



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/20/0984

Re: Property at 505 Dumbarton Road, Glasgow, G11 6RW (“the Property”)

Parties:

Ms Andriana Labanets, Calle Sanchez Morate 2, 3K 28903, Getafe, Madrid, Spain (“the Applicant”)

Mr Stewart Burton, 505 Dumbarton Road, Glasgow, G11 6RW (“the Respondent”)

Tribunal Members:

Melanie Barbour (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

1. Two applications were made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 and Rule 111 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”) seeking (1) an order for payment for failure to lodge a tenancy deposit into an approved scheme; and (2) an order for payment to repay the tenancy deposit to the Applicant.
2. Each application contained,
 - a. a copy of the lodger agreement.
 - b. evidence of the end tenancy.
 - c. evidence of payment of the deposit; and
 - d. messages seeking return of the deposit.

3. The Applicant advised that the Respondent had failed to submit the deposit of £500 to an approved scheme; and had failed to return the deposit at the end of the period of occupancy.
4. The cases were conjoined. The Applicant attended the first case management discussion by telephone conference on 3 August 2020 reference is made to that discussion note. The Respondent did not attend the first telephone case management discussion. The Respondent had emailed the tribunal on 28 July 2020 to advise that he would not attend as his wife and children had returned from India and only now out of quarantine. I refused to adjourn the applications. That case management discussion was subsequently adjourned as it was not clear to me what the living arrangements were at the property, and if the Respondent and family members also lived at the same address. If so, did the Applicant and his family live there as their only or main home.
5. Notice of today's case management discussion had been made on the Respondent. He did not attend today's case management discussion. He had however submitted a written representation, in it he advised: -
 - a. That he had offered the Applicant a settlement which she had refused. He claimed not long before she left, she broke her bed; burnt a duvet and cover. He offered to repay £300 of her deposit.
 - b. That the Applicant was a lodger not a tenant, the property was his house; she rented a room. As a lodger he was not required to put her deposit into a government system. She was a lodger not a tenant. The deposit scheme does not apply in this case.

The Case Management Discussion

6. The Applicant advised that she was seeking orders as her deposit had not been lodged with any approved scheme and had not been repaid to her.
7. She addressed the tribunal on the preliminary matters whether the tribunal had jurisdiction to deal with her case and was the landlord a resident landlord.
8. She advised that she considered that he was not a resident landlord for the following reasons. When she took the room, the Respondent had not told her that he was a resident landlord. He did not reside in the property for the first month from early September to early October, as he had been in India with his wife and children. She advised that he did return in October 2019 and that the Respondent stayed in the property after that date. His wife and children did not reside with him, she believed that they stayed in India.
9. From October until December 2019 the Applicant resided at the property with another 3 females and the Respondent. There were 5 people in the household. It was a house with three floors, (ground, 1st, and 2nd). The Applicant stayed on the second floor; her friend also had a room on the second floor. She had her own bedroom, shared a bathroom, and shared a hall/living area. Her bedroom

had a lock on the door. There was no separate access to the second floor. Anyone in the house could walk into the hall/living area, there was no door into this living area. The Respondent had a room on the first floor. There were another two people with rooms on the first floor. All the tenants and the Respondent shared the kitchen. There were two accesses to the property, at the front and back which all parties could use to access their rooms.

Findings in Fact

10. I found the following facts: -

- a. There was an agreement between the applicant and the respondent.
- a. The agreement was called "lodger agreement".
- b. The agreement provided that the landlord's address was the property address, namely 505 Dumbarton Road, Partick, Glasgow.
- c. The applicant's accommodation was "one bedroom"
- d. Shared areas were two bathrooms, kitchen, hallways, front, and back garden.
- e. The Respondent appeared to reside in the property.
- f. The Respondent appeared to have his own room in the property.
- g. It appeared that the property was the Respondent's principal or only home.
- h. It appeared that the rooms let to the Applicant were accessed through the same access as the rooms used by the Respondent.
- i. The Respondent appeared to be a resident landlord.

Reasons for Decision

11. These two applications have been brought under the Private Residential (Tenancies) (Scotland) Act 2016 and the Tenancy Deposit Schemes (Scotland) Regulations 2011.

12. This tribunal has jurisdiction prescribed by law. It can only deal with legal matters which have been transferred to it. The First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, rule 2 provides that proceedings before the First Tier Tribunal are governed by the rules set out in its schedule. Rule 2 goes on to list the statutes transferred to its jurisdiction.

13. The tribunal has jurisdiction to deal with applications made under the 2016 Act and the 2011 Regulations.
14. Section 1 of the 2016 Act provides the meaning of private residential tenancy. It provides that a private residential tenancy is not one set out in Schedule 1 of the 2016 Act. Schedule 1 sets out tenancies which cannot be private residential tenancies. The 2016 Act does not apply to those tenancies. Paragraphs 7, 8 and 9 of Schedule 1 deal with residential landlords. Paragraph 7 provides that a tenancy cannot be a private residential tenancy if paragraphs 8 or 9 apply.

Resident landlord

7A 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 while 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 that access was available to the tenant as of right).

...

15. I consider given the factors as set out by the Applicant, that paragraph 7 applies in this case. The let property was part of a dwelling occupied by the landlord. It appears that the landlord lives in the property as his only or principal home. There is no separate access to the rooms let to the Applicant. I do not consider therefore that I have jurisdiction to deal with the application for civil proceedings under the 2016 Act.
16. I consider that the Applicant was granted a common law tenancy, and therefore jurisdiction to seek to recover the Applicant's deposit would lie with the Sheriff Court.
17. Regulation 3 of the 2011 Regulations provides for duties in relation to tenancy deposits.

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) ...

(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.

18. Regulation 3(3) provides that a *relevant tenancy* does not include a house of a type described in section 83 (6) of the Anti-Social Behaviour etc (Scotland) Act 2004. Section 83 (6) provides: -

83 Application for registration

...

(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—

(a) the house is being used for the provision of—

(e) the house is the only or main residence of the relevant person.

19. It appears to me that the Applicant is a tenant, living in a property with a resident landlord. Her tenancy is a common law tenancy. The lodger agreement which was provided suggests the Respondent was the resident landlord. While the Respondent did not reside in the property for the first month, it appears that the Respondent was living in the property from early October 2019 once he returned from India. The property appears to be the Respondent's principal home during the period when the Applicant was a tenant in the property. The parties shared the accommodation. There was no separate dwelling. There was no separate access.

20. Having regard to the factors which appear to have existed, I consider that the tenancy was not a private residential tenancy. I do not consider that I have jurisdiction to deal with the application for civil proceedings.

21. I also do not consider that the tribunal has jurisdiction to deal with the application under rule 103 that there has been a breach of the tenancy deposit regulations. The reason being that I do not consider that this is regulated tenancy and therefore it appears to me that the landlord did not receive a deposit for a regulated tenancy, and therefore the tenancy deposit regulations are not engaged.

22. I consider therefore that I do not have jurisdiction to consider either case, and I dismiss both applications under rule 27 (1).

Decision

23. Application dismissed.

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.

Melanie Barbour

28th August 2020

Legal Member/Chair

Date