did not apply simply because the deposit was paid late. The consequence of the Respondents' failure had been that the Applicant had, on the termination of the tenancy, been denied the opportunity of an independent assessment by a Tenancy Deposit Scheme as to what should happen to the deposit and this matter had still not been resolved 5 months after the tenancy came to an end.
20. Having taken into account all the circumstance of this particular case and the evidence, written and oral, presented to it, the Tribunal decided that an appropriate sum to order the Respondent to pay to the Applicant under Regulation 10 of the 2011 Regulations was £500. This is a sanction on the Respondent and does not in any way affect the rights of the Parties in relation to the deposit itself.

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.

G Clark

Legal Member/Chair

9 November 2021
Date