

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 16 of the Housing (Scotland) Act 2014 (“2014 Act”)

Chamber Ref: FTS/HPC/CV/18/2810

Re: Flat 3, 9 Rosebery Crescent, Edinburgh, EH12 5JP
 (“the Property”)

Parties:

Mr James Malloch, c/o 109 Pilton Avenue, Edinburgh, EH5 2HP (“the Applicant”)

Bernisdale Homes Ltd, 1A Rosebery Crescent Lane, Edinburgh, EH12 5JR (“the Respondent”)

Tribunal Members:

Pamela Woodman (Legal Member) and Ann Moore (Housing Member)

Present:

The hearing in relation to case reference FTS/HPC/CV/18/2810 took place at George House, 126 George Street, Edinburgh, EH2 4HH at 2.00pm on Monday 18 February 2019 (“**the Hearing**”). The Applicant was present in person at the Hearing. The Respondent was represented at the Hearing by David Alexander (“**Mr Alexander**”) of DJ Alexander (“**the Respondent’s Representatives**”). The clerk to the Tribunal was Rebecca Forbes. There were also three observers, namely Ben Alexander, and Ana Dickson and Graham Dickson, both of the Respondent.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:

BACKGROUND

1. An application was made to the Tribunal under section 16 of the 2014 Act for civil proceedings in relation to matters associated with a tenancy under the Housing (Scotland) Act 1988 (“**1988 Act**”). The application was made in terms of the First-tier Tribunal for Scotland Housing and Property Chamber

Rules of Procedure 2017 (“**HPC Rules**”) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, (“**2017 Regulations**”). More specifically, the application was made in terms of rule 70 (*Application for civil proceedings in relation to an assured tenancy under the 1988 Act*) of the HPC Rules.

2. A notice of acceptance of the application was issued by the Tribunal dated 1 November 2018 under rule 9 of the HPC Rules (“**Notice of Acceptance**”), which confirmed that the application paperwork had been received by the Tribunal on 19 October 2018.
3. A case management discussion was held on 14 December 2018 (“**CMD**”), at which the Tribunal “identified that there were factual matters in dispute and that a Hearing was accordingly necessary”. Notes on the CMD were issued by the legal member who presided over the CMD, in which the legal member noted that the “issues to be determined at the Hearing are:
 1. Whether or not the Respondent imposed a requirement upon the Applicant that 12 months’ rent was due and payable in advance;
 2. If the answer to 1 is affirmative then whether such a requirement was a prohibited requirement for the purposes of section 89(1) of the Rent (Scotland) Act 1984 (as amended); and
 3. If the answer to 2 above is affirmative whether the rent of £13,980 paid by the Applicant should be repaid to him.”
4. The parties had confirmed in the application paperwork and written representations that the tenancy in question was a short assured tenancy which commenced on 8 November 2016. The Tribunal was satisfied that the tenancy in question was an assured tenancy and so the Tribunal had jurisdiction to hear the case as a result of section 16 of the 2014 Act.
5. The application form was accompanied by various documents, including a copy of a “short assured tenancy” agreement between the Respondent and the Applicant signed by (or on behalf of) each party and dated 8 November 2016 (“**Tenancy Agreement**”) in terms of which:
 - (a) the tenancy commencement date was 8 November 2016 (“entry date”);
 - (b) the end date of the initial term was 7 November 2017 (“termination date”);
 - (c) if not terminated by either party on 7 November 2017, the tenancy was to “continue thereafter on a monthly basis until ended by either party”;
 - (d) clause 16 set out the manner in which the tenancy may be ended;
 - (e) the rent was £1,165 per calendar month;
 - (f) the rent was “payable twelve months in advance” with the “first twelve month’s rent... payable at or before the entry date”;
 - (g) thereafter the rent was “payable by way of monthly direct debit (subject to a successful credit and reference check)” and the landlord was entitled to increase the rent after the termination date on giving advance

- written notice to the tenant of the increase which would “reflect local market rates”; and
- (h) a deposit of £300 was payable and required to be paid into an approved tenancy deposit scheme.

6. Clause 3 of the Tenancy Agreement was in the following terms:

“The rent is £1165.00 per calendar month payable twelve months in advance. Thereafter the rent is payable by way of monthly direct debit **(subject to a successful credit and reference check)**. Payment of the full monthly rental will only be accepted from one account. It is your responsibility to ensure the correct amount is collected from your bank account. The first twelve month’s rent is payable at or before the entry date. The landlord or landlord’s agent may increase the rent after the termination date specified in Clause 2 above....”

7. The Applicant provided a copy of an invoice from D.J.Alexander to the Applicant dated 26 October 2016 in respect of rent for the period from 8 November 2016 to 7 November 2017 and a security deposit (which together totaled £14,280), less an amount of £582.50 already paid, on which invoice it was noted in handwriting that this had been paid on 8 November 2016.

8. The Applicant was seeking an order for payment of £13,980 from the Respondents in terms of section 89 of the Rent (Scotland) Act 1984 (“**1984 Act**”), as amended by section 27 of the Housing (Scotland) Act 1988 (“**1988 Act**”).

9. This decision arises out of the Hearing.

KEY RELEVANT LEGISLATION

10. Section 27 of the 1988 Act is in the following terms:

“Prohibition of premiums etc. on assured tenancies.

Sections 82, 83 and 86 to 90 of the Rent (Scotland) Act 1984 (which make it an offence to require premiums and advance payment of rent in respect of protected tenancies and make related provision) shall apply in relation to assured tenancies as they apply in relation to protected tenancies (including protected tenancies which are regulated tenancies), but with the following modifications -

(a) section 83(5) shall not apply; and

(b) section 88(1) shall apply as if for the references to 12th August 1971 there were substituted references to the date of commencement of this section.”

11. Section 89 of the 1984 Act is in the following terms:

“Avoidance of requirements for advance payment of rent in certain cases.

- (1) Where a protected tenancy which is a regulated tenancy is granted, continued or renewed, any requirement that rent shall be payable –
 - (a) before the beginning of the rental period in respect of which it is payable, or
 - (b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months),shall be void, whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof; and any requirement avoided by this section is, in the following provisions of this section, referred to as a “prohibited requirement”.
- (2) Rent for any rental period to which a prohibited requirement relates shall be irrecoverable from the tenant.
- (3) Any person who purports to impose any prohibited requirement shall be liable to a fine not exceeding level 3 on the standard scale, and the court by which he is convicted may order any amount of rent paid in compliance with the prohibited requirement to be repaid to the person by whom it was paid.
- (4) Where a tenant has paid on account of rent any amount which, by virtue of this section is irrecoverable by the landlord, then, subject to subsection (6) below, the tenant who paid it shall be entitled to recover that amount from the landlord who received it or his personal representatives.
- (5) Subject to subsection (6) below, any amount which a tenant is entitled to recover under subsection (4) above may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord.
- (6) No amount which a tenant is entitled to recover under subsection (4) above shall be recoverable at any time after the expiry of two years from the date of payment.
- (7) Any person who, in any rent book or similar document, makes an entry showing or purporting to show any tenant as being in arrears in respect of any sum on account of rent which is irrecoverable by virtue of this section shall be liable to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the making of the entry, the landlord had a bona fide claim that the sum was recoverable.

- (8) If, where any such entry has been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant to do so, refuses or neglects to cause the entry to be deleted within seven days, the landlord shall be liable to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the neglect or refusal to cause the entry to be deleted, he had a bona fide claim that the sum was recoverable.”
12. In terms of section 90 of the 1984 Act, “rental period” means a “period in respect of which a payment of rent falls to be made.”

PROCEEDINGS, NAMELY THE HEARING

13. The Applicant confirmed that he was a non-practising solicitor in England and Wales. Mr Alexander confirmed that he was not a solicitor.
14. The Applicant was asked to confirm his current residential address. He confirmed that he was living in a hotel, with a check out date of Wednesday 20 February 2019. He confirmed that his address for correspondence was care of 109 Pilton Avenue, Edinburgh. The Applicant confirmed that he was a volunteer at a charity, namely CRISIS, and that the address for correspondence was the address of a person who worked there.
15. It was confirmed (after conferring with the observers from the Respondent) that the Respondent owned the Property and had done since the late 1970s.
16. The Applicant confirmed that he had been served with notice to quit by the Respondent, by virtue of which his tenancy of the Property had been brought to an end in December 2018. The Applicant had confirmed to the Tribunal by e-mail on 7 December 2018 that “As of today I am no longer residing at” the Property.
17. The Applicant confirmed that he had first raised the matter of section 89 of the 1984 Act with the Respondent or Respondent’s Representatives by e-mail on 11 December 2017. He confirmed that he had received advice from Shelter. He had recently signed a new (second) tenancy agreement for the Property on 8 December 2017. The e-mail stated:

“...With regard to the tenancy agreement dated 8th December 2017, can I draw your attention to the following:

S89 Rent (Scotland) Act 1984 as amended by s27 Housing (Scotland) Act 1988.

My understanding is that the relevant requirement in Clause 3 of the tenancy agreement is prohibited under s89(1)(b) Rent (Scotland) Act 1984 as amended.

I would be grateful for your response...”

18. The Applicant received the following response from Kimberley Berry of the Respondent’s Representatives on the same day:

“...Your new lease has identical terms to the previous SAT and this is a fixed term extension of the contract. As such we are not aware of any discrepancies with the terms which would be in contravention of any [of] the terms of the Housing (Scotland) Act 1988.

Can I ask for a bit more information regarding your concerns and if you have any specific questions that I can help to answer?...”

Mr Alexander confirmed that Ms Berry was a lease co-ordinator and would prepare lease documents on the instructions of others.

19. The Applicant confirmed that he only became aware of the provisions of section 89 of the 1984 Act around November 2017 and that he contacted the Respondent’s Representatives once he was confident that there was an issue.

20. Both the Applicant and Mr Alexander confirmed that the Tenancy Agreement provided with the application paperwork was the tenancy agreement which had actually been entered into. They also confirmed that the Property had originally been advertised for rent at £1,300 per month.

21. The Applicant confirmed the following:

- a. His claim related to the duration of the tenancy from 8 November 2016 to 7 November 2017;
- b. He genuinely did not think that he would pass an affordability test – he was certain about this;
- c. He had not been induced into this view by the Respondent or any person from the Respondent’s Representatives – this view was based on his own investigations and information obtained when he had been looking at properties to rent somewhere other than Edinburgh;
- d. He had told the person from the Respondent’s Representatives that his pension was less than the monthly rent;
- e. The Respondent’s Representatives did not contradict his view that he would not pass an affordability test;
- f. Given that the words “**(subject to a successful credit and reference check)**” appeared in bold and underlined in clause 3 of the Tenancy Agreement, he had understood that he had not passed the affordability

test (i.e. credit check) but he did not ask about the outcome of it, nor was he told the outcome of it by the Respondent's Representatives;

- g. In addition, he did not want adversely to affect his credit rating / record – he did not know if a credit check for a tenancy would do this but did not want to risk it – however, he was told that it was mandatory to go through a credit check process;
 - h. He had offered to pay twelve months' rent upfront (up to a maximum of £14,000 for the year) – he had suggested this and said that he could pay in advance because he did not want to be overlooked or miss out on the Property;
 - i. It had not been the Respondent's or the Respondent's Representatives' suggestion that he paid in advance;
 - j. The Tenancy Agreement was not signed under duress;
 - k. The Tenancy Agreement reflected (i) the arrangement that twelve months' rent was to be paid in advance, (ii) everything that had happened and (iii) what he believed would be in it – he was not surprised by any of the terms of the Tenancy Agreement.
22. Mr Alexander confirmed that the credit check process was mandatory for every proposed tenant and that it was done through Sure Tenant. He noted that Sure Tenant had confirmed that they had sent an e-mail to the Applicant to confirm the outcome of the credit check, which was an approval. However, Mr Alexander acknowledged that he could not confirm that this was done by Sure Tenant. The Applicant confirmed that he had not received any confirmation of the outcome of the credit check from Sure Tenant.
23. Mr Alexander confirmed that there were only limited circumstances where they insisted upon a tenant paying six months' rent in advance, such as where they did not have a UK bank account. He confirmed that, in the case of the Applicant, there was not requirement on the Applicant to pay twelve months' rent in advance (or even six months' rent in advance). The Applicant had made a request to pay in advance which the Respondent's Representatives had sought to facilitate.
24. The Applicant submitted that the Respondent's Representatives should have been aware of the terms of section 89 of the 1984 Act.
25. The Applicant submitted that the requirement to pay rent twelve months in advance was imposed "under the terms" of the Tenancy Agreement. Therefore, the requirement in clause 3 of the Tenancy Agreement was unlawful and void. He submitted that it was the actual terms of the Tenancy Agreement which were relevant in determining whether section 89 applied,

rather than any discussions or arrangement which had preceded signing the Tenancy Agreement.

26. The Applicant stated that he had not been given the option to pay rent monthly. The Respondent's Representative did not agree with this and submitted that the advertisement for the letting of the Property referred to an amount per month and the "example copy" of the tenancy agreement also referred to paying monthly. It stated "The rent is <<RENT>> per calendar month payable monthly in advance on the <<DAY>> of each month..." The Applicant highlighted that this was only an "example copy" and not the actual tenancy agreement for signing.
27. The Respondent's Representative submitted that the Applicant had imposed the requirement to pay in advance on himself.
28. The Applicant had provided the following documents as part of his productions:
 - a. Document JM/13 – Scottish Government "Consultation on proposals for regulations and policy supporting the Private Housing (Tenancies) (Scotland) Act 2016" dated October 2016, which included a "Recommended Model Tenancy Agreement" for the private rented sector, in which no mention was made of any restriction on paying rent more than six months in advance, either as a mandatory or a discretionary clause;
 - b. Document JM/14 – Scottish Government "Proposals for regulations and policy supporting the Private Housing (Tenancies) (Scotland) Act 2016 Analysis of responses to the public consultation exercise Final Report 1 March 2017"; and
 - c. Document JM/15 – "Scottish Government Model Private Residential Tenancy Agreement For the Private Rented Sector", in which it is stated in section 8 that: "The maximum amount of rent which can be paid in advance is 6 months' rent." This is a mandatory clause.
29. The Applicant submitted that these documents supported his submission that it was illegal to require a tenant to pay more than six months in advance as in the case of the Tenancy Agreement. He submitted that the language in section 8 of the model agreement had been included, essentially, in implementation of section 89 of the 1984 Act which was applied to private residential tenancies by section 20 of The Private Housing (Tenancies) (Scotland) Act 2016.

FINDINGS IN FACT

30. The Applicant had suggested, for his own benefit, paying the rent twelve months in advance. He wanted to secure a letting of the Property and was of

the opinion that he would not pass affordability checks based on his income and so might otherwise "lose out" on it.

31. The Tenancy Agreement referred to rent for the first twelve months of the duration of the tenancy being payable "at or before the entry date".
32. The Tribunal was satisfied, on the balance of probabilities, that neither the Respondent nor the Respondent's Representatives had stipulated that paying rent twelve months in advance was a requirement or condition of the grant of the tenancy.
33. As part of the written submissions made on behalf of the Respondent on 10 December 2018, it was stated in paragraph 7 that:

"The Applicant without duress and at his own insistence offered to pay a years' rent in advance and at his own insistence wanted this reflected in the lease. The lease was specifically amended in accordance with the Applicant's wishes."

No evidence of this insistence of the Applicant was provided to the Tribunal.

However, document 13 of the Respondent's productions, being an e-mail from the Applicant to Judy Bain of the Respondent's Representatives dated 9 November 2017 was in the following terms:

"...The current tenancy agreement only caters for the tenancy continuing on a monthly basis after the termination date and for the rent being paid by way of monthly direct debit. In order for me to pay the next twelve months rent in advance, we would need a new tenancy agreement which confirms that agreement."

34. The Tribunal noted that the e-mail on 9 November 2017 related to the renewal of the tenancy after the expiry of the initial twelve month duration of the Tenancy Agreement. However, the Tribunal found that this e-mail indicated that the Applicant wanted the written document to reflect what was happening in practice and was satisfied, on the balance of probabilities, that the language in the Tenancy Agreement around the payment of twelve months' rent "in advance...at or before the entry date" had been included as a requirement of the Applicant.
35. The Tribunal was not persuaded by the Applicant's references to the development of section 8 (regarding the payment of rent in advance) in the model tenancy agreement for a private residential tenancy. The Tribunal noted that the Tenancy Agreement did not constitute a private residential tenancy but also that the relevant provision of the model agreement referred to a restriction on how much rent may be "paid" in advance, rather than any restriction on "imposing" a "requirement" to pay more than a certain period in advance. The restriction in the model tenancy appears to prevent a tenant choosing to make a payment more than six months in advance, as well as

preventing a landlord making it a requirement that rent is payable more than six months in advance.

REASONS FOR DECISION

36. Section 89(1) had been applied to assured tenancies, such as the tenancy recorded in the Tenancy Agreement, by virtue of section 27 of the 1988 Act.

37. Section 89(1), as amended to take account of section 27 and the particular circumstances of this case, provides that:

“Where [an assured tenancy] is granted..., any requirement that rent shall be payable - ...

(b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months),

shall be void,

whether the requirement is imposed

as a condition of the grant... of the tenancy
or
under the terms thereof;...”

38. The Applicant submitted that the words from “whether” to “under the terms thereof”:

a. were “a clarification and not a substitute for the words “any requirement””;

b. “set out a clarification which is undoubtedly inclusionary and not exclusionary in nature”; and

c. “draw a distinction between two situations...it is therefore essential to recognise that whatever interpretation is given to the words “imposed as a condition of”, the interpretation of the words “imposed...under the terms [of]” must have a significant and meaningful distinction.”

39. The Tribunal agreed that there should be a distinction drawn between where a “requirement is imposed as a condition... of the grant of the tenancy” and where a “requirement is imposed...under the terms” of the tenancy.

40. Otherwise, the arguments put forward by the Applicant regarding the interpretation of section 89 were not accepted by the Tribunal.

41. The Tribunal was satisfied that the words “whether” and “or” provided specific defined alternatives as to how a “requirement” might be “imposed” for the purposes of section 89, in other words an exhaustive list of examples. This

would be in accordance with the normal and ordinary interpretation and/or use of such words. Furthermore, had there been an intention on the part of the legislators that this was not an exhaustive list, the words "including" or "such as" would more likely have been used.

42. The Applicant appeared to have accepted that it was not a "condition... of the grant of the tenancy" that twelve months' rent was to be paid in advance.
43. The Applicant appeared to be preferring to seek to rely upon the reference to there having been a requirement imposed "under the terms" of the tenancy. He submitted that the mere inclusion of the phrases "payable twelve months in advance" and "the first twelve month's rent is payable at or before the entry date" of themselves constituted a "requirement" which had been imposed "under the terms" of the tenancy.
44. During the Hearing, the Applicant appeared to be reluctant to confirm that anything had been "agreed" prior to the signing of the Tenancy Agreement. However, the Tribunal considered that it would be highly unusual for a tenancy agreement to be produced without there being, at the very least, agreement in principle on the rent and the frequency with which it would be payable. Based on the correspondence produced to the Tribunal, the Tribunal was satisfied, on the balance of probabilities, that there had been an agreement, at least in principle, as to the amount of rent payable per month (namely £1,165) and that twelve months' rent was, at the suggestion of the Applicant, going to be paid in advance.
45. The Tenancy Agreement reflected what had been discussed prior to signing. There was no "surprise" in the Tenancy Agreement as the Applicant put it.
46. The Tribunal noted that, in support of his interpretation of section 89, the Applicant was seeking to rely on "terms" of the Tenancy Agreement which he had required be inserted.
47. In addition, the Tribunal considered that the normal and ordinary interpretation of the word "requirement" in a legal context indicated something that was compulsory, imposed as an obligation and/or was a necessary condition.
48. There was no evidence to suggest that the Respondent, or the Respondent's Representatives on its behalf, sought to make the payment of rent twelve months in advance compulsory or a pre-condition to the granting of the tenancy. On the contrary, it was the Applicant who had requested to pay twelve months in advance for his own benefit, namely to secure a letting of the Property. This was his suggestion and not a "requirement" which was "imposed" on him.
49. Accordingly, the Tribunal was not satisfied that any "requirement" had, in fact, been "imposed" on the Applicant "under the terms" of the Tenancy Agreement. Rather, the Tenancy Agreement reflected the terms which had been agreed between the parties before the Tenancy Agreement had been

produced for signing. It was untenable to suggest that the mere inclusion of the words recording what had been agreed, at least in principle, prior to signing was the imposition of a requirement, particularly in light of the facts and circumstances of this case.

50. The Applicant appeared to be seeking to rely on an overly technical interpretation of section 89(1) which ignored the facts and circumstances which led up to the inclusion of specific wording in the Tenancy Agreement. In addition, the Tribunal did not consider that it was in the interests of justice to interpret section 89 in such a way as to allow the Applicant to benefit from his own offer to pay rent twelve months in advance and/or from "terms" which he had required be inserted into the Tenancy Agreement.

DECISION

51. Accordingly, for the various reasons set out above, the Tribunal refused the application for the order for payment in the case with reference FTS/HPC/CV/18/2810.
52. The decision was intimated orally to the parties at the Hearing.

Right of Appeal

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.

Chair

Date

own offer to pay rent twelve months in advance and/or from "terms" which he had required be inserted into the Tenancy Agreement.

DECISION

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P Woodman

Chair

Date

18.2.19