



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 3 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/22/0878

Re: Property at 50A Forest Avenue, Aberdeen, AB15 4TH (“the Property”)

Parties:

Mr Graham Grant, 65 Kirkhill Road, Aberdeen, AB11 8FT (“the Applicant”)

Miss Erin Mitchell, 50A Forest Avenue, Aberdeen, AB15 4TH (“the Respondent”)

Tribunal Members:

Alison Kelly (Legal Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment in the amount of £500 should be made.

Background

On 27th March 2022 the Applicant lodged five separate applications seeking a variety of remedies and using the same information on each form.

Lodged in support of the application were several documents, including:

1. Copy Licensees Agreement Between A Resident Landlord and Occupier For Residence in the Resident Landlord’s Home
2. Text from the Applicant to the Respondent dated 1st March 2022 asking how to give notice
3. Bank Statement showing payment of £375 to the Respondent on 25th February 2022

4. Email to Landlord Registration dated 21st March 2022 complaining that the Respondent had changed the locks before the tenancy had come to an end and that the Applicant still had belongings in the property

On 31st March 2022 the Tribunal sent a very detailed letter to the Applicant giving him information on how to submit a claim properly and asking for further information on each separate claim. This information was requested by 14th April 2022.

On 19th April 2022 the Tribunal sent a reminder to the Applicant.

The Applicant responded on 19th April 2022 by email saying that he didn't follow what he was being asked for.

On 21st April 2022 the Tribunal sent an email reattaching the letter of 31st March 2022.

On 21st April 2022 the Applicant sent an email to the Tribunal answering some of the points, but not updating his application.

On 28th April 2022 the Tribunal wrote to the Applicant asking for evidence of payment of the deposit of £500 and an explanation of what order he sought from the Tribunal. The letter also advised that the only order the Tribunal could make in respect of Rule 103 is one for payment of compensation of an amount not exceeding three times the amount of the deposit paid. An answer was required by 12th May 2022.

On 3rd May 2022 the Applicant sent an email to the Tribunal attaching a bank statement to show payment of the deposit. At this point the Applicant's email correspondence to the Tribunal was terse, and he expressed his disgust at the Tribunal and other agencies.

On 6th May 2022 the Applicant sent an email to the Tribunal asking for the Tribunal to submit whichever forms are now correct and to confirm what he still needed to change.

On 10th May 2022 the Tribunal sent an email confirming that the Tribunal is unable to provide legal advice or guidance and it is up to an Applicant to submit whichever forms they deem to be correct and referring again to the letter of 28th April 2022.

On 10th May 2022 the Applicant sent an email to the Tribunal, which was abusive, and indicated his intention to complain.

On 18th May 2022 the Tribunal sent an email to the Applicant giving him a list of what information the Tribunal still required and giving a time limit of 25th May 2022.

On 30th May 2022 the Applicant sent another abusive email to the Tribunal, again saying he was going to complain.

On 8th June 2022 the Tribunal sent another letter to the Applicant advising that he had not provided everything that was required and asking for the documentation by 15th

June 2022 and advising that the application would be time barred if the documents and information required was not supplied within three months of the end of the tenancy.

On 10th June 2022 the Applicant submitted an amended application form under Rule 103 of the First Tier Tribunal for Scotland (Housing and Property Chamber Rules of Procedure) 2017 (“The Rules”), seeking an order under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The Application was attached to another abusive email.

It should be noted that had the Applicant spoken by telephone to any member of the Tribunal staff in the manner in which he composed his emails the calls would have been terminated.

On 21st June 2022 the Tribunal accepted the Applicant’s application and put it forward for a Case Management Discussion, but also issued a Direction requiring the Applicant to provide evidence of the end date of the tenancy and evidence from the three deposit schemes that the deposit was not lodged by them. The documentation was required by 18th July 2022.

On 22nd June 2022 the Applicant sent proof from the three tenancy deposit schemes that no money was lodged with them, claiming in another abusive email that he had already sent them. He asked for a note of the Complaints Procedure.

On 22nd June 2022 the Tribunal sent a link to the Complaints Procedure. The Applicant responded by email on 23rd June 2022, again in an abusive manner.

The Application was served on the Respondent.

The Respondent sent an email to the Tribunal on 15th September 2022 outlining her position. This was crossed to the Applicant, who responded in an abusive manner. There were further emails from each party, all with information that could easily be given at the Case Management Discussion.

Case Management Discussion

The Case Management Discussion (“CMD”) took place by teleconference. The Applicant did not dial in. The Clerk telephoned him on the mobile telephone number which he had given and left a message. The Chairperson waited until 14.20 before commencing the CMD.

The Respondent dialled in and represented herself.

The Chairperson explained the purposes of a CMD in terms of Rule 17 of the Rules. The Chairperson explained that as there was a question of time bar in relation to the Applicant’s case she required to continue the case to a further CMD to give him an opportunity to be heard.

The parties were advised of the continued date and sent a copy of the CMD Note.

The Applicant responded by email on 1st November 2022. The email was again abusive in its terms. The Applicant made it clear he would not be attending the continued CMD.

Continued CMD

The continued CMD took place by teleconference on 1st December 2022. The Applicant did not dial in. The Respondent dialled in and represented herself.

The Chairperson again explained Rule 17 of the Tribunal's rules, relating to the purpose of a CMD.

The Respondent explained that she had been in New Zealand for three years. She arrived there on 23rd October 2019, having gone on a working holiday visa. The pandemic hit and she could not return to the UK. She explained that the rules in New Zealand had been much stricter than they were in the UK. She had not been able to return to the UK until summer 2022, when she was in the UK for a month, and then returned to New Zealand. She has no set date for returning permanently.

The Respondent confirmed that she owns the flat. It has two bedrooms, living room, kitchen, bathroom, utility room and attic storage room.

The Respondent explained that when she had rented the room to the Applicant on 26th August 2021 she was planning to return to the UK and occupy the other room as the borders had been opened. However, there was another lockdown in Australia which quickly spread to New Zealand. She realised that she would not be able to get back to the UK in the immediate future, and she rented out the other room on the same basis i.e. Licensee's Agreement. She had intended to come back to the UK when the Applicant vacated and occupy his room.

The Respondent confirmed that she had taken a deposit of £500 from the Applicant, and that she had repaid it in full after he left. She did not lodge it with a tenancy deposit scheme as she was following the terms of the Licensee Agreement.

The Respondent said that the situation had been affected by global circumstances, namely the pandemic. The flat was her only or principal home. She had complied with all safety regulations. She had upgraded the electrical equipment. She did not think she was doing anything wrong.

The Respondent said that as far as she was concerned the Agreement had come to an end on 5th March 2022, the Applicant had not lodged his application until 9th June 2022, and it was therefore time barred.

Findings In Fact

1. The parties entered in to an Agreement for the Applicant to occupy a room in the Applicant's property;
2. The Agreement was headed "LICENSEES AGREEMENT BETWEEN A RESIDENT LANDLORD AND OCCUPIER FOR RESIDENCE IN THE RESIDENT LANDLORDS HOME";
3. The period of occupation was from 31st August 2021 until 28th February 2022;
4. The Licence was thereafter to continue on a monthly basis;
5. On 25th February 2022 the Applicant paid the Respondent the sum of £375 for another month's occupation;
6. On 1st March 2022 the Applicant sent a message to the Respondent seeking to give notice;
7. The notice period would come to an end at the end of March 2022;
8. The Respondent went to New Zealand on 23rd October 2019;
9. The Respondent did not return to the UK until summer 2022;
10. The Respondent did not occupy the property during the time that the Applicant occupied the property;
11. The Agreement was not a "LICENSEES AGREEMENT BETWEEN A RESIDENT LANDLORD AND OCCUPIER FOR RESIDENCE IN THE RESIDENT LANDLORDS HOME";
12. The Applicant had a Private Residential Tenancy;
13. The Respondent should have deposited the Applicant's deposit in a Tenancy deposit scheme;
14. The Applicant's application to the Tribunal was made within three months of the end date of the Agreement.

Reasons For Decision

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.

The Respondent did not occupy the property at any time that the Applicant lived there, and the tenancy does not therefore fall within this exemption.

In terms of the act writing is not required to constitute a tenancy and therefore if there is nothing in writing the statutory terms of a Private Residential Tenancy in are implied in terms of section 7 of the Act.

It follows that as the Agreement between the parties is a private residential tenancy agreement the Tenancy Deposit Scheme (Scotland) Regulations 2011 apply.

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.

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.

The issue of time bar was raised. The Tribunal was satisfied that the Applicant had brought the application within the three month time limit. The Agreement could not have come to an end until the notice period was finished. Notice was given on 1st March 2022. Evidence of that was provided by the Applicant at the outset. The Agreement would terminate at the end of March. The final version of the application was lodged by the Applicant on 9th June 2022. It was therefore within the three month period.

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.

The Applicant chose not to attend the Case Management Discussion and did not therefore challenge anything that the Respondent said. It was clear though, from what the Respondent said, that she was not in the UK when she rented the room to the Applicant and she had no fixed, or even proposed, date for returning. She should not

have entered in to an agreement as a resident landlord when she was not physically resident. Whatever her intentions may have been, she was not resident at the start of the Agreement, or at any time during it. It makes no difference in law that the Respondent considers the property to be her only or principal home. She should have entered in to a Private Residential Tenancy Agreement and placed the Applicant's deposit in a scheme.

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.

In all the circumstances the Tribunal has decided to order the Respondent to pay to the Applicant £500.

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.

A Kelly

05/01/2022

Legal Member/Chair

Date