



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

Chamber Ref: FTS/HPC/PR/23/2923

Re: Property at 3/2 19 White St, Glasgow, G11 5RR (“the Property”)

Parties:

Mr Javier Garcia, 1/2 282 Woodlands Rd, Glasgow, G3 6NE (“the Applicant”)

Mr Kenneth Hui, 3/2 19 White St, Glasgow, G11 5RR (“the Respondent”)

Tribunal Members:

Alison Kelly (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be made.

Background

1. On 27th August 2023 the Applicant lodged an application under Rule 103 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”) seeking a sum under the Tenancy Deposit (Scotland) Regulations 2011.
2. Lodged in support of the application were several documents including:
 - a. A document headed “Lodger Agreement” for the period from 1/9/18 to 31/8/19 showing a rent of £800 per month and a deposit of £1200
 - b. A document headed “Lodger Agreement” for the period from 16/1/19 to 31/8/19 showing a rent of £400 per month and a deposit of £460
 - c. Copy letter from the Applicant to the Respondent dated 18th May 2023 giving notice to terminate the tenancy as at 17th June 2023
 - d. Email from the Respondent to the Applicant asking for his bank details to return the deposit

- e. Evidence from each of the three tenancy deposit schemes confirming that the deposit had not been lodged with them
3. The Application was served on the Respondent by Sheriff Officer on 22nd September 2023.
4. There then followed a series of emails from the parties each making different allegations and points.

Case Management Discussion

5. The Case Management Discussion (“CMD”) took place by teleconference on 30th October 2023. The parties both dialled in and represented themselves.
6. The Chairperson made introductions and explained the purpose of a CMD in terms of Rule 17 of the Tribunal’s Rules.
7. The Chairperson ascertained from the Applicant that purpose of his application was to seek compensation as he was of the view that his tenancy deposit should have been lodged in an approved tenancy de[posit] scheme. He confirmed that it was.
8. The Chairperson ascertained from the Respondent that his position was that he did not think that he was required to lodge the deposit in an approved scheme. He confirmed that it was.
9. The Chairperson established with the parties that they agreed the following points:
 - a. The Applicant moved in to the property on 1st September 2018 with his partner
 - b. He paid a deposit of £1200
 - c. The Applicant’s partner moved out in December 2018
 - d. The Respondent gave £400 back to the Applicant at that time
 - e. The Respondent held £800 as a deposit for the remained of the occupancy by the Applicant
 - f. The Applicant gave the Respondent written notice that he would bring the tenancy to an end as at 17th June 2023
 - g. The Respondent left on 27th May 2023 but paid rent until 17th June 2023
 - h. The tenancy ended on 17th June 2023
 - i. The Respondent refunded £800 to the Applicant after he left
10. The Chairperson asked the Applicant to state why he thought the deposit should have been placed in a scheme. He said that although the agreement said it was a Lodger Agreement the Respondent had never lived in the property during the five year period that he was there and it was therefore a Private Residential Tenancy and the deposit should have been lodged in a scheme.

11. The Chairperson asked the Respondent to state why he thought the deposit should not have been placed in a scheme. He said that he was a resident landlord, although he had not lived there all the time and therefore the deposit did not require to be placed in a scheme.
12. As there was a matter in dispute the case require to be continued to a Hearing. The Chairperson agreed with the parties that the disputed issues were:
 - a. What type of tenancy was in place between the parties
 - b. Did that type of tenancy require the deposit to be placed in a scheme.
13. The Chairperson told the parties that they would require to look at the law and apply it to the facts when presenting the case to the Tribunal.
14. It will be for the Respondent to prove that he was a resident landlord in terms of the legislation.
15. It was agreed that the Hearing should take place by videoconference.

Actions Subsequent to CMD

16. The Tribunal issued Directions to each party.
17. On 1st December 2023 the Respondent lodged Written Submissions and an Inventory of Productions in accordance with the Direction.
18. On 8th December 2023 the Applicant lodged Written Submissions and an Inventory of Productions in accordance with the Direction.
19. On 14th December 2023 the Respondent lodged an updated Inventory of Productions.
20. The Applicant informed the Tribunal that he and his witness would be out of the UK at the date of the hearing. The hearing had to be rescheduled while permission was sought for him to give evidence from abroad. Permission was not granted and therefore the Applicant and his witness were not able to give evidence. The Applicant opted to continue with the Hearing being represented by the Strathclyde University Law Clinic.

Hearing

21. The Hearing took place by videoconference on 9th May 2024. The parties both dialled in. The Applicant was represented by Mr McCreaner of the Strathclyde University Law Clinic. The Respondent represented himself.
22. The Chairperson made introductions and explained the purposes of the Hearing. She advised that everyone was expected to tell the truth.

23. The Chairperson went through the terms of the CMD Note so that everyone was clear about the purpose of the Hearing and about what had already been agreed.
24. The Respondent said that he had a witness, Luke Willis, who had been another lodger in the property.
25. Mr McCreaner read through his Written Submission in relation to the definition of a Private Residential Tenancy ("PRT") in terms of the Private Housing (Tenancies)(Scotland) Act 2016 ("the Act"). His point was that the Respondent did not occupy the property as his only or principal home.
26. Mr Hui confirmed that his position was that he owned no other residence but due to the nature of his work he was away from home often and was provided with hotel accommodation by his employer. He presented his written Submission and said that the Applicant had not rented the whole flat, and that each lodger had their own lodger agreement. He said that the property was his main and only residence.
27. Mr McCreaner challenged the Respondent on whether he had actually lived in the property while the Applicant occupied it. He was adamant that he had. He refuted that he had predominantly been living in Denmark since 2017. When asked about payment towards bills he said that he topped up the electricity but did not need broadband as he had his phone. He accepted that the Applicant had been asked to open letters and packages for him and send on the details. He said that this had been towards the end of his employment with his previous employer and was required to stay in Denmark before switching employers. He said that this was in the last few months before the Applicant had moved out.
28. The Tribunal asked the Respondent how often he had stayed over at the property. He could not be specific. He said that he stayed over whenever he had days off. He said that he was occupying the property when the respondent moved in. He said that he would stay either at the property, with his mum or with his partner. He confirmed that in his previous job, which he had had for most of the time that the Applicant occupied the property he had been based in Copenhagen. He was asked if he came back to Glasgow for Christmas and other events. He said that he spent Christmas at his mother's, but would go back to the property for some nights.
29. Mr McCreaner asked the Respondent if he had been registered for Council Tax at the property. He said that he had not as he was away so frequently. He said he was away more time that he was there.
30. Mr McCreaner asked the Respondent if he had a wife and child, and where they lived. The respondent said that he had a partner and child, and that they lived in Copenhagen. He said that he did not live with them, but that he would stay with his partner in her room on occasion.
31. The Respondent decided not to call his witness.

32. The Tribunal was satisfied that it had enough information to make a decision about the primary question on the type of tenancy. Both parties were satisfied that their Written Submissions addressed the question of compensation in the event that the Tribunal found that the tenancy was a PRT.

Findings In Fact

- i. The Applicant moved in to the property on 1st September 2018 with his partner;
- ii. The Applicant signed a document Headed "Lodger Agreement";
- iii. The Applicant paid a deposit of £1200;
- iv. The Applicant's partner moved out in December 2018;
- v. The Respondent gave £400 back to the Applicant at that time;
- vi. The Respondent held £800 as a deposit for the remained of the occupancy by the Applicant;
- vii. The Applicant gave the Respondent written notice that he would bring the tenancy to an end as at 17th June 2023;
- viii. The Respondent left on 27th May 2023 but paid rent until 17th June 2023
- ix. The tenancy ended on 17th June 2023;
- x. The Respondent refunded £800 to the Applicant after he left;
- xi. The Respondent did not occupy the property at the time that the Applicant's occupation of the property began;
- xii. The Respondent was stationed in Copenhagen and was away from Glasgow more often than he was there;
- xiii. The Respondent spent nights at his mother's house when he was home from work;
- xiv. The Respondent spent nights with his partner and child in Copenhagen;
- xv. The Respondent did not occupy the property during the time that the Applicant occupied the property.

Reasons For Decision

33. The Tribunal considered all the papers, productions and the evidence heard. The Applicant could not give evidence due to his location, but he had been clear in the Application that his position was that the Respondent did not spend any nights in the property during the period of his own occupation.
34. The Tribunal did not find the evidence of the Respondent to be wholly credible. He was vague in his answers. He produced a lot of documentation to show when he was away for work, but nothing to show when he occupied the property.
35. Section 1 of the Private Housing (Tenancies)(Scotland) Act 2016 defines a private residential tenancy as follows:

1. *Meaning of private residential tenancy*

(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,

(b) the tenant occupies the property (or any part 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.

(2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied.

Paragraphs 7 to 10 of Schedule 1 to the Act provide exceptions, and deal with resident landlords in paragraphs 7 to 10 as follows:

Resident landlord

7 A tenancy cannot be a private residential tenancy if paragraph 8 or 9 applies to it.

8 This paragraph applies to a tenancy if—

(a) the let property would not be regarded as a separate dwelling were it not for the terms of the tenancy entitling the tenant to use property in common with another person (“shared accommodation”), and

(b) from the time the tenancy was granted, the person (or one of the persons) in common with whom the tenant has a right to use the shared accommodation is a person who—

(i) has the interest of the landlord under the tenancy, and

(ii) has a right to use the shared accommodation in the course of occupying that person’s home.

9(1) This paragraph applies to a tenancy if sub-paragraphs (2) and (3) apply to it.

(2) This sub-paragraph applies to a tenancy if, from the time it was granted, a dwelling within the same building as the let property has been occupied as the only or principal home of a person who, at the time of occupying it, has the interest of the landlord under the tenancy.

(3) This sub-paragraph applies to a tenancy if, at the time it was granted, there was an ordinary means of access—

(a) through the let property to the dwelling occupied by the person who is, or is to be, the landlord, or

(b) through the dwelling occupied by the person who is, or is to be, the landlord to the let property (whether or not that access was available to the tenant as of right).

(4) For the purpose of this paragraph, in determining whether a dwelling is occupied as the only or principal home of the person having the interest of the landlord, no account is to be taken of—

(a) any period beginning with the date on which the interest of the landlord is transferred (other than on death) and ending—

(i) 28 days later, or

(ii) 6 months later if, within 28 days of the period beginning, the person to whom the interest is transferred notifies the tenant of the person's intention to occupy a dwelling within the same building as the let property,

(b) any period of up to 24 months beginning with the date of the person's death and ending with the person's interest in the tenancy being vested in another person (otherwise than as the person's executor).

10 If, at any time, the landlord holds the landlord's interest as a trustee under a trust, a reference in paragraph 8 or 9 to a landlord or the person having the interest of the landlord includes a person who is a beneficiary under the trust.

11 In a case where two or more persons jointly are the landlord under a tenancy, references to the landlord in paragraphs 8 to 10 are to any one of those persons.

36. The Tribunal were not satisfied that the Respondent occupied the property at any time that the Applicant lived there, and the tenancy does not therefore fall within this exemption. This is in terms of Paragraph 9(2) above. "Occupy" is not defined in the legislation but given that the heading for paragraph 7 is "Resident Landlord" the implication can be drawn that the intention is that the landlord should actually live in the property.

37. It may well have been that the Respondent considered the property to be his only or principal home, and no evidence was lodged to suggest that he owns any other property, but the Tribunal does not consider that the absence of another property leads to a conclusion that the Respondent occupied the property and was therefore a resident landlord.

38. It follows that as the Agreement between the parties is a PRT, the Tenancy Deposit Scheme (Scotland) Regulations 2011 apply.

39. Regulation 3 states:

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.

40. The Respondent should have complied with the Regulation and place the deposit in an approved scheme.

Regulation 10 states that

10. If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal—

(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 First-tier Tribunal 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.

41. The Tribunal has discretion in deciding what the Respondent should be ordered to pay. Serial offenders, i.e. landlords with multiple properties who do not place deposits in schemes are at the upper end of the scale. The current case is not at the upper end of the scale. However, there is still a breach of the Regulations. Renting out a property is a commercial decision and there are laws and regulations in place to protect parties who enter in to tenancy agreements. These must be complied with.
42. The Respondent said in his written Submission that the Applicant knew what the arrangement was. As she is the landlord, entering in to a commercial arrangement it is for him to determine the type of contract required in terms of the law. It is not the responsibility of the tenant.
43. The reasons for the Regulations are to protect the tenant's deposit, as the money belongs to the tenant, and also to provide a fair and impartial mechanism for adjudicating on whether a deposit should be returned to a tenant or some or all be retained by the landlord. The Respondent did however return the deposit to the Applicant in full at the end of the term.
44. The Tribunal has power to award a sum equivalent to up to three times the amount of the deposit.
45. The Tribunal is prepared to accept that there was a misunderstanding of the law by the Respondent and In all the circumstances the Tribunal has decided to order the Respondent to pay to the Applicant the sum £800, being the equivalent of one times the deposit amount..

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.



9th May 2024

Legal Member/Chair

Date