

**Housing and Property Chamber**  
First-tier Tribunal for Scotland



**Decision**

of

**the Housing and Property Chamber of the First-tier Tribunal for Scotland**

(Hereinafter referred to as “the Tribunal”)

Under Sections 50(1) and (3) and 49 of the Housing (Scotland) Act 2014

**Chamber Ref: FTS/HPC/LA/18/1720**

**The Parties:-**

**Lucinda Willis, Flat 18, Caird House, 4 Scrymgeour Place, Dundee DD3 6TU  
 (“the Applicant”)**

**Rent Flats Dundee Limited, (company number SC578355) having a place of  
business at 214 Blackness Road, Dundee, DD1 5PL (“the Respondents”)  
represented by Bannatyne Kirkwood France & Co, solicitors, 16 Royal  
Exchange Square, Glasgow G1 3AG**

**Tribunal Members:-**

David Bartos - Chairperson, Legal member  
Helen Barclay - Ordinary member

**NOTICE TO THE PARTIES**

The Tribunal :

(1) decides that the Respondents have failed to comply with part (b) (i) of the Letting Agent Enforcement Order reference FTS/HPC/LA/18/1720 in respect of the Property dated 8 November 2018;

(2) refuses to vary part (b) (i) of said Order.

### **Introduction**

1. In this decision the Housing (Scotland) Act 2014 is referred to as "the 2014 Act"; the Letting Agent Code of Practice is referred to as "the Code"; and the rules in the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

### **Reasons**

2. On or about 9 November 2018 the parties were issued with a Letting Agent Enforcement Order ("LAEO"). There has been no appeal against the LAEO.

3. By e-mails and forms dated 20 November 2017 the Respondents applied to the Tribunal for a certificate of compliance. This was accompanied by various documents.

4. By letters dated 22 November and on or about 14 December 2018 from the Tribunal the Applicant was notified of the opportunity of commenting on whether the LAEO had been complied with by the Respondents. The Applicant has not made any comments on whether there has been compliance with the LAEO.

5. On 9 January 2019 the Tribunal decided that the Respondents had complied with parts (a), (b) (ii), and (c) to (e) of the LAEO. It also varied part (b) (i) of the LAEO by extending time for its compliance to 31 January 2019. There has been no appeal that decision.

### ***Part (b) - Lease***

6. Part (b) of the LAEO sought to rectify the inaccurate information contained in the Respondents' style leases as to the lawful uses of the deposit. In particular the existing style (*pro forma*) failed to give effect to the legal position that a deposit covering matters beyond those specified in section 90(3) of the Rent (Scotland)

Act 1984 is itself an unlawful premium under sections 82 and 83 of that Act. In effect the lease in the current style allowed the use of a deposit for unlawful purposes. For example in the sixth paragraph of clause 11 the deposit was stated to cover reasonable costs of any duty of the tenant to carry out any "particular thing". This went well beyond the lawful purposes in section 90(3).

7. The Respondents submitted a revised style lease with their e-mail of 4 December 2018. However contrary to part (b) (i) of the LAEO it did not omit the fourth and sixth paragraphs of clause 11. Furthermore the change to the seventh paragraph of that clause still leaves the deposit extending beyond the lawful deposit provisions of section 90(3). In these circumstances the Tribunal found that there had not been compliance with part (b) (i) of the LAEO.

8. By letter dated 18 February 2019 the Respondents' solicitors sought a variation of the LAEO through the deletion of part (b) (i) on the basis that the paragraphs sought to be omitted were ones which the Respondents were entitled to use given that they were within the Scottish Government's Model Private Residential Tenancy Agreement. The letter was copied to the Applicant but she did not respond.

9. A decision on whether there has been compliance with a letting agent order is made under section 50 of the 2014 Act. Before it is made the Tribunal must apply its mind to the provisions of section 50(3) of the 2014 Act which provide that a decision of failure to comply must not be made if there is a reasonable excuse for non-compliance. In addition section 49(1)(a) of the 2014 Act allows the Tribunal to vary the order at any time as it thinks fit. Accordingly section 49(1)(a) gives the Tribunal a discretion to vary a letting agent enforcement order in such manner as it considers reasonable.

10. The Tribunal appreciated that the Respondents wished to have the convenience of using the Scottish Government's Model Private Residential

Tenancy Agreement without alteration. However the Respondents were not and are not legally obliged to use what is as its title suggests, a “model” or style agreement. No basis for any such legal obligation was put forward by the Respondents. It is quite open to the Respondents to alter the style suggested by the Scottish Government in order to comply with the LAEO.

11. In its decision of 9 January 2019, in paragraph 11, the Tribunal reiterated the flaw with the Scottish Government model that it had found to exist in clause 11 of the model. The reasons behind the flaw had been explained in paragraphs 54 to 56 of the Tribunal’s decision of 8 November 2018. In short the wording of clause 11 as it stood was misleading to tenants as to the lawful purposes of a deposit and when a deposit becomes an unlawful premium.

12. The Tribunal took the view that the imperative of providing all relevant information to tenants under section 43 of the Code overrode administrative convenience to the Respondents as letting agents. Little would be required to create a new style that incorporated the changes suggested in part (b) (i) of the LAEO. Conversely a style with a properly worded deposit clause would have the benefit of making the nature of deposits clearer to tenants and quite possibly avoiding cases such as the present. In these circumstances the Tribunal exercised its discretion to refuse the request for deletion of part (b) (i) of the LAEO.

13. In connection with reasonable excuse for non-compliance with part (b) (i) of the LAEO, the Respondents submitted that as they did not intend making unlawful deductions from the deposit in future, there was no need for compliance with part (b) (i) of the LAEO. The view of the Tribunal was that this missed the objective of part (b) (i) and also the reasons why part (b) (i) was imposed. The reason for part (b) (i) was to ensure that tenants would be fully informed about the deposit, regardless of what the Respondents might or might not do with deposits in the future. Part (b) (i) had been caused by the Respondents’ breach of section 43 of the Code which related to informing tenants. All of this had been made clear to the

Respondents in both the decisions of 9 January 2019 and 8 November 2018. Yet no effort to comply had been made for reasons of administrative convenience.

14. In these circumstances the Tribunal found that the excuse for non-compliance with part (b) (i) was not a reasonable one. The Respondents had therefore failed to comply with part (b) (i) of the LAEO.

15. The decisions of the Tribunal were unanimous. Notice of the decision of failure to comply with the LAEO will be served on the Scottish Ministers. The Respondents are reminded that a person who without reasonable excuse fails to comply with a property factor enforcement order commits a criminal offence albeit this decision does not establish any presumption of a criminal offence having been committed. The Tribunal expected that the Scottish Ministers and any prosecuting authority would take account of the role of the Scottish Ministers in the drafting of the flawed model tenancy agreement.

### **Right of Appeal**

16. The parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

D Bartos

Signed ...

... 4 March 2019

David Bartos, Chairperson