



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/21/1043

Re: Property at 1/2, 2 Leyden Court, Glasgow, G20 9LY (“the Property”)

Parties:

Mrs Yamei Zheng, 61H New City Road, Glasgow, G4 9DF (“the Applicant”)

Mr Fionn McCausland, 1/1 107 Queen Margaret Drive, Glasgow, G20 8PB (“the Respondent”)

Tribunal Members:

Jan Todd (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be refused.

Background

1. This was a hearing scheduled to take place by teleconference on 8th September 2021 at 10am to hear evidence in relation to the application by the Applicant dated 4th May 2021 for payment of £360 in respect of rent the Applicant is claiming is due by the Respondent for the month of November 2020.
2. The following documents were lodged with the application and available to the Tribunal today:
 - a. Tenancy agreement between the Applicant and Respondent which purports to be a short assured tenancy dated 18th September 2020 with a commencement date of 19th September 2020.
 - b. Print out of rent and deposit payments
 - c. Text messages dated 26th October 2020 and 1st November from the Respondent to the Applicant confirming he is giving notice to leave on 26th October and then on 1st November asking where he should leave the keys and then a reply saying “Hi could you leave them in the room”.

- d. Decision from Safe Deposit Scotland advising they could not adjudicate on the deposit and returning it to the Respondent.
 - e. Review application by the Applicant of the SDS decision
 - f. Applicant's e-mail to the Tribunal dated 16th May 2021
 - g. Respondent's e-mail to the Tribunal dated 29th June 2021
 - h. Text messages lodged from the Respondent dated between October and November 2021
 - i. Screenshots of the advert of the Property
3. A Case management discussion (CMD) was held on 3rd August 2021 to discuss the application. Both parties participated and the note of that CMD is referred to for its terms.
4. The conclusion of the CMD was that the following facts were agreed namely:- that the parties were landlord and tenant in a tenancy that began on 19th September 2020; that the monthly rent was £360; that rent was paid up to and including October 2020; on 26th October 2020 the Respondent texted the Applicant advising he would move out and offered the deposit as rent for the notice period; a telephone conversation took place after that text message; the keys to the Property were returned on 1st November 2020 and the deposit of £360 was returned to the Respondent from SDS because the tenancy agreement contained no clause dealing with the deposit and what it could be used for.
5. The issues to be resolved were identified as follows:-
 - a. When did the tenancy end
 - b. Was there a verbal agreement that the Respondent would not have to give notice for the tenancy in terms of S48 and S49 of the 2016 Act
 - c. If so under what conditions
 - d. Was there an agreement that the Respondent did not require to pay rent after 31st October 2021
 - e. If so under what condition
 - f. Is the rent for November 2020 due?
6. The Tribunal also asked for further information in a direction and the Respondent lodged further clearer copies of the text messages between himself and the landlord dated 26th October, 1st November, 15th November, 16th November and 17th November and text messages between the Respondent and another person called Yessir on 16-18th November 2020.
7. The Respondent also advised he would be calling one witness namely Ms Suzanne Eisenhoffer who he had indicated was a witness to the telephone call on 26th October 2020.
8. The Applicant in response to the Direction lodged another copy tenancy agreement in favour of a new tenant, Mr Ekop dated and signed on 9th November 2020 but with a commencement date of 1st December 2020, together with bank statements showing rental payments from the new tenant dated from 2nd December 2020.

The Hearing

9. The hearing took place today by teleconference at 10am on 8th September and both parties were present on the call but neither was represented.
10. The Legal Member explained the purpose and order of proceedings and asked a few preliminary questions about the tenancy of the Applicant. The Applicant advised that the tenancy was a room in a flat that she owns at 2 leydon court Glasgow and after some further questions explained there are three rooms in the flat that the Applicant only rented one room with shared access to a kitchen and bathroom and she let out the other rooms to other tenants. She advised that it is registered with the local authority as a House in Multiple Occupation (HMO) although the Respondent later advised he was unable to recall seeing a notice advising of this in the flat.
11. The Applicant then explained that she was seeking payment of rent for November 2020. She advised that the Respondent had sent her a text on 26th October 2020 which stated "Due to unforeseen difficulties regarding Covid 19 I'll have to give you my months notice I'm afraid. You can keep my deposit as the last months rent. Thanks for everything." She advised that she had tried to claim the deposit for the rent originally from the tenancy deposit scheme Safe Deposit Scotland (SDS) but they had advised that as her tenancy agreement contained no detail about the deposit or what it was for they were not able to adjudicate on it. The Applicant has lodged the reasons for the decision by SDS which states, "Without the direction provided by a deposit clause and without more detail in the tenancy agreement I am unable to adjudicate on the distribution of the deposit regardless of any other evidence provided. There is no evidence to confirm that the landlord is entitled to use the deposit in terms of unpaid rent, cleaning or damage." SDS then suggest the landlord must pursue her claim elsewhere.
12. The Tribunal asked the Applicant if she was aware there was a new tenancy created by the 2016 Act and that her tenancy agreement did not comply with it, She advised she had just googled it and thought the one she had used was appropriate. The legal member advised there are standard terms and conditions now. But the lack of a written tenancy or one not in the correct format does not mean there is no tenancy but that the new terms apply.
13. The Tribunal noted the 2016 Act in section 48 provides that if no agreement is reached with the landlord, then notice by the tenant must be at least 28 days. The Applicant advised she thought it was a month because the tenant said that in his text message and indicated he wished to live there until the end of November when he offered that she take the deposit as the last month's rent.
14. The Applicant went on to explain that after receiving the Respondent's text message giving her notice on 26th October that he was ending the tenancy, she phoned him within an hour to discuss it and offer any assistance with Covid and he confirmed that he would leave at the end of November and said the deposit could be used as the last month's rent. The Applicant then confirmed that she advised him if he was staying to the end of the November

then he had to pay rent on 1st November and then would get his deposit back at the end of November. However she went on to say she offered a second option which was that he leave at the end of October and in that case the deposit could be used as the last rent. When asked to clarify she said “he wouldn’t need to pay rent if he moved out earlier”. She went on to say that she wanted the benefit of viewings and no damage to the flat, adding “I said he should move out to use the deposit as rent ...I can only return the deposit if someone moves in.”

15. The Applicant confirmed that she received a text message saying the tenant had left the keys on 1st November and she assumed he had moved out. She confirmed she visited a few days later and it was empty. She then advised she advertised on gumtree and got 4/5 viewings and she found a new tenant, Mr Ekop who paid a deposit on 10th November 2020 and she gave him the keys. She advised that they agreed the lease would start on 1st December but admitted she handed over the keys on 10th November and does not know when the new tenant actually moved in. She advised Mr Ekop had no bank account in the UK initially as he was an international student and stated the first rental payment was made on 2nd December by his uncle and that he told her he had temporary accommodation booked so he wouldn’t move in until 1st December.
16. The Tribunal then heard from the Respondent Mr McCausland. He confirmed that he was the tenant in the Property and that there were other flatmates there. With regard to the decision to leave he confirmed that he had sent a text to the landlady on 26th October as per the text message lodged by the Applicant and spoken to by her. He then advised that the Applicant called him an hour later and over that phone call they came to an agreement that he would move out by 1st November at her suggestion; that she would keep the deposit until the end of November but that he would get it back then. He confirmed that the Applicant told him that if he was to move out early and there was no damage at the end of the tenancy he would get his deposit back, but that she needed to keep it for a month as “insurance”. Under questions from the Tribunal the Applicant elaborated on the phone call explaining that it was made at 11.36 from checking his phone record, that they talked about why he was moving out which was because of Covid; that he had confirmed that he would leave at the end of November and agreed that the Applicant could keep the deposit but that she then offered that he move out by 1st November and when he asked what would happen he advised that the Applicant confirmed “I would release the deposit to you at the end of the month but I need it for insurance for damage”. The Respondent confirmed that the offer to move out early came from the Applicant who he said advised that “I don’t need a month’s notice” and who he said advised she would give back the deposit after a month. He then advised that “it didn’t make a lot of sense to me but I didn’t ask why she would keep it for a month. I don’t know why she would say that.”
17. The Respondent advised that the telephone call took place while he was with his then girlfriend Ms Eisenhoffer in her room and that she had overheard the conversation. He could not recall if he had put the mobile phone on which he

had received the call on speaker but was quite clear that Ms Eisenhower was near enough to hear both sides of the conversation and that she had indicated after the call that she had heard it all. The Respondent then confirmed that he explained to Ms Eisenhower that he would move out on 1st November but that he had thought it was a strange conversation. He reiterated that they had both heard the landlady clearly say he would get his deposit back. The Respondent indicated that he thought the Applicant may have wanted to get someone else in quickly and confirmed that after texting the Respondent about where his deposit was he sent a text to one of his flatmates, someone called Yessir, asking if someone else was staying in his room. The answer he received was “yes” but when he asked when the person had moved in Yessir did not respond further and the Respondent believes he did not want to get involved further.

18. Ms Eisenhower was then called as a witness for the Respondent. She confirmed she was the former partner of the Respondent, but they were no longer together. Under questions Ms Eisenhower explained that she could not remember precisely when the telephone conversation took place about the Respondent leaving but thought it was the end of September 2020/ mid October 2020 and said it was close to when he wanted to move out. She advised she and the Respondent were both in her room and that he had sent a text to his landlady to let her know he was leaving and that she could keep the deposit as the last month's rent. The witness then confirmed that she could hear the conversation and that the landlady had said he could move out early on 1st November and she would keep the “deposit as insurance for any damage”. Ms Eisenhower confirmed that as she was close to the Respondent she could hear her voice and advised that there was some confusion about if he could move out earlier so he wouldn't have to pay the next month's rent but the landlady said “it's fine if you move on the 1st of the month” and when asked to clarify the conversation the witness repeated that the landlady said “you can move out earlier and not pay rent and I'll keep the deposit for any missing items.” Ms Eisenhower also confirmed the landlady had said that she would pay the deposit back after keeping it as insurance. She further advised that the tenant had tried to text the landlady to get written confirmation but he got no response. Under questions from the Applicant who suggested that there was no agreement but that the Respondent was to let her know if he was leaving on 1st and then not paying rent upfront but that she would then keep the deposit, the witness was categorical that it was clear there was an agreement and that she heard he would get the deposit if he moved out early. The Applicant noted at this point that it would be strange to have to wait a month to get the deposit and the Respondent agreed but said he perhaps should have challenged this but was just happy to think he was getting his deposit back and was prepared to wait.

Findings in Fact

19. The Applicant and Respondent were landlord and tenant in a tenancy that began on 19th September 2020;
20. The Tenancy is a Private Residential Tenancy notwithstanding the fact the tenancy agreement purports to be a Short Assured Tenancy

21. The monthly rent was £360;
22. The rent was paid up to and including October 2020;
23. On 26th October 2020 the Respondent texted the Applicant advising he would move out and offered the deposit as rent for the notice period;
24. A telephone conversation took place after that text message between the Applicant and the Respondent where the Applicant offered to allow the Respondent to move out earlier and not pay rent on 1st November 2020;
25. The keys to the Property were returned on 1st November 2020 when the Respondent left the Property
26. The Applicant arranged viewings of the Property after 1st November and entered into a new tenancy agreement with a new tenant on 9th November 2020 giving him the keys on 10th November 2020.
27. The new tenant was in the Property at least by 16th November 2020.
28. The deposit of £360 was returned to the Respondent from SDS because SDS could not adjudicate on it given the tenancy agreement contained no clause dealing with the deposit and what it could be used for.
29. No rent is due and owing for the month of November 2020 by the Respondent to the Applicant

Reasons for Decision

30. There is no dispute that the Respondent originally gave notice indicating his intention to leave in a month to the Applicant by text message on 26th October 2020. The Applicant however has not given the Respondent a tenancy agreement with the standard terms of a PRT nor any explanatory notes which would have indicated that the tenant only requires to give 28 days' notice to leave a tenancy. However notwithstanding that the tenancy agreement is not in a form compliant with the 2016 Act, S 3 of the Act makes it clear that the terms of any purported contract which is unrelated to a private residential tenancy is not to be regarded as a term of the contract for the purposes of subsection 1. For these purposes therefore this is a PRT and the required terms of PRT must apply.
31. Both parties acknowledge that the Respondent may have originally intended to stay until the end of November 2020 but actually left on 1st November after a discussion with the Applicant where she suggested he could leave earlier and both parties agree he would not then have to pay a rental sum on 1st November. The Applicant then submits that she only meant that he did not have to pay it up front but that she would deduct it (as he had originally offered in the text message of 1st November) from the deposit which is also the same as one month's rent, £360.
32. The Respondent denies that was what was offered or agreed. He submits that she told him if he wished to leave earlier on 1st November 2020 she would not charge rent for that month but would hold the deposit until the end of the month as insurance for any damage that might be caused in the flat. This version of the telephone conversation is supported by the Respondent's witness Ms Eisenhower who was present at the time of the telephone call.

33. The Question for the tribunal is what was agreed during that telephone call and was there an agreement for the Respondent to leave the Property on 1st November and if so would the rent then be waived by the Applicant or is the rent still due and owing for the remainder of that month or for at least 28 days from the 26th October.
34. The Tribunal found the evidence of the Applicant quite vague and confused. She admitted it was her suggestion to the Respondent that he move out earlier and that she retain only the deposit until the end of November. She stated on one occasion that he wouldn't need to pay rent if he moved out, but also said if he moved out she would use the deposit as rent. It was clear however that it was the Applicant's suggestion or offer that he move out early, She suggested 1st November and specifically said he would not then have to pay rent at that point and that she wanted the benefit of conducting viewings and checking there was no damage. The request or offer to a tenant to ask him to move out but still expect him to pay rent for that month is inconsistent and contradictory with the purpose of a lease which is to provide accommodation in return for the rent. In addition the Applicant accepts that she entered into a new lease with a new tenant which although it shows a date of commencement of 1st December was signed on 9th November and she admits he gave her the deposit on 10th November in return for which she gave him the keys to the Property. The Respondent has shown in his copy text messages with a former flatmate called "Yessir" that there was someone else occupying his former room by 16th November 2020. The Applicant could not offer an explanation for this merely saying she had not checked when the new tenant moved in, and noting that he had told her he had temporary accommodation and would not need the Property until 1st December.
35. The Tribunal found the evidence of the Respondent and his witness Ms Eisenhoffer, clear credible and convincing. The Respondent gave a clear account of the telephone conversation with the Applicant, was able to confirm the timing of the call and his version of the call is supported by the fact he chose to leave on 1st November leaving his keys in the Property which is both confirmed in the text messages of 1st November and accepted by the Applicant. If he had thought his deposit would be used a payment of rent for November there would have been no reason to leave early possibly incurring costs elsewhere for a month as he would be in no better a position by staying to the end of November and then claiming his deposit or waiving it if he had not paid the rent up front. The Respondent has shown by his query to the applicant in this text messages of 16-17th November 2020, that he was seeking payment of the deposit and he confirms the reasons why stating in one message "you specifically said I don't need a months notice you can move out on the first and you can get the deposit back at the end of the month." The Respondent was clear and consistent in his evidence repeating under questions that the landlady had advised him she was holding the deposit as insurance against any damage. He was particularly alarmed about this when he found out someone else was in the room and worried he would not get the deposit back if damage was then caused by another party.

36. The Respondent's evidence relating to the substance of the telephone call was supported in all material points by Ms Eisenhoffer who joined the call after both parties had given their evidence. She confirmed that she and the Respondent are no longer in a relationship but that they were around 26th October 2020. She supported in all relevant details the Respondent's evidence about the phone call and advised under questioning from the Tribunal and the Applicant that it was quite clear that the landlady was holding the deposit as "insurance for any damage".
37. The Tribunal accepts and prefers the evidence of the Respondent and Ms Eisenhoffer as credible and convincing that there was an agreement made between the parties that if the Respondent left early on 1st November the Applicant would not seek rent from him on 1st November and that she would return the deposit at the end of November 2020. The Applicant's version of the conversation is not credible. She admits offering to the tenant that he could leave early, she then says she expected to retain the deposit for rent even though she made it a condition that he had to leave the Property so she could show it to prospective tenants and has in fact given the keys to a new tenant on 10th November 2020. Even if the Tribunal accepted the Applicant's description of the phone call, which it does not, the Tribunal would find that there is no rent due and owing to the Applicant by the Respondent as he was no longer entitled to stay in the Property and in those circumstances he is entitled to treat the tenancy as at an end or at least to treat rent as not being due and owing for that last month as he had no right to occupy the property should he have wished to do so. A landlord has a right to have notice of a tenant leaving and can claim rent for that notice period unless they have accepted an earlier date to leave in writing or as in this case, the landlord has agreed not to charge rent or has withdrawn the right of occupancy which is an essential requirement for the obligation to pay rent. For these reasons the Tribunal finds that no rent was due by the Respondent to the Applicant for the month of November 2020 as he left with her agreement on 1st November 2020 and she used that time to conduct viewings and gave keys to a new tenant on 10th November 2020.

Decision

38. Application refused.

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.

Jan Todd

Legal Member/Chair

Date

10th September 2021