

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under the Tenancy Deposit Schemes (Scotland) Regulations 2011, regulation 3, and under the Housing (Scotland) Act 2014, section 16.

Chamber Ref: FTS/HPC/PR/19/2846

Re : Property at 52 Dundee Loan, Forfar, Angus DD8 1EE ("the Property")

The Parties:-

Miss Alana Ross, 9C Castle Street, Forfar, Angus DD8 3AE

("the Applicant")

Mrs Maggie Jordan, 5 Panmure Street, Broughty Ferry, Dundee DD5 2ER

("the Respondent")

Tribunal Member:

David Bartos (Legal Member)

DECISION

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent shall pay to the Applicant the sum of NINE HUNDRED POUNDS (£900.00) STERLING.

Summary of Case Management Discussion

- 1. In this application the Applicant seeks an order for payment of £900 (rather than the £950 stated in the application). The payment is sought as two elements:
 - (1) Payment of a penalty of £450 for not lodging the deposit with an approved deposit-holding scheme**
 - (2) Repayment of rent of £450 for not providing a property that was reasonably fit for human habitation.****

2. A case management discussion ("CMD") took place on 14 November 2019 at 11.30 hrs at Caledonian House, Greenmarket, Dundee DD1 4QX. The Applicant appeared supported by her mother Carol Ross. The Respondent appeared supported by her son Barry Jordan. Written representations had been received by the Tribunal from the Respondent by e-mail dated 23 October 2019.
3. At the end of the CMD, the Tribunal agreed with the parties to either decide the application or fix a hearing.

Facts Not in Dispute Between the Parties

4. Having considered the evidence placed before it, the Tribunal found the following facts not to be in dispute :-
 - (a) On 8 August 2019 the Respondent and the Applicant signed an "Assured Shorthold Tenancy Agreement" in relation to the Property ("the Agreement"). Under the Agreement the Applicant was the tenant and the Respondent was the landlord of the Property.
 - (b) The Agreement provided for the payment by the Applicant to the Respondent of a deposit of £450. At the time of the signing of the Agreement the Applicant paid the deposit to the Respondent. It was made up of £100 which had been paid by the Applicant as a reservation payment and the balance of £350;
 - (c) The Agreement provided for the payment by the Applicant of rent of £450 per month in advance with the first instalment payable on 8 August 2019 and thereafter on the 8th day of each month;
 - (d) The date of entry under the Agreement was 8 August 2019. The Agreement purported to be for a term of 6 months. Both parties were under the impression that this would be the duration of the tenancy. The Respondent did not supply the Applicant with any information about deposit or the deposit scheme administrator holding the deposit at any time until the CMD;
 - (e) The Applicant obtained the keys to the Property on Friday 9 August. The Respondent had allowed the Applicant to decorate the Property. The Property was a two bedroomed property with a living room within a old stone-built building.

- (f) When the Applicant took entry wallpaper was hanging off the wall. This had not been the case during her earlier inspection. There was a lot of rain in the first weekend after entry. The Applicant complained to the Respondent about the wallpaper, and about a missing screw in an electrical socket in the hall. The screw was fixed by the Applicant's uncle.
- (g) The Respondent spoke to a builder about the dampness complaint. He advised that a particular paint should be used for the decoration. The Respondent delivered the paint to the Property in the first weekend.
- (h) The Applicant painted the bedroom and living room in the first weekend. The walls of the Property were still wet by 19 August.
- (i) The Applicant approached her local Citizens Advice Bureau for assistance. The CAB carried out a check on whether the Respondent was registered as a landlord with Angus Council. It was discovered that the Applicant was not registered. Unbeknown to the Applicant the Respondent had applied for registration on 4 August but the application had not yet been granted. The Applicant telephoned the Council to make sure of the position.
- (j) The CAB also advised her that the Agreement was in an incorrect form and was invalid – and that she should check with the Respondent as to what had happened with the deposit.
- (k) As a result of this they advised her to send a letter to the Respondent. Prior to sending it the Applicant attempted to contact the Respondent but without success. On Tuesday 3 September 2019 the Applicant sent a letter to the Respondent. In it she sought return of the rent and the deposit because she had been “unable to move into [the Property] due to disrepair in [it]”.
- (l) By text message to the Applicant dated Friday 6 September 2019 timed at 17.57 hrs the Respondent asked her for the keys to the Property and an e-mail address. The Applicant replied stating that she would post the keys through the letterbox that night. The Respondent replied by text denying that the Property was in a state of disrepair and alleging that the Applicant was in breach of the Agreement.
- (m) The Applicant deposited the keys through the door of the Property on 6 September 2019. They were uplifted by the Respondent on Saturday 7 September. Both parties thought that the Agreement had been terminated in that way.

(n) The Respondent has lodged the deposit of £450 with SafeDeposits Scotland. This was done on 12 November 2019. The Respondent's application for registration as a landlord was approved on 9 September 2019.

(o) The Applicant lodged her application to the Tribunal on 11 September 2019.

(p) The Respondent has a new tenant in the Property from the beginning of October 2019.

Oral Evidence and Submissions – Tenancy Deposit Penalty

5. Dealing with the tenant deposit penalty payment, the Respondent accepted that 30 working days after her receipt of the deposit expired on 19 September 2019. She accepted that she had not lodged the deposit with a deposit-keeping scheme until shortly before the CMD itself. This was after she had consulted solicitors having received the Tribunal's direction dated 8 November 2019.
6. Her explanation for not lodging the deposit was that she had not put it in because of the Applicant's departure letter of 3 September 2019 and a "concern about the Property". She had attempted to obtain legal advice after receiving the letter but was told that her solicitor was away. She thought in any event that the tenancy was at an end when the keys had been returned. She had also noticed that a cutlery tray, supplied with the fitted kitchen, had been removed and a handle was missing off the living room door. The decorating also had to be completed. Remedial work and replacements were carried out in September which resulted in her paying £956 to Ballindean Interiors as per the invoice to her.
7. The Respondent accepted that if the Agreement had not been brought to an end on 7 September she had breached regulation 3 of the 2011 Regulations. The advice she had received was that the Agreement had not been brought to an end due to the absence of a tenant's termination notice under sections 48 and 49 of the Private Housing (Tenancies) (Scotland) Act 2016.
8. With regard to the size of any penalty payment, she asked the Tribunal to take account of the circumstances of the breach but did not suggest a figure that might be reasonable for a penalty payment.

9. The Applicant indicated that the advice that she had received from the CAB was that the Agreement was not a proper lease at all and did not bind the parties. She sought a payment equal to the deposit had nothing further to add.
10. The Tribunal was satisfied that the Applicant had given her evidence credibly and was reliable. No doubt was cast on that evidence. The Tribunal was also similarly satisfied with the Respondent's evidence. On material matters there was no real divergence between their evidence. On the basis of that evidence and the supporting documentary evidence the Tribunal made the findings in fact set out above.

Reasons - Tenancy Deposit Penalty

11. The Tribunal considered the application, the written submissions which it had received, the oral submissions of the parties and their evidence. It found that it was able to make sufficient findings in fact and that to do so was not contrary to the interests of the parties. It was therefore able to decide the case at the discussion without a hearing. It could see no benefit to be gained from a further hearing which would cause delay.
12. The first issue was whether as suggested by the Applicant's CAB adviser, there was a binding tenancy at all between the parties where both parties thought that they were entering into 6 month tenancy but unbeknown to both the Private Housing (Tenancies) (Scotland) Act 2016 prevented contractual tenancies from being limited to a fixed duration or term.
13. This raised to question of the circumstances in which a shared mutual error of both parties can lead to the agreement purportedly entered into between them being void and not binding.
14. It is clear that such a mutual error must be as to fundamental features of the agreement such as the property being let. For example if both parties thought that they were letting and taking on property A and the agreement showed that they were letting and taking on property B, such an agreement would err as to its substantials and the agreement would be void.
15. It is also tolerably clear that if both parties had done nothing more than agreed on the property, agreed on the rent, and the would-be tenant had taken occupation, there would be a tenancy for an indefinite period covered by the 2016 Act. The question is as to the situation where, as

here, the parties agree on the property, a particular duration for the tenancy, and the rent but find that the 2016 Act prevents the tenancy from coming to an end either at the end of the duration (the ish) or on any other basis other than the service of either party's statutory notices in the 2016 Act.

16. In the Tribunal's opinion the duration of a tenancy is an essential and substantial feature of it. If both parties are in error in thinking that the agreement fixes the duration of the tenancy when in fact it does not, that is a mutual and shared error as to an essential and substantial part of the tenancy agreement. It follows that the "Assured Shorthold Tenancy Agreement" document signed by the parties on 8 August 2019 has from the outset been void and unenforceable.
17. As no tenancy agreement ever began, the duty to lodge the deposit with the approved scheme within 30 working days never arose in the first place. It followed that the Applicant's CAB adviser was correct in that respect. However the consequence was that as the duty to lodge did not even arise, there was no breach that could give rise to a penalty payment.
18. If the Tribunal should be wrong on that matter, and the "Assured Shorthold Tenancy Agreement" did give rise to a private residential tenancy with no fixed duration nor ish (end date), the Tribunal took the view that there was a breach of regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The deposit had been lodged nearly two months after the last date for lodging, namely 19 September.
19. In such a situation the Tribunal has a discretion of awarding a penalty payment of up to three times the amount of the deposit. In the present case the Applicant sought an amount only equivalent to the deposit itself. That would have been a reasonable amount for the penalty payment. There was nothing in the circumstances surrounding the non-lodging that suggested that the penalty payment should be any less, were it to be due.

Reasons - Tenancy Deposit & Rent

20. The refusal of a penalty payment was not the end of the matter concerning the deposit. While the application form stated that it was made under rule 103 of the schedule to First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, which deals with applications for penalty payments, it sought an order for "return of £950 rent and deposit" (now £900). This expression indicated that in substance

the application was also made under either rule 70 or rule 111 of the schedule.

21. However both of those rules allow an application to be made which is "arising from" an assured tenancy or private residential tenancy. That is the effect of section 16 of the Housing (Scotland) Act 2014 and section 71 of the 2016 Act already mentioned.
22. This case arises from a purported 6 month assured tenancy, despite the English law sounding title of the "Agreement". Whilst the Tribunal has found, in the exercise of its jurisdiction, that the tenancy was void, the claim for return of the £900 rent and deposit can still be seen as "arising out of" the void assured tenancy.
23. In these circumstances the Tribunal found that the Applicant had paid the rent of £450 and the deposit of £450 by mistake to the Respondent. She thought that she was paying them under a tenancy agreement when in fact it was void. The Respondent had been unjustifiably enriched thereby.
24. In these circumstances the total of the erroneous payment of £900 fell to be repaid to the Applicant unless there was any reason why it was inequitable for this to take place. The Tribunal could see no reason why it should be inequitable for the repayment to take place. The whole difficulty had arisen through the Respondent putting forward a form of agreement that was ineffective. The return of the money to the Applicant would have no effect on any sheriff court claim that the Respondent might or might not have in respect of remedial work to the Property. In the meantime there could be no obstacle to the Respondent recovering the "deposit" of £450 from Safe Deposits Scotland given that no valid tenancy had ever been entered into under which it had been lodged.
25. For these reasons the Tribunal made the decision set out above. The parties expressed the view that the Tribunal should, if possible reach its decision without reference to further documentation or the holding of a hearing. The Tribunal acceded to these views.

Outcome

26. The First-tier Tribunal for Scotland (Housing and Property Chamber) disposed of the application as set out above.

Right of Appeal

27. In terms of section 46 of the Tribunals (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.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

David Bartos

Legal Member

17 November 2019

Date