



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under the Housing (Scotland) Act 2006 section 121 and Regulation 9 the Tenancy Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/22/1059**

**Re: Property at 13 Haremooss Drive, Portlethen, AB12 4UX (“the Property”)**

**Parties:**

**Mr Angelo Van Wyk, 16 Schoolhill Drive, Portlethen, Aberdeen, AB12 4PN (“the Applicant”)**

**Ms Pei Tan, 5 Kirk Brae Court, Cults, Aberdeen, AB15 9QE (“the Respondent”)**

**Tribunal Members:**

**Gabrielle Miller (Legal Member) and Elizabeth Currie (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Landlord is in breach of her obligations in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“Regulation 3”). The Respondent shall make payment to the Applicant in the sum of £2400.00 POUNDS (TWO THOUSAND FOUR HUNDRED POUNDS) STIRLING**

**Background**

1. The Tribunal received an application from the Applicant dated 11<sup>th</sup> April 2022 in terms of Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Rules 2017 which was signed on 20<sup>th</sup> December 2021. The Application included a lease which detailed that a deposit of £1200 had been paid.
2. This case has been conjoined with PR/22/1240 which is an application under Rule 110. The hearings were conducted sequentially with the Tribunal hearing this case first.

3. A Case Management Discussion (“CMD”) was held on 27<sup>th</sup> June 2022 at 10am by teleconferencing. Both parties were present and represented themselves. Parties remained in dispute about whether a Private Rented Tenancy (“PRT”) or a holiday let had been created when the Respondent had moved into the Property. As a consequence the date that the deposit was required to be lodged in an approved scheme was disputed. The Tribunal continued the matter to a hearing to allow full evidence and for parties to comply with a direction that was issued after the CMD.
4. Both parties lodged submissions prior to the hearing.

### The hearing

5. A hearing was held on 5<sup>th</sup> September 2022 at 10am by teleconferencing. Both parties were present and represented themselves.
6. The Applicant said that he had arrived in the UK on 7<sup>th</sup> November 2020. He travelled with his family. He had initially stayed with his family in Airbnb accommodation. He wished to be in more settled accommodation so responded to the Respondent’s advertisement for this Property. He had investigated the area and liked the amenities and the schools as his children were aged 5, 7 and 13 at that time. The Applicant has family in Stonehaven and this property was in a good proximity to them. His children were home school online from 7<sup>th</sup> November 2020 to March 2021 when their visas came through.
7. On 3<sup>rd</sup> – 13<sup>th</sup> December 2020 the Applicant returned to South Africa. He then returned again to South Africa on 24<sup>th</sup> January 2021 to 4<sup>th</sup>/6<sup>th</sup> February 2021. Both occasions were to sort out his visa or passport. When going to South Africa he had to comply with quarantine requirements due to the Covid 19 restrictions which extended his stay in South Africa. He did not return to South Africa again until the end of June 2021.
8. The Applicant said he arrived in the UK with 15 bags of luggage for him and his family. It was his intention to remain in the UK. He worked from home in the Property for the main South African company until he was able to work in UK branch of his company. His company had agreed to pay his deposit and paid three months up front. The Applicant’s company’s long term plan is worked on a five year basis. The relocation agreement was that his rent would be paid by his company for 1 year. He had been renting a property from his company in South Africa. All his belongings were removed from it before coming to the UK. He did not pay any rent for it from when he left South Africa. This was his only residence in South Africa. South Africa does not have a mail redirect system. He has everything delivered electronically. This included his bank statements. Any paperwork went to his office in South Africa. When he returned to South Africa he stayed in hotels. His lease on the South African property ended on 8<sup>th</sup> January 2021 when his visa was granted allowing him to reside in the UK. Once his full visa had come through, the Applicant contacted the Respondent. She

was not satisfied that this met the regulations and refused to issue a PRT. The Applicant said that he put the Respondent on notice as he intended to raise an application with the Housing and Property Chamber to force the Respondent to provide a written PRT. He said from that he was given a written PRT that was back dated to 1<sup>st</sup> December 2020 with the tenancy starting at that date. Although the PRT was arranged in March 2021 it was electronically dated as being signed on 1<sup>st</sup> December 2020. The deposit was lodged on 16<sup>th</sup> March 2021.

9. The Applicant stated that he had signed the holiday agreement as it was a suitable property. He did not consider that it was a holiday let as he had to buy furniture for him moving into the Property. There had been a agreement to convert the holiday let to a PRT once his visa came through. It was this condition that allowed the Applicant to have security with renting the Property. The Applicant said that the Respondent offered to extend his tenancy, prior to it being agreed to be a PRT, for 3 months or 6 months. He had been informed by the Respondent that she was looking for a long term let. The Applicant stated that the Respondent had offered him the short term let at a higher rent. He contacted the Citizens Advice Bureau and Shelter Scotland for advice. He was told that this was not a holiday let but a PRT. He felt the correct action at that time was to have the lease put before the Housing and Property Chamber for them to make a decision on it as there was disagreement about the type of tenancy. The Applicant accepts that the lease was electronically signed in March but that the document was electronically backdated as being signed on 1<sup>st</sup> December 2022. The Applicant also noted that the Property was not advertised as a holiday let. He was happy with this property due to its location as mentioned above and also due to being able to gain access from 1<sup>st</sup> December 2020. Other properties had move in dates of January and he wanted to get his family settled.
10. The Applicant stated that he arranged for broadband service to be installed in the Property for when he moved in. He purchased furniture for the move such as beds, a freezer, TV, cutlery, kitchen items including a kettle. He also started paying Council Tax from 1<sup>st</sup> December 2020.
11. The Respondent had one other person interested in the Property. That person needed to give notice on his Property. The Respondent did not wish to wait an extra month to rent the Property out so she let it to the Applicant. She considered that the Applicant was not entitled to undertake a PRT as he did not have a residency visa. She had based this upon her own experience of entering the UK. She had entered in England. She created the holiday let herself. It was a combination of her own experience of using holiday lets and she searched the internet for holiday let agreements.
12. The Respondent objected to the Applicant's oral evidence. She wished to see written proof of the number of bags he had and the advice given to him by Shelter Scotland. The Tribunal explained that it looks at all the evidence presented both written and oral. The Respondent noted that the Applicant's children enrolled at school after the PRT was agreed upon. She also noted that

the bank statements provided to her were dated November and December 2020 but had a South African address on them.

13. The Respondent noted that she was fairly new to being a landlord. She had only let out the Property once prior to this time. She had let out the Property on 24<sup>th</sup> January 2020 and lodged the deposit on 5<sup>th</sup> February 2020. She created the holiday lease herself. She based this upon her own personal experiences of using holiday lets and from looking online. The Respondent said, when asked by the Tribunal, that she was not aware of the difference between Scots Law and English Law. She was not sure what law the holiday lease she drafted was based upon. She did not take legal advice on it. The Respondent did not contact her insurance company to see if the Property being used as a holiday let made any difference to her terms and conditions nor did she contact her mortgage company to enquire on the same issue. She told the Tribunal that she believed that the let was a holiday let and that the Applicant was on holiday. She was content to offer a PRT once she had seen documentation that satisfied her that the Applicant had the right to reside in the UK. The Respondent said that she contacted the Scottish Association of Landlords (“SAL”) when the Applicant put her on notice about raising a case for a written PRT. She was told by SAL to get advice from a solicitor but did not do this. She did not pursue her insurance company to obtain legal advice.
14. The Respondent said she then offered the Applicant a three month or six month short term let as she could not offer a holiday let for that duration. She said that she wanted to comply with the law but could not explain to the Tribunal on what legal basis she made that decision or the offer of a 3 holiday let month or 6 month short term let. The Tribunal queried with her that she was in fact offering a PRT.
15. The Respondent said that she did not lodge the money that she got as a deposit as she wished to take utility bills off of it. She could not be asked for this if she had lodged it within a deposit scheme. The utility bills from 1<sup>st</sup> December to mid February were £663.
16. The Respondent said that she considers that she let the Property as a holiday let and it was used for holiday purposes. She only agreed to backdate the PRT as she was worried about the cost of proceeding to a tribunal. She does not consider that the Applicant had right to reside until 17<sup>th</sup> February 2021. She does not consider that he could have a PRT until that point. She lodged the deposit on 16<sup>th</sup> March 2021 which was within 30 days. She noted that the Applicant returned to South Africa in the time period between 1<sup>st</sup> December 2020 and 17<sup>th</sup> February 2021.

#### Findings and reason for decision

17. A Private Rented Tenancy Agreement commenced 1<sup>st</sup> December 2020. A PRT does not need to be written as stipulated in terms of the Private Housing (Tenancies) (Scotland) Act 2016 (“the Act”)

18. A deposit of £2400 was paid on 12<sup>th</sup> November 2020.
19. The deposit was lodged with Safe Deposit Scotland on 16<sup>th</sup> March 2021 which is outwith 30 days from the start of the tenancy. This is a breach of the regulations.
20. The Act does not specify that a tenant requires the appropriate visa to engage in the contract. This issue of breaching visa stipulations is a matter for the Home Office or other agencies. There is no legal requirement for a landlord to check the immigration status of a prospective tenant in Scotland. The Respondent does not have any specialist immigration knowledge other than her own experience when coming to the UK. However, she first lived in England where the rules regarding letting properties are different. This case is not an immigration case but a housing case which has meant that the housing issue was at the centre of the case. Much of the Respondent's submissions related to this but the Tribunal did not consider this relevant for the above reasons.
21. The Tribunal did not consider that there was a holiday let created on 1<sup>st</sup> December 2020. Section 1 of the Act states at section 1:
- (1) *A tenancy is a private residential tenancy where –*
    - (a) *The tenancy is one under which a property is let to an individual (“the tenant”) as a separate dwelling house;*
    - (b) *The tenant occupies the Property (or any party of it ) as the tenant’s only or principal home, and*
    - (c) *The tenancy is not one which schedule 1 states cannot be a private residential tenancy.*
22. It In Schedule 1 paragraph 6 of the Act that an exception to a PRT is if it is a holiday let. The Tribunal did not consider this to be a holiday let. It is clear that this was let to an individual. The Applicant also gave evidence that this was his principal home. In this case the Applicant had bought furniture and belongings for the date of entry. He had broadband installed and he had paid Council Tax from the date of entry. He was working from home. He left the UK for approximately 23 days from 1<sup>st</sup> December 2020 to end of June 2021. He had given up his home in South Africa. His children were home schooled in the UK until such time as they were legally permitted to attend school in the UK. This is not suggestive of someone who is treating the Property as a temporary home. It is clearly his principal home where he had the intention to stay beyond that of a holiday. In fact the Applicant remained in the Property until the Applicant served a Notice to Leave and he left in January 2022. The Respondent did not take legal advice before creating the tenancy. She did not utilise legal advice from her insurance as it was a further cost. She did not take legal advice after consulting the Scottish Association of Landlords who told her to speak to a solicitor. She did not wish to face the extra cost. By her own evidence she was very concerned that the Housing and Property Tribunal would issue her with a 6 times the rent penalty for not issuing a PRT. This caused her to issue this to avoid the penalty. She noted in her evidence that the failure to lodge a deposit was not as great as it is a 3 times penalty. The Respondent did not advertise

the Property as a holiday let but created a lease of her own to suit the occupation of the Applicant and his family. She did not at that point contact her mortgage company or insurance company to ask if she needed to make any amendment to them. This gives an indication that the Respondent did not perceive the tenancy as anything other than a PRT albeit that a written PRT was not given. In *St Andrews Forest Lodges Ltd v. Jeremy Grieve and Iona Grieve 2017 SC DUN 25* It made clear that simply stating that it is a holiday let is not sufficient to prevent the tenancy being a PRT if that is what it in fact is.

23. The Tribunal did not find it relevant that the Applicant's children enrolled in school after the PRT was agreed upon. That was an immigration issue and this Tribunal was looking to see if the criteria have been met for a PRT to have been created on 1<sup>st</sup> December 2020.
24. The deposit was not returned to the Applicant as it was used to pay the outstanding rent arrears. The Respondent did not make any deductions for utility bill prior to lodging it. This had been her reason that she said that she did not deposit the money she received from the Applicant which became the deposit. The Tribunal found the Respondent's evidence to be inconsistent on this point.
25. Overall we found the evidence of the Applicant to be consistent. We did not find the evidence of the Respondent to be consistent or credible in parts. She was not consistent with her view that the Property was let as a holiday let as she backdated the PRT to 1<sup>st</sup> December 2020 and had it electronically signed on that date. She could easily have gone to a tribunal and explained her position. If she believed that she was correct she would have been able to explain this to a tribunal. She ignored SAL's advice of getting a solicitor at that point. She did not disclose what SAL's advice was in full. It is implied that she had not undertaken the correct route with the PRT.
26. The Tribunal have discretion as to the level of the penalty up to the amount of three times the deposit. The Tribunal noted the Respondent's engagement with the process and took this into consideration when reaching their decision regarding the level of the penalty.

### Decision

27. The Respondent has a duty under Regulation 3 to place the deposit in an approved scheme within the specified time but failed to do so. The Respondent did not get any legal advice before creating the 'holiday let' to find out that it was in fact a PRT. She did not get legal advice when the Scottish Association of Landlords advised her to do so. By her own volition she created a legal document without the knowledge of its legality. She had opportunity to find out her legal position but failed to do so which resulted in the breach of the regulations. She acted without consideration to the Regulations. The Tribunal decided that a fair, just and proportionate sanction would be to order the Respondent to pay the Applicant two times the amount of the deposit (£2400.00).

## **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.**

**Gabrielle Miller**

**5<sup>th</sup> September 2022**

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**Legal Member/Chair**

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**Date**