



**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**

**Chamber Ref: FTS/HPC/CV/20/2576**

**Re: Property at Flat 3, 9 Rosebery Crescent, Edinburgh, EH12 5JP (“the  
Property”)**

**Parties:**

**BERNISDALE HOMES LIMITED (SCO55252), 1A ROSEBERY CRESENT LANE,  
Edinburgh, EH12 5JR (“the Applicant”)**

**Mr James Malloch, C/O 109 PILTON AVENUE, EDINBURGH, EH5 2HP (“the  
Respondent”)**

**Tribunal Members:**

**Alison Kelly (Legal Member) and Helen Barclay (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the  
Tribunal”) determined that an order for payment in the amount of £13,680  
should be made.**

**Background**

- [1] The Applicants lodged an application under Rule 70 of the First Tier Tribunal for Scotland (Housing and Property Chamber Rules of Procedure) 2017 (“The Rules”), seeking payment from the Respondent of the sum of £13,980 by way of rent arrears.
- [2] Lodged with the application were: -
1. Short Assured Tenancy Agreement between the parties dated 8<sup>th</sup> November 2016.

2. Email from the Applicant's agent to the Respondent dated 7<sup>th</sup> November 2017.
3. Email from the Respondent to the Applicant's agent dated 9<sup>th</sup> November 2017.
4. Email from the Respondent to the Applicant's agent dated 15<sup>th</sup> November 2017.
5. Continued Short Assured Tenancy Agreement dated 8<sup>th</sup> December 2017.
6. Email from the Respondent to the Applicant dated 11<sup>th</sup> December 2017.
7. First Tier Tribunal for Scotland (Housing and Property Chamber) Decision FTS/HPC/CV/18/2810 dated 18<sup>th</sup> February 2019.
8. Upper Tribunal Decision dated 22<sup>nd</sup> January 2020.
9. Letter from Applicant's agent's solicitors to Respondent dated 3<sup>rd</sup> December 2020 with Sheriff Officer's report.
10. Rent statement from 8<sup>th</sup> December 2017 to 7<sup>th</sup> December 2018.

[3] The Respondent lodged Written Representations, and a number of productions containing emails and documents.

### **Previous Tribunal Application**

- [4] The background to this action can only be fully understood by making reference to the previous tribunal application featuring the same parties. The Respondent raised an application against the Applicants, reference FTS/HPC/CV/18/2810. The parties had entered in to a Short Assured Tenancy Agreement for the Respondent to rent the property, said Agreement being dated 8<sup>th</sup> November 2016. A copy of said Agreement was produced by the Applicant in this case. It ran initially for a period from 8<sup>th</sup> November 2016 to 7<sup>th</sup> November 2017 and monthly thereafter. The rent was £1165 per calendar month, payable twelve months in advance.
- [5] The Applicant in the action (the Respondent here) sought repayment of the sum of £13,980, being the total rent paid twelve months in advance, as he claimed that the Respondents (the Applicants here) were in breach of section 89(1) of the Rent (Scotland) Act 1984.
- [6] The First-tier Tribunal issued a decision dated 18<sup>th</sup> February 2019. They held that there was no evidence to suggest that the Respondent sought to make payment of rent twelve months in advance compulsory or a pre-condition to the granting of the tenancy. They held that no "requirement" had been "imposed" on the Applicant and that the Tenancy Agreement reflected the terms which had been agreed between the parties before the Tenancy Agreement had been entered in to. They refused the application.
- [7] The Applicant appealed to the Upper Tribunal. The Upper Tribunal issued a decision dated 22<sup>nd</sup> January 2020. The Upper Tribunal upheld the decision of the First-tier Tribunal.

## **Case Management Discussion**

- [8] A Case Management Discussion (“CMD”) in the current application took place by teleconference on the 12<sup>th</sup> February 2021. The Applicant was represented by David Alexander of DJ Alexander. The Respondent represented himself.
- [9] The Chairperson advised that having read the application, and the submission by the Respondent, the case would require to proceed to a hearing as evidence would require to be led.
- [10] The Chairperson listed the disputed facts as follows:-
1. Given the terms of Mr Alexander’s email to the Respondent dated 6<sup>th</sup> April 2018, has the rent been paid, meaning that no sums are due by the Respondent?
  2. What occurred in the lead up to the second Tenancy Agreement being signed?
  3. Did the Respondent insist on the Tenancy Agreement reflecting that the rent for the year should be paid in advance?
  4. Is the Applicant entitled to seek payment of the rent given the terms of Section 89 of the Rent (Scotland) Act 1984?
- [11] Each party agreed that they were content with those being listed as the issues in dispute.
- [12] Subsequent to the CMD the Applicants in this case lodged a number of emails to support their position, together with a list of witnesses. The Respondent lodged further Written Submissions and documents, including emails, to support his position.

## **The Hearing**

- [13] The Hearing took place by teleconference on 12<sup>th</sup> March 2021. The Applicants were represented by David Alexander, Director of the letting agents, DJ Alexander. The Respondent represented himself.
- [14] The Tribunal introduced everyone, explained the purpose of the Hearing and how it would be conducted.
- [15] There were no preliminary issues to be dealt with.

## **Witness – Graham Dickson**

- [16] Mr Alexander led his first witness. This was Graham Dickson, Director of the Applicants, Bernisdale Homes Limited. Mr Graham gave evidence in chief that DJ Alexander had acted as letting agents for his company since 1997. During that time DJ Alexander had organised in excess of 100 leases for his company. None of those leases had ever required the tenant to pay 12 months' rent in advance.
- [17] The Respondent was given the opportunity to cross examine. He asked Mr Dickson to confirm his understanding of an ex gratia payment made to his company by DJ Alexander in respect of the Tenancy Agreement under discussion here. Mr Dickson said that he became aware in February 2017, after being contacted by Mr Alexander that the Respondent was not paying rent.
- [18] In April 2017 Mr Alexander called him to say that DJ Alexander would advance the rent to the Applicants while they pursued the Respondent. Mr Dickson said that it was his understanding that if DJ Alexander were successful in recovering rent from the Respondent the Applicants would refund them the sums they had paid to cover the loss.
- [19] The Respondent asked Mr Dickson if he was aware that the Mr Alexander had advised the Respondent in an email of 8<sup>th</sup> April 2017 that they were in breach of section 89 of the Rent (Scotland) Act 1984 by asking for twelve months rent up front. Mr Dickson said that he was not.
- [20] The Respondent asked Mr Dickson why the Applicants would need an advance from DJ Alexander to cover the rent which had not been paid. Mr Dickson said that he had not asked for the advance payment, Mr Alexander had offered.
- [21] There were no further question for the witness.

## **David Alexander**

- [22] Mr Alexander gave evidence. He is a director of the letting agents, DJ Alexander.
- [23] Mr Alexander said that it was not in dispute that his company had paid money to the Applicants to cover the rent that the Respondent had not paid. He said that he appreciated an error that had been made. He said that if the Respondent had not raised the previous Tribunal application for return of the first year's rent he would have moved on and accepted that the error was "a bad day at the office". He was firmly of the opinion that everything his employees had done was what the Respondent wanted. He was adamant that his company had not asked the Respondent to pay the second year's rent up front. He said that the Respondent had signed the second lease with no intention of paying the rent. He said that he was aware that the Respondent

had previously worked for the Crown Prosecution Service in England, and when the Respondent suggested that Mr Alexander had committed a criminal offence he was very upset.

- [24] The Tribunal referred Mr Alexander to paragraph 7 of the Upper Tribunal's decision. It mentioned the Respondent in that case (the Applicants here) "granting a considerable rent free period between 2017 and 2018 for separate reasons which are unexplained". Mr Alexander said that the Respondent had never been granted a rent free period. He said that the reason that he had decided to pay money to the Applicants was because he had felt that his company had made an error.
- [25] Mr Alexander referred to an email contained in Email chain 2 lodged with the Applicant's Supplementary List of Documents. This was an email from his employee, Judy Bain, to the Respondent dated 14<sup>th</sup> September 2017. She asked if the Respondent would like to extend the lease for another 6 months. He then referred to the Respondent's email in reply, dated 28<sup>th</sup> September 2017, where the Respondent replies that he would like to extend the tenancy for 12 months. He then referred to Miss Bain's email to the Respondent dated 7<sup>th</sup> November 2017, in which she says "Apologies for the delay in coming back to you I have been in discussion with the landlord and they are happy to extend for a further 12 months at the current rent of £1165 which would be £13980.00". She then gives bank details for the payment. He referred to the Respondent's reply of 9<sup>th</sup> November 2017 in which the Respondent says that the current tenancy agreement only provides for the tenancy continuing on a monthly basis and "in order for me to pay the next twelve months rent in advance we would need a new tenancy agreement which confirms the arrangement". Mr Alexander's point was that the arrangement was being driven by the Respondent, not by DJ Alexander. He said that there was no correspondence in which DJ Alexander says the lease cannot be renewed if the Respondent doesn't pay twelve months rent at the start.
- [26] Mr Alexander said that the Respondent signed the new lease with no intention of paying the rent. He referred to point 24 of the Respondent's initial Written Submission where he says that he began investigating section 89 of the Rent (Scotland) Act 1984 in late November 2017 and early December 2017.
- [27] Mr Alexander said that he first became involved in the matter in January 2018. His staff were dealing with it before then. The Respondent signed the lease and then refused to pay. There had been emails between the Respondent and Ryan Lochtie in the Accounts Department (email chain 4). These emails did not resolve the issue and it was then escalated to Mr Alexander to try to resolve.
- [28] Mr Alexander referred to email chain 6. He said that these emails were his attempts to resolve the matter. His first email to the Respondent is dated 26<sup>th</sup> January 2018 and ask the Respondent to suggest how he would like to resolve the matter. In his email to the Respondent of 30<sup>th</sup> January 2018 he accepts it is unlawful to insist in paying 12 months' rent in advance. He says

there is no intention to hold the Respondent to this obligation. He narrates his understanding of the situation. He offers to report the error to the relevant authorities. He offers to treat the new lease as void and treat the original lease as having tacitly relocated or issue a new lease with rent due on a monthly basis.

- [29] Mr Alexander referred to email chain 5. His employee, Kevin Fraser, emailed the Respondent on 22<sup>nd</sup> January 2018 stating that DJ Alexander have not stipulated that the full 12 months' rent needs to be paid in advance. He confirms that they are happy for him to pay on a monthly basis, and that advanced payment of rent was not a condition of the tenancy. The Respondent replies on 26<sup>th</sup> January 2018 stating that he is disappointed in the failure to comply with primary legislation and nature of response when that failure is highlighted. He says "with regard to your invitation to pay rent on a monthly basis, the current tenancy agreement only caters for paying rent twelve monthly in advance which is prohibited."
- [30] The Respondent was given the opportunity to cross examine Mr Alexander. He began by asking if Mr Alexander had been involved in the negotiation and preparation of the first tenancy agreement. He replied that he had not.
- [31] The Respondent put to Mr Alexander that he had said in evidence at the Tribunal Hearing in the other case that the rent in the second tenancy was a rent free period. Mr Alexander replied that he had never mentioned a rent free period at any stage of proceedings.
- [32] The Respondent put to Mr Alexander that he had said that his staff were doing what the Respondent wanted, but that the Respondent had in fact been faced with a demand. Mr Alexander replied that that was not true, and it hadn't been shown anywhere to be true.
- [33] The Respondent referred to his production JM4. This was an email from Donald Gray, an employee of Mr Alexander, dated 24<sup>th</sup> October 2017. The email read:
- [34] "I'm writing to inform you that on the 8<sup>th</sup> November your initial 12 month rental period is coming to a close and as you have paid 12 months up front we will need to reach some agreement in regards to how we proceed with your lease. Do you have any thoughts on extending your lease? I understand that you are unable to go through our credit checking process due to not meeting our affordability criteria on just your pension meaning that a certain number of months will need to be paid up front again. I will also say that the rental amount paid last time (£1165 pcm) will likely increase as it was negotiated down last year. Do you have any thoughts on how you wish to proceed?"
- [35] The Respondent put the contents of this email to Mr Alexander and contended that it was very clear that he was being asked for rent up front. Mr Alexander replied that the email referred to a "certain number of months". It

would be standard procedure to ask for 6 months up front if a tenant did not pass a credit check.

- [36] The Respondent asked Mr Alexander what evidence he had for his contention that the Respondent had no intention of paying the rent. Mr Alexander said that that at the previous Tribunal the Respondent had said that he had researched it and knew that taking 12 months rent was illegal.

### **Kimberley Berry**

- [37] Mr Alexander called his final witness, Kimberley Berry. She is an Application Operator, and has worked for DJ Alexander for 5 years.
- [38] Mr Alexander asked Miss Berry how many leases she had signed on behalf of the company in the five years she has worked for him. She said that it was at least one thousand. He asked in how many of those leases 12 months' rent had been asked for up front. She replied that they had never asked for that. She was asked if she remembered signing the lease with the Respondent. She said that she did. She said that she normally looked to make small talk with a tenant but that the Respondent did not want to. She recalled him having a list of questions that they worked through. She could recall him asking about paying twelve months in advance. She knew it had been agreed. She asked him if it was not agreed but he replied that it was agreed and he had the money. She said that she had offered monthly payments at that meeting. The meeting took place on 17<sup>th</sup> March 2018.
- [39] The Respondent cross examined Miss Berry. He asked her if she recalled the initial tenancy agreement she had sent to him. She said that she did and recalled the error in it. It was dated 8<sup>th</sup> November 2017. The Respondent read the rent clause to her and asked her if it made sense. She agreed that it did not make sense. She said that she had apologised at the time and sent a new one. The Respondent put it to the witness that she had given the impression that she thought he was making a fuss about nothing with his questions. She said that that had not been her intention.
- [40] The Respondent referred Miss Berry to email chain 1. He referred her to the email to her from Judy Bain dated 9<sup>th</sup> November 2017 and timed at 17.00. Miss Berry agreed that she had been asked to draw up a lease asap. The Respondent referred her to her email reply dated 7 minutes later in which she replied "Done". He said that she had done it very quickly.
- [41] The Respondent disputed Miss Berry's recollection of the meeting. He suggested that she could not really remember what had happened four years before. She said that she could.

### **David Alexander**

- [42] The Tribunal asked Mr Alexander to confirm what had happened to the deposit of £300 paid by the Respondent at the outset of the initial tenancy. Mr

Alexander did not know. The tribunal decided to adjourn for a period to let him investigate.

- [43] The Tribunal reconvened. Mr Alexander said that the deposit had been claimed back at the end of the tenancy and put towards the rent arrears. The statement submitted to the Tribunal did not reflect that and he moved to amend the sum sought to £13,680. This was allowed by the Tribunal.
- [44] The Respondent asked Mr Alexander to confirm exactly where the £300 was. Mr Alexander said that it had been taken back and used against the rent. The respondent asked exactly where it was. Mr Alexander said that it had been used up by the business.

### **The Respondent**

- [45] The Respondent gave evidence. He said that if he had received an email from Judy Bain a month before the tenancy ended, with a new agreement, he would have signed the agreement, paid the rent and thought no more about it. He did receive an email asking if he wanted to extend the tenancy, but did not receive the agreement until the existing tenancy was due to end. He referred to point 10 in his initial Written Submission and to his production JM6. He contented that the email said that he needed to pay 12 months in advance. He read it and thought it was out of order. He thought that there should be an agreement in writing.
- [46] He referred to his email of 9<sup>th</sup> November 2017 to Judy Bain, contained in production JM7. He said that the purpose was to see if something should be in writing, he mentioned a new tenancy agreement confirming the arrangement to allow him to pay.
- [47] The Respondent said that he then received a new draft tenancy agreement. He made some comments about it as Clause 3 did not make sense. It also referred to a deposit, which he had already paid. He felt that the errors were a bit ridiculous and not professional. He requested a meeting to discuss it.
- [48] The Respondent said that he had a meeting with Kimberley Berry on 17<sup>th</sup> March 2017. He asked her questions regarding the agreement, and while she was polite and pleasant he got the impression that she thought he was making a fuss about nothing. He decided to look in to the law regarding short assured tenancies. He said that there had been previous incidents with DJ Alexander during the tenancy which had led him to think they were not professional. As these incidents had not mentioned before and had not been put to Mr Alexander or his witnesses the Tribunal did not allow him to give evidence about them.
- [49] The Respondent said that he started looking in to tenancy agreements in late November 2017. He learned that Private Residential Tenancies were coming in to force in December 2017 and that there was a model agreement. He looked at the model agreement and discovered from it that the maximum rent



that could be taken in advance was 6 months. He tried to work out why this didn't apply to SATs but discovered that it did. He became concerned that the Applicants' Agent was doing something that it should not be doing. He tried to take legal advice but each firm he tried referred him to organisations such as Shelter and CAB. He got advice from Shelter on 11<sup>th</sup> December 2017. His suspicions were confirmed regarding the legality of taking more than 6 months' rent up front. He thought that the Agents should have been aware of it.

- [50] The Respondent sent an email to Kimberley Berry on 11<sup>th</sup> December 2017 questioning it. He said that he expected someone to come back to him taking it seriously. As far as he was concerned Miss Berry did not address his concerns. He was surprised by her response.
- [51] The Respondent was contacted by David Alexander on 26<sup>th</sup> January 2018. In subsequent email exchanges Mr Alexander admitted that it was unlawful to take more than 6 months rent up front. The Respondent said that he had a genuine issue with the way DJ Alexander treated him as a tenant and the way that they dealt with his concerns regarding the unlawfulness of the situation. He was of the view that the legislation would be undermined if it was just ignored. He was concerned that it took 4 months for them to accept that they were wrong. He said that if the concern had been acknowledged and addressed quickly after he raised it in his email of 11<sup>th</sup> December 2017 things would have worked out very differently. He said that a tenancy agreement is an important document. He was quite shocked at receiving a draft document with errors in it and being made to feel as if he was making a fuss about nothing. He said that by the point Mr Alexander came back to him it felt quite personal. He did not know if he would be able to find somewhere else to live and he had some personal issues regarding his health. He said that he accepted that raising his own Tribunal application was perhaps not the right way to do things but he felt that there was a real issue about the way they dealt with tenants.
- [52] The Respondent said that Mr Alexander said in his evidence that the Respondent had signed the Tenancy Agreement with no intention of paying the rent. The Respondent said that that was just not true. He had transferred the money to his current account so that he could pay.
- [53] The Respondent said that DJ Alexander had paid the rent to the Applicants so there was no need for the Tribunal to be proceeding.
- [54] Mr Alexander cross examined the Respondent. He disagreed with the Respondent's contention that it was months before anyone took the issue seriously. He referred to his email chain 6. He also referred to his email chain 5 and asked the Respondent that in light of those emails was he still saying that no one was in touch in January/February 2017? The Respondent replied that no one was addressing the point regarding the legality of taking more than 6 months' rent up front. He asked the Respondent if it was not clear from the emails that he had offered every olive branch to resolve the matter. The

Respondent replied that the whole point was that a demand for payment of 12 months' rent up front was in the tenancy agreement, and that was not allowed.

- [55] The Tribunal asked the Respondent why he had signed the Agreement if he was not happy with it. He said that he was still looking in to whether it was lawful at that point. He said that he was the tenant, DJ Alexander were the biggest estate agents in Edinburgh, and it wasn't for him to do their job.
- [56] The Tribunal asked the Respondent if he moved out on 7<sup>th</sup> December 2018, and that he had not paid any rent for the whole term of the second tenancy agreement. He confirmed that both points were correct.

### **Submissions**

- [57] Mr Alexander made submissions. He said that he felt that he had shown beyond all reasonable doubt that there would have been no issue with the Respondent paying monthly. He accepted that there had been a mistake/misunderstanding but his staff had thought that the Respondent wanted to pay 12 months in advance. There was no evidence that he would not have been able to carry on renting the property if he did not pay 12 months' rent up front.
- [58] The Respondent said it was clear that the Applicants had received payment of the rent from DJ Alexander and therefore no rent was due.
- [59] He said that the terms of section 89 of the Rent (Scotland) Act 1984 were clear, and that if it did not apply in this case it was a redundant piece of legislation. He made reference to his written submissions.

### **Findings in Fact**

1. The parties entered into a Tenancy Agreement in relation to the property commencing 8<sup>th</sup> November 2016.
2. The rent for the first year was paid at the commencement of the tenancy.
3. On 7<sup>th</sup> November 2017 the first tenancy continued by tacit relocation for a month.
4. The Respondent paid rent of £1,165 for November 2017.
5. On 7<sup>th</sup> November 2017 the parties agreed that the tenancy would continue for a further 12 months at £1,165 per month rent.
6. On 9<sup>th</sup> November 2017 the Applicant's agent sent the Respondent a new Short Assured Tenancy agreement.
7. On 9<sup>th</sup> November 2017 the Respondent queried the wording.
8. On 15<sup>th</sup> November 2017 the Respondent reiterated he wished to pay 12 months' rent in advance.
9. The new Short Assured Tenancy was signed on 8<sup>th</sup> December 2017.
10. The Respondent did not enter in to that Agreement with the intention of not paying the rent;
11. The second tenancy terminated on 7<sup>th</sup> December 2018.

12. The Respondent removed from the property on that date.
13. The Respondent did not pay any rent in respect of the property from December 2017 until December 2018.
14. The Applicant's Agent retained the deposit of £300 towards outstanding rent.
15. At the date of termination the rent arrears totalled £13,680.
16. DJ Alexander have paid the outstanding rent to the Applicants.

## Reasons For Decision

- [60] The Tribunal found the Applicant's witnesses, and the Respondent, to be credible and reliable. They had different perceptions of what had happened but no one was untruthful.
- [61] There were two issues to be resolved for the Tribunal to come to a decision.
- [62] Firstly, the Respondent contended that DJ Alexander has paid the rent for the second tenancy to the Applicants and therefore there was no rent outstanding. The Tribunal did not agree with this. Evidence was given by Mr Dickson that he understood that if this action was successful he would refund DJ Alexander the sums they had paid to him. The Tribunal held that this was an arrangement between the Applicants and Mr Alexander, and did not have a bearing on whether the Respondent was due to pay rent. In his email of 6<sup>th</sup> April 2018 Mr Alexander uses the word "cover" in relation to the rent payment made to the Applicants. The Tribunal did not interpret this as DJ Alexander taking responsibility for the rent. There was no evidence before the Tribunal of any rent free period having been granted to the Respondent.
- [63] The second issue is the application of section 89 of the Rent (Scotland) Act 1984 to this situation.

Section 89 states as follows:

**1. 89 Avoidance of requirements for advance payment of rent in certain cases.**

*(1) Where a protected tenancy which is a regulated tenancy is granted, continued or renewed, any requirement that rent shall be payable—*

*(a) before the beginning of the rental period in respect of which it is payable, or*

*(b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months),*

*shall be void, whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof; and any*

requirement avoided by this section is, in the following provisions of this section, referred to as a “prohibited requirement”.

(2) Rent for any rental period to which a prohibited requirement relates shall be irrecoverable from the tenant.

(3) Any person who purports to impose any prohibited requirement shall be liable to a fine not exceeding level 3 on the standard scale, and the court by which he is convicted may order any amount of rent paid in compliance with the prohibited requirement to be repaid to the person by whom it was paid.

(4) Where a tenant has paid on account of rent any amount which, by virtue of this section is irrecoverable by the landlord, then, subject to subsection (6) below, the tenant who paid it shall be entitled to recover that amount from the landlord who received it or his personal representatives.

(5) Subject to subsection (6) below, any amount which a tenant is entitled to recover under subsection (4) above may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord.

(6) No amount which a tenant is entitled to recover under subsection (4) above shall be recoverable at any time after the expiry of two years from the date of payment.

(7) Any person who, in any rent book or similar document, makes an entry showing or purporting to show any tenant as being in arrears in respect of any sum on account of rent which is irrecoverable by virtue of this section shall be liable to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the making of the entry, the landlord had a bona fide claim that the sum was recoverable.

(8) If, where any such entry has been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant to do so, refuses or neglects to cause the entry to be deleted within seven days, the landlord shall be liable to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the neglect or refusal to cause the entry to be deleted, he had a bona fide claim that the sum was recoverable.

[64] There could be some debate about the type of tenancy the Respondent had. He entered in to a Short Assured Tenancy in 2016. It tacitly relocated for a month after the end of its initial term. By the time the Respondent signed the second Tenancy Agreement, 8<sup>th</sup> December 2017, the Private Housing (Tenancies) (Scotland) Act 2016 was in force, and the new tenancy should

have been a Private Residential Tenancy. This is contrary to the terms of Miss Berry's email to the Respondent dated 11<sup>th</sup> December 2017 in which she contends "For those tenants who have previously signed Short Assured Tenancies, they can continue to do so unless the new PRT Agreement is requested". It is clear, however, that the Respondent's tenancy, whether it is a SAT or a PRT, is subject to section 89.

- [65] The First-tier Tribunal and the Upper Tribunal considered the application of section 89 in the previous case. The First-tier Tribunal, at paragraph 49 of their decision, when interpreting section 89(1), were not satisfied that any "requirement" had been "imposed" on the Applicant "under the terms" of the Tenancy Agreement. This was upheld by the Upper Tribunal.
- [66] In the previous case the Respondent sought to have paid back to him the sum he had paid at the outset of the tenancy. In this case he argues that Clause 3 of the new Tenancy Agreement is in breach of section 89 and should be void. He relies on section 89 (2) which states that rent for any rental period to which a prohibited requirement relates shall be irrecoverable from the tenant.
- [67] The question for the Tribunal to determine in this case is the same as in the previous case, namely was the clause in the tenancy agreement stating rent was payable 12 months in advance a requirement which had been imposed as a condition of the renewal of the lease.
- [68] The Tribunal considered all of the evidence, both written and oral, which was presented.
- [69] The Tribunal considered that it was clear from the emails in email chain 1 that the Respondent was offered a chance to extend the lease by 6 months. It was he who said that he would like it to be for 12 months. Mr Gray's email of 24<sup>th</sup> October 2017 refers to a number of months, not 12 months. The Tribunal did not agree with the Respondent's interpretation of the email to him from Judy Bain dated 7<sup>th</sup> November 2017(JM6). He said in evidence that he interpreted it as a requirement to pay 12 months' rent in advance. The Tribunal considered

it to be one of a series of emails following on from the Respondent confirming that he wished to continue the tenancy for 12 months. The Respondent's email of 20<sup>th</sup> November 2017 (email chain 3) confirms an agreement that there will be a tenancy agreement commencing 8<sup>th</sup> December 2017 with 12 months' rent payable in advance.

[70] What followed was a series of errors and misunderstandings which fitted Mr Alexander's description of "a bad day at the office". The Respondent said that he was made to feel as if he was making a fuss about nothing at his meeting with Kimberley Berry. The Respondent is a solicitor. He has been trained to respect the sanctity of legal and binding documents. It was clear from his evidence that he was troubled that Miss Berry had drafted the new tenancy agreement in under 7 minutes before sending it to him, and that there were errors in it regarding the deposit, and a clause that did not make sense. It was also clear from his evidence that he felt brushed off when he tried to point it out. The Tribunal did not agree that the Respondent entered in to the second agreement with the intention of not paying, although given the timings it is easy to see why Mr Alexander might draw that conclusion. The Respondent had done some research and discovered section 89. He sought clarity from DJ Alexander and it can be seen why he felt again brushed off by the response he received from Ryan Lochtie in his email of 11<sup>th</sup> January 2018 (email chain 4). The Respondent is trying to highlight a serious error and Mr Lochtie misses the point. It is an example of how corresponding by email can miss the nuance of language. The Respondent was trying to highlight a serious legal issue, the staff at DJ Alexander thought he was being difficult. The Tribunal has some sympathy with the Respondent's view. Tenancy Agreements are binding legal documents, and this case and the previous one shows that wording is very important and drafting should not be approached lightly. There is a tendency to treat them as a style with blanks to be filled in, and while that may be true in many cases it does not mean that no thought should be put in to their preparation. The Tribunal appreciates that none of the staff involved are solicitors, but a letting agent should be aware of the law and its application in their area of practice. The Respondent's view is further borne out by Miss Berry's email regarding SATs and PRTs mentioned above, and the fact that it had not occurred to anyone before raising this action to check the position regarding the deposit.

[71] It is clear from email trail 6 that Mr Alexander tries to resolve the matter by offering various compromise positions, but by then the Respondent has lost patience.

[72] Notwithstanding the error and misunderstandings on the part of DJ Alexander, the Tribunal does not accept that they were acting contrary to the Respondent's interests. They thought that he wished to proceed as per the previous year and acted accordingly. There was no evidence of there being a requirement on the Respondent to pay 12 months' rent up front as a condition of the grant, renewal or continuance of the tenancy.

[73] For the reasons above the Tribunal consider that section 89 of the Rent (Scotland) Act 1984 cannot be invoked by the respondent and his is therefore liable to pay the rent for the second year of his occupation of the property.

### **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.**

**Alison Kelly**

**12<sup>th</sup> March 2021**

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**Legal Member/Chair**

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**Date**