

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 Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/19/3251

Re: Property at Flat 3/2, 37 Minerva Way, Glasgow, G3 8GF (“the Property”)

Parties:

Mr Samuel Chan Sin Yan, 23 Rue De Sandricourt, Emalleville, 27930, France (“the Applicant”)

Mr Kenneth White, 4 Avenue Marechal De Ney, Waterloo, 1410, Belgium (“the Respondent”)

Tribunal Members:

Lesley Ward (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the respondent failed to comply with the duties contained in regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and shall pay the applicant the sum of one pound (£1).

This is a case management discussion ‘CMD’ regarding an application in terms of rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, ‘the rules’ and regulation 9 of Tenancy Deposit Schemes (Scotland) Regulations 2011, ‘the regulations’. The tribunal had before it the following copy documents:

1. Application dated 9 October 2019 and received by the tribunal on 10 October 2019.
2. Blank model tenancy agreement.
3. Letter from Safe Deposit Scotland dated 13 September 2019.
4. Copy messages regarding payments to Iain and Margaret White.
5. Welcome information for tenants.

6. Landlord registration details.
7. Joint tenancy agreement flat information sheet.
8. Email from respondent's representative dated 8 January 2020 with the following enclosures:
 - Written representations
 - End of tenancy report
 - Power of attorney
 - Joint tenancy agreement personal information sheet.
 - Joint tenancy agreement.
 - Blank model tenancy agreement.

The case proceeded with both parties via conference call. The applicant had requested a French translator who was also present in the tribunal room. The respondent was represented by Dr Iain White.

Preliminary matters

1. Regarding the translator, Mr Chan stated that he would not require every word to be translated. It was agreed that the CMD would proceed in English and the translator would translate for the applicant when he requested a translation.
2. The tribunal required to clarify some very basic issues before proceeding:
 - (a) The tribunal required to establish who the landlord for the property was. The documents which had been lodged by the applicant had Kyle White as the landlord. The application had been made against Kenneth White. The register of landlords lodged by the applicant had Kenneth and Kirsty White as the landlords. The applicant stated that he found it very confusing as during the tenancy he thought Iain White was the landlord. It was only when he was investigating the application and did a search of the landlord register that he became aware that there were 2 landlords, Kenneth and Kirsty White. It appeared to the tribunal that on the face of the documents lodged, Kyle White was the landlord. Dr White as the respondent's representative stated that his position was that all three of his children, Kenneth, Kirsty and Kyle are owners and landlords and he has no objection to the application proceeding in the name of Kenneth who in his view is a joint landlord. This being conceded, the tribunal proceeded on the basis that the application is a valid one.
 - (b) The tribunal required to be satisfied that the application has been made within 3 months of the tenancy coming to an end. The model tenancy agreement had not been signed and the respondent's representative was under the impression that the document which he had lodged and which was headed 'joint tenancy agreement' and which was accompanied by the 'Joint tenancy agreement personal information sheet' was sufficient to constitute a

private residential tenancy without the need to sign the entire model agreement. The tribunal was prepared to accept that a private residential tenancy agreement had been constituted. That established, the applicant's position was that the tenancy started on 6 May 2019 and it came to an end on 31 August 2019. This was not disputed by Dr White. The application was made on 10 October 2019 and was therefore timeous.

- (c) The tribunal required to establish if a deposit had been paid. After some considerable discussion it was agreed that a deposit of £420 had been paid.
- (d) The tribunal then had to consider if the deposit had been lodged in a deposit scheme. It was agreed that the deposit was lodged on 13 September 2019.
- (e) The tribunal then sought to ascertain the purpose of the application. It was agreed that the application solely related to the late payment of the deposit. The deposit scheme were dealing with the return of the deposit and that was not a matter within the tribunal's jurisdiction.

Discussion

Having dealt with the preliminary matters the tribunal moved on to consider if there had been a breach of the regulations and if so, to determine the gravity of the breach.

Applicant's position

The applicant paid the first month's rent of £420 in advance. He also paid a further £420 in respect of the last month's rent at the start of the tenancy. He agreed that the document he signed headed "Joint tenancy agreement personal information sheet" referred to a deposit as 'nil'. That document also referred to the tenancy coming to an end on 31 August 2019. Mr Chan disputed he paid the deposit on 31 July 2019 or that he had agreed to pay it no later than 1 August 2019. He stated that he lodged the deposit on 26 July 2019 and not 31 July 2019. Mr Chan did not seem to be aware of when the deposit should have been lodged in a deposit scheme. Further, neither party lodged any evidence regarding when the deposit was to be paid by the applicant to his landlord. His position today however was that if 30 working days is taken as the deadline for the lodging of the deposit in a scheme, the 30 working days would have been up by 6 September 2019. The deposit was not lodged until 13 September 2019 and is therefore late. He was seeking a penalty. Mr Chan had not lodged any document to show when he paid the deposit.

Respondent's position

Dr White stated that the deposit it was paid on 31 July 2019 and the 30 working days required by the regulations meant that it was timeously lodged in the scheme on 13 September 2019. He stated that it was agreed that the deposit would be paid in the month before the tenancy came to an end. He conceded that it may have been the case that Mr Chan did lodge the deposit with him (on behalf of the landlords) on 26 July 2019. He stated he did not transfer the money until 1 August 2019 as this was the agreed date and it was paid to deposit Scotland within 30 working days. By his calculation that was 13 September 2019 but he was prepared to concede that if Mr Chan was correct, the 13 September 2019 would mean that the deposit was a few days late in being lodged. Dr White also made the valid point that the regulations have been drafted on the basis that the deposit is paid within 30 days of the beginning of a tenancy and are silent on the scenario we have here where a deposit is paid during a tenancy. He therefore took the view that he should lodge the deposit within 30 days of it being received by him and that is in accordance with the guidance on the website of Safe Deposits Scotland. Dr White also conceded that he did not comply with the other duties in regulation 42 as he knew that Safe Deposit Scotland would notify the applicant and most of that information was already known to the applicant anyway.

Reasons

This was a complex case. On the balance of probability the tribunal decided that the application against one of three possible landlords was nevertheless competent.

The tribunal proceeded on the assumption that the deposit should be paid into the deposit scheme within 30 working days of it being paid by the applicant. This seems to be in accordance with common sense and the spirit of the regulations.

The tribunal also considered whether the second payment of rent could be looked on as a deposit (even though the parties agreed that it was an advance payment of rent). The decision of Sheriff Drummond in the case of *Cordiner-v- Al Shaibany* from 2015 answers this point: the payment of the first and last month's rent is not a tenancy deposit under s120 of the Housing (Scotland) Act 2006.

The tribunal was satisfied that on the balance of probability, a breach of the regulations had occurred. If a 30 day time limit is taken, the deposit should have been lodged by around 6 September 2019. This seems to be an implied term of the regulations and the respondent's representative, Dr White, was working to this timescale. Where he erred was that he assumed as the deposit was to be paid in for the last month of the tenancy, the 30 days would start from 1 August 2019. This seemed to the tribunal to be a genuine mistake of a few days. The purpose of the

deposit being lodged is served as the scheme is dealing with the post tenancy issues regarding damage and so on.

The tribunal went on to consider the gravity of the breach and considered the cases relating to the regulations. In the case of Kirk –v- Singh 2015 SLT(Sh ct) 111 sheriff Jamieson reviewed the case law and noted that the tribunal required to proceed in a manner which was fair proportionate and just. The tribunal decided that this was a very minor breach and there had been no prejudice to the applicant. The respondent was one of three landlords and his father was acting as representative. Dr White made every effort to comply and the failure appears to be a genuine oversight and not a plan to thwart the spirit of the regulations. The property is a family owned property and the breach is at the very low end of the scale.

The respondent's agent by his various concessions at the CMD and documents lodged in advance effectively enabled the application to proceed and a decision regarding a minor breach to be made. The tribunal legal member decided that in the round and on the balance of probability there had been a very minor and technical breach of the regulations. The member decided initially that no penalty was appropriate. When writing up the decision the member realised immediately that in terms of regulation 9, if a breach has been identified a penalty must be awarded and there is no discretion. Accordingly the legal member has decided that it is in the interests of justice and legally correct to order that a penalty be made and that a penalty of £1 is fair proportionate and just in all of the circumstances.

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.

17 January 2020

Lesley Anne Ward Legal Member

Date