

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 regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“2011 Regulations”)

Chamber Ref: FTS/HPC/PR/18/0236

Re: 30 Lethen Walk, Portlethen, Aberdeen, AB12 4TX
 (“the Property”)

Parties:

Ms Deborah Plumpton, 4 Peggy's Garden, Durris, Banchory, AB31 6BG
 (“the Applicant”)

Ms Ruth Brown, Mooring 11, Mary Sophia, Willows Park, Windsor, SL4 5TG
 (“the Respondent”)

Tribunal Member:

Pamela Woodman (Legal Member)

Present:

The case management discussion in relation to case reference FTS/HPC/PR/18/0236 took place at 2.00pm on Friday 21 December 2018 at The Credo Centre, 14-20 John Street, Aberdeen, AB25 1BT (“the CMD”). The Applicant was not present in person and Mr Ian King (“Mr King”) appeared on her behalf (see further discussion on this below). The Respondent was not present in person but was represented by her father, Mr Robert Brown (“the Respondent’s Representative”). The clerk to the Tribunal was Joanna Harrold.

Decision

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

BACKGROUND

1. An application was made (by Mr King on behalf of the Applicant) to the Tribunal under regulation 9 of the 2011 Regulations and in accordance with 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 103 (*Application for order for payment where landlord has not paid the deposit into an approved scheme*) of the HPC Rules.

2. The order sought from the Tribunal was an order for return of the tenancy deposit and “any other amount the Tribunal sees fit” for the Respondent’s failure to comply with her obligations with regard to the 2011 Regulations.
3. The application was dated 26 January 2018 and was received by the Tribunal on 29 January 2018. Previously scheduled case management discussions had been postponed.
4. The application was made in terms of rule 103 of the Procedure Rules.
5. Rule 103 of the Procedure Rules relates only to an application made by “a tenant or a former tenant... under regulation 9 (court orders) of” The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“2011 Regulations”).
6. Regulation 9(1) (Court orders) of the 2011 Regulations is in the following terms:

“A tenant who has paid a tenancy deposit may apply to the sheriff for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.”
7. Regulation 3(1) (Duties in relation to tenancy deposits) of the 2011 Regulations is in the following terms:

“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.”
8. Regulation 9(2) (Court orders) of the 2011 Regulations is in the following terms:

“An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended.”
9. Regulation 10 (Court orders) of the 2011 Regulations is in the following terms:

“If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff –

 - 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 sheriff 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.”
10. With effect from 1 December 2017, the functions and jurisdiction of the sheriff on matters arising out of the 2011 Regulations (and various other civil matters) in relation to any “assured tenancy” (as defined in section 12 of the Housing (Scotland) Act 1988) were transferred to the Tribunal by virtue of section 16 of the Housing (Scotland) Act 2014.

11. Regulation 9 of the 2011 Regulations refers to a failure of a landlord to comply with a duty in regulation 3 of the 2011 Regulations. Regulation 10 of the 2011 Regulations refers to remedies for a failure to comply with a duty in regulation 3 of the 2011 Regulations. None of regulations 3, 9 and 10 of the 2011 Regulations deal with the repayment of a tenancy deposit by a landlord to a tenant. Regulation 10 provides for certain remedies where there has been a failure to comply with a duty in regulation 3 of the 2011 Regulations.
12. Accordingly, it was explained to Mr King and the Respondent's Representative that the CMD would not deal with the matter of repayment of the tenancy deposit but rather with the matter of the breach of any duty in regulation 3 of the 2011 Regulations by the Respondent.
13. However, there was a preliminary issue which was the subject of directions issued on 4 December 2018 and which were in the following terms:

"In terms of Rule 16, the First-tier Tribunal (on its own initiative) directs the Applicant, on or before (but no later than) Monday 17 December 2018, to submit to the First-tier Tribunal:

- a. if the Applicant has appointed Ian King as her representative, a signed mandate authorising him to submit the application on her behalf and to act as her representative in relation to this case;
- b. a copy of the tenancy agreement between the Applicant and the Respondent in relation to the tenancy which commenced on 10 April 2017 (which is referred to in the application form but not provided); and
- c. evidence of the date of payment of the tenancy deposit to the Respondent.

Reasons for directions

The application has been made in the name of the Applicant. The First-tier Tribunal requires to be satisfied that the Applicant has duly authorised Ian King to submit the application on her behalf and to represent her in relation to this case.

The application form appears to suggest that the tenancy deposit was paid in relation to a tenancy which commenced on 10 April 2017 and states that a copy of the relevant tenancy agreement is available if requested. A copy of the relevant tenancy agreement is required.

The copy tenancy agreement (which was provided with the application form) is dated 6 October 2017 and narrates that the lease commencement date was 10 November 2017. Given that there are two tenancy agreements mentioned in connection with this application, the First-tier Tribunal requires evidence as to when the tenancy deposit was, in fact, paid to the Respondent."

14. Prior to the CMD, the Tribunal had been provided with a copy of the tenancy agreement referred to in direction b. and the bank statements referred to in direction c. Mr King produced further copies of the bank statements at the Tribunal which were accepted into evidence by the Legal Member.
15. However, neither the Applicant nor Mr King had provided a signed mandate or letter of authority as required in terms of direction a. This had been highlighted by the Tribunal to

Mr King by e-mail on 18 December 2018 but he advised that he had not received that e-mail. During an adjournment, Mr King discovered this e-mail in his "Junk" mail folder. Mr King confirmed during the CMD that there was no such mandate or letter of authority in place from the Applicant but that he could obtain one. He referred to the fact that he was named in the tenancy agreement as guarantor and the fact that his own bank statements showed payment of the tenancy deposit and first month's rent to the Respondent. He explained that he was the Applicant's son-in-law and that the Applicant had some health issues and so was unable to attend the CMD herself.

16. The Legal Member decided to hear from both Mr King and the Respondent's Representative before considering the implications of this lack of a mandate or letter of authority.
17. The Respondent's Representative confirmed that, as the Respondent had previously confirmed to the Tribunal, the Respondent accepted that she had not paid the tenancy deposit into an "approved scheme" within the required timescale.
18. It was agreed that:
 - a. there had been two tenancy agreements which ran one after the other, the first commenced on 10 April 2017 and the second commenced on 10 November 2017;
 - b. the tenancy terminated on 26 December 2017;
 - c. the tenancy deposit was paid into the "approved scheme" on 24 September 2017;
 - d. the Respondent provided the deposit protection certificate from my deposits Scotland to Mr King (on behalf of the Applicant) on 12 January 2018;
 - e. the Respondent had applied to my deposits Scotland – the relevant "approved scheme" – for release of the full amount of the tenancy deposit to her and had advised the Applicant that she would be making such an application;
 - f. the Respondent had been paid the full amount of the tenancy deposit in February 2018; and
 - g. the relationship between the Applicant / Mr King and the Respondent during the currency of the tenancy had been "OK" and there had not been any significant issues.
19. Mr King indicated that neither he nor the Applicant had contacted my deposits Scotland to dispute the payment of the full amount of the tenancy deposit to the Respondent. He stated that he had not received any correspondence from my deposits Scotland in respect of the application for release. However, that was not a matter for consideration by the Tribunal at the CMD.
20. Mr King and the Respondent's Representative were not in agreement regarding disputed damage to the Property allegedly caused by the Applicant, the cost of repairing/remediating such alleged damage and whether or not any repairing or remedial works were in fact carried out.
21. Mr King (on behalf of the Applicant) confirmed that the Applicant was seeking an amount equivalent to the amount of her tenancy deposit. The Respondent's Representative

suggested that the Respondent should not be required to bear the costs of the repairing/ remedial works required as the (net) result of being ordered to make a payment but he did acknowledge that the Respondent had not complied with her obligation to pay the tenancy deposit into an approved scheme timeously.

22. The Applicant's Representative confirmed that, to the best of his knowledge and belief, the Applicant had three properties in Scotland which were rented out by her and that she had been renting out properties for 15 to 16 years.

FINDINGS OF FACT

23. The application was made in time in terms of regulation 9 of the 2011 Regulations.
24. The Respondent had failed to comply with her duties as landlord in terms of regulation 3 of the 2011 Regulations. Accordingly, the Tribunal was required to make an order in terms of regulation 10 of the 2011 Regulations of "an amount not exceeding three times the amount of the tenancy deposit".
25. The tenancy deposit was paid by Mr King (on behalf of the Applicant) to the Respondent on 10 April 2017.
26. According to the government website, there were bank holidays "in any part of the United Kingdom" on 14 April 2017, 17 April 2017, 1 May 2017 and 29 May 2017. These all fell within the relevant 30 working day period within which the tenancy deposit required to be paid into an "approved scheme". Accordingly, the tenancy deposit should have been paid to an "approved scheme" on or before 25 May 2017. It was not, in fact, lodged until 24 September 2017.
27. The Respondent had failed to give the Applicant any of the information required in terms of regulation 42 of the 2011 Regulations until requested to do so by Mr King in January 2018.

REASONS FOR DECISION

28. In determining what would be a "fair, proportionate and just sanction" in the circumstances of this particular case, the Legal Member:
- a. Noted that the Respondent had three properties which she leased out and had been a landlord for 15 to 16 years. Therefore, she could not properly be considered to be a novice landlord;
 - b. Noted that, upon realising that the tenancy deposit had not been paid into an "approved scheme", the Respondent had remedied this and had done so without any prompting by the Applicant or Mr King and before notice was given to the Respondent that the Applicant wished to terminate the tenancy;
 - c. Found that, by paying the tenancy deposit into an "approved scheme" prior to termination of the tenancy, the actions of the Respondent had not deprived the Applicant (and the Respondent) of the free dispute resolution mechanism which was available;
 - d. Found that the tenancy deposit was not protected in an "approved scheme" for a period of approximately 4 months;

- e. Found that the failure to comply with regulation 42 of the 2011 Regulations had continued for a period of approximately 9 months; and
- f. Noted that, during the currency of the tenancy, the landlord-tenant relationship had been amicable and without significant issues.

DECISION

29. Returning to the matter of the lack of evidence of Mr King's authority to represent the Applicant, the Legal Member was cognisant of the overriding objective of the Tribunal as set out in rule 2 of the HPC Rules, the fact that this application had originally been made in January 2018 (more than 10 months previously), that both the Applicant and the Respondent were (potentially) represented and, on seeking submissions from Mr King and the Respondent's Representative, neither objected to the proposed course of action as set out in the next paragraph, both being keen to receive a decision. The Legal Member also noted that Mr King was named "as guarantor" in the tenancy agreement, had been the point of contact with the Respondent in relation to the Applicant's tenancy of the Property and had provided bank statements which showed payments to the Respondent on 10 April 2017. This was all consistent with him being known to and assisting with the Applicant's affairs in relation to the tenancy.
30. The Tribunal decided to grant the order but stipulated that the order would not be released (and so would not be able to be enforced) unless the Applicant provided a signed mandate or letter of authority to the Tribunal appointing Mr King as her representative, authorising him to submit the application on her behalf and to act as her representative in relation to this case. This would require to be provided within a period of 14 days from the date of the CMD. Mr King was advised of this requirement during the CMD and, by virtue of this decision, the Applicant is hereby directed to provide such mandate or letter of authority if she wishes the order to be released to her on expiry of the appropriate appeal period.
31. The Tribunal decided that a fair, proportionate and just sanction in the circumstances of this particular case was for the Respondent to be ordered to pay the Applicant an amount of £371.25 (three hundred and seventy one pounds and twenty five pence sterling) as a result of the Respondent's failure to comply with her duties in regulation 3 of the 2011 Regulations. This amount was equivalent to nine twelfths or 75% of the tenancy deposit (of £495).

32. If a signed mandate or letter of authority is not received (as required in terms of paragraph 30 above), then the Tribunal should review this decision in accordance with rule 39 of the HPC Rules.

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.

Pamela Woodman, Legal Member

Legal Member

21 December 2018
Date