

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 46 of the Housing (Scotland) Act 2014 and Paragraph 48 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016.

Chamber Ref: FTS HPC/LA/18/1162

Re: 3/2, 167 Great Western Road, Glasgow, G4 9AW

Parties: Miss Grace Saunders, 150 Queens Drive, Mossley Hill, Liverpool, L18 1JW, (the Applicant)

Let's Direct (South) Ltd, incorporated in Scotland under the Companies Act (SC 431947) and having a place of business at 605, Cathcart Road, Glasgow G42 8AD (the Respondent)

Tribunal Members:

George Clark (Legal Member) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the respondent had failed to comply with Paragraph 48 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 and that the Respondent should pay to the Applicant the sum of £1200.

Background

By application, received on 18 May 2018, the Applicant asked the Tribunal to make an order requiring the Respondent to refund to the Applicant the sum of £1200. The Applicant stated that this sum represented a deposit paid to the Respondent to secure the letting of the property. This payment had been paid on 27 March 2018. Subsequent to making the payment, the Applicant advised the Respondent that she was unable to proceed with the proposed letting and requested a refund of the deposit. The Respondent refused to refund the money stating that it had been made clear to the Applicant, at the time of reserving the property, that the payment of £1200 was non-refundable. On 6 April 2018, the Respondent had told the Applicant that if the Applicant did not, by Monday 9 April 2018, make up her mind, the property would be re-advertised.

The Hearing

A Hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT. The Applicant was present at the Hearing and was supported by Mr Paul Jamieson of Glasgow University Student Representative Council's Advice Centre. Miss Lucy Juif attended as a witness for the Applicant, the Respondent's Manager, Mr John Iqbal attended the Hearing.

The Applicant told the Tribunal that the payment of £1200 had originally been described by the Respondent as a 'holding fee'. Later it had been described as a 'holding deposit' and, when the Applicant confirmed the letting was not going ahead, it had been described as a 'partial payment'. The Applicant had felt pressurised into paying the 'holding fee', to secure the property on 27 March 2018, the date on which Miss Juif had viewed the property. The Applicant had experienced difficulty in finding a fourth tenant and that was the reason that the letting did not go ahead. The lease had not been due to start until 3 July 2018 and the Applicant had not seen any of the lease documentation by the time the decision not to go ahead was made.

The Applicant contended that the non-return of the money was unlawful in terms of the Rent (Scotland) Act 1984, Section 82. Miss Juif, on behalf of herself and the Applicant requested a full refund within 7 days, in an email which she sent to the Respondent on 10 April 2018.

The Respondent told the Tribunal that the payment was partly deposit and part advance payment of rent. The justification of not refunding the money was that it reflected the wasted time and effort of the Respondent where a prospective tenant withdrew before the commencement of the lease. The Respondent had not been responsible for the fact that the lease did not go ahead. It had been a personal issue of behalf of the Applicant and the other prospective tenants. The Respondent had taken the payment in good faith, and had the Applicant, for example not passed a credit scoring check it would have been repaid in full. The Respondent compared the situation to booking a holiday where any deposit would be non-refundable. The Respondent rejected the Applicant's claim that the Respondent had acted in haste in telling the Applicant of the intention to re-advertise with effect from 9 April 2018 and stressed that the sum paid was not in addition to rent or a deposit. The Respondent did not accept that the payment fell within the ambit of Section 82 of the Rent (Scotland) Act 1984 ('the 1984 Act').

When asked by the Tribunal, the Respondent advised that the property had been re-let in June 2018 so there had been no loss of rent to the Respondent's client.

Findings of Fact

Miss Juif viewed the property on 27 March 2018. Later that day she received an email from the Respondent requesting, amongst other things, payment of the 'holding fee' of £1200. Miss Juif transferred that sum to the Respondent's bank account on 27 March 2018.

The Respondent's email states 'once received your holding fee we will stop advertising the property and cancel any future viewings. This reserves the property for yourself as we process your application. If your application is denied you will be given a full refund. However, should you decide not to take property, you will not be refunded.'

On 3 April 2018, Miss Juif requested additional time to send the documents required by the Respondent. She stated that three of the prospective tenants had filled out the documents but the fourth tenant was still undecided.

On 6 April 2018, the Respondent emailed Miss Juif to say that it seemed that she was struggling to find people to move in with her and that, if the Respondent did not have the documents for all four applicants by Monday 9 April 2018, the Respondent would be looking to re-advertise the property.

On 8 April 2018, Miss Juif emailed the Respondent to say that she planned to call at the Respondent's office, with a representative of Glasgow University Student Representative Council, to arrange 'return of my deposit'. The Respondent replied on 8 April 2018 that 'in cases like this the full deposit is non refundable'.

On 10 April 2018, the Glasgow University SRC Advice Centre emailed the Respondent advising that, if a full refund were not made the Applicant would apply to the Tribunal, as the payment fell within the definition of 'premium' under Section 82 of the 1984 Act which defines a premium as 'any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge'. The email also stated that the refusal to return the £1200 was in breach of the Letting Agent Code of Practice.

Reasons for the Decision

The Tribunal accepted that had the letting gone ahead the payment of £1200 would have been assimilated into the first month's rent of £1850 and the deposit of £1950 which would have become due at the commencement of the lease. The letting, however, did not go ahead and the Tribunal had to decide the nature of the payment of £1200. The Tribunal decided that it could not be said to be advanced rental or a deposit. The Respondent's email sent shortly after the viewing on 27 March 2018 clearly described it as a 'holding fee'. The view of the Tribunal was that this fell within the definition of 'premium' in Section 82 (1) of the 1984 Act. This Section originally related to protected tenancies but now extends to Assured Tenancies and

to Private Residential Tenancies. The Tribunal concluded therefore, that the Respondent was guilty of an offence under Section 82 of the 1984 Act.

The Tribunal also determined that the Respondent failed to comply with Paragraph 48 of the Letting Agent Code of Practice, which requires letting agents to comply with Section 82 of the 1984 Act, which prohibits any person from requiring a tenant or a prospective tenant to pay any charges except rent and a refundable deposit of no more than two month's rent.

The Tribunal accepted that the decision of the Applicant not to proceed had resulted in a certain amount of wasted time and effort on the part of the Respondent. That did not, however, entitle the Respondent to retain the money paid, because the requirement for payment was in breach of Section 82 of the 1984 Act and of Paragraph 48 of the Letting Agent Code of Practice.

On the basis of the evidence before it, the Tribunal determined that the sum of £1200 should be repaid to the applicant. The Tribunal further determined not to impose a fine, but to admonish the Respondent in respect of that offence. The Tribunal decided that no interest should be paid on the sum due.

The Decision

The Tribunal determined that, within seven days of the last date on which its Decision may be appealed, the Respondent should pay to the Applicant the sum of £1200.

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.

G Clark

Legal Member/Chair

20 August 2018
Date