



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.

Chamber Ref: FTS/HPC/PR/20/1037

Rule 103 – Application for an Order for Payment where Landlord has not paid the deposit into an Approved Scheme

Re: Property at 18/1 Haugh Park, Edinburgh, EH14 2BD (“the Property”)

Parties:

Miss Holly Crocker, address to remain private (“the Applicant”)

Mr Gino Cortellessa, 1 Belgrave Road, Edinburgh, EH12 6NG (“the Respondent”)

Tribunal Members:

Shirley Evans (Legal Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application be dismissed in terms of Regulation 27(2)(b) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Background

1. By application dated 12 April 2020, the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) for an order for payment to be made under the Tenancy Deposit Schemes (Scotland) Regulations 2011 in terms of Regulation 103 the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”) where the Landlord has failed to place a tenancy deposit with an approved tenancy deposit scheme.

2. The application was accompanied by a signed copy of a Short Assured Tenancy dated 17 October 2017 and emails between parties with regard to the termination date of the tenancy. The Applicant sought payment of £1800 being three times the deposit.
3. On 15 April 2020, the Tribunal accepted the application under Rule 9 of the Regulations 2017.
4. On 13 July 2020, the Tribunal enclosed a copy of the application and advised parties that a Case Management Discussion (“CMD”) under Rule 17 of the Regulations would proceed on 12 August 2020 at 2pm by way of a conference call. The Respondent was also advised that any written representations had to be lodged with the Tribunal by 3 August 2020 and that the Tribunal could do anything at the CMD which it may do at a hearing including making a decision on the application. Parties were also advised that if they did not take part in the CMD this would not stop a decision or order being made if the Tribunal considered that it had sufficient information before it to do so and that the procedure had been fair. This paperwork was served on the Respondent by Patrick Dooley, Sheriff Officer, Edinburgh on 14 July 2020 and the execution of service were received by the Tribunal administration.
5. The Respondent lodged written representations with the Tribunal on 3 August 2020. A copy of these were sent to the Applicant by the Tribunal administration on 6 August 2020 with a reminder the CMD would proceed on 12 August 2020.

Case Management Discussion

6. The Tribunal proceeded with the CMD on 12 August 2020 at 2.10pm by way of teleconference call. The Applicant did not join the conference call, nor was she represented during the conference call. Mr Wells from ELP Arbuthnott McClanachan, Solicitors represented the Respondent who also joined the call.
7. The Tribunal noted the written submissions lodged on behalf of the Respondent which gave a full and candid explanation of his oversight to lodge the deposit in an approved scheme due to a number of health and personal issues. The Respondent’s position was that this was not a deliberate attempt to avoid the Tenancy Deposit Schemes (Scotland) Regulations 2011 and that he had paid the Applicant the full deposit at the end of the tenancy on 16 January 2020 despite there being significant damage left by the Applicant at the property. It was submitted on behalf of the Respondent that any award should be on the lower end of the scale.

8. Mr Wells submitted it was unfortunate that the Applicant had not participated in the CMD as that would have clarified the Applicant's position as to whether she accepted what had been submitted on behalf of the Respondent.
9. The Tribunal enquired as to whether there had been any recent correspondence from the Applicant which may give some insight as to why the Applicant had not joined the CMD. The Tribunal Clerk advised that the Tribunal administration had emailed the Applicant on 6 August 2020 with the representations and to remind her that the Case Management Discussion was proceeding on 12 August 2020.

Reasons for Decision

10. The Tribunal was conscious of the overriding objective in Regulation 2 to deal with proceedings justly. Without input from the Applicant supporting her seeking three times the amount of the deposit, the Tribunal had no information which would allow it to deal with the application, in light of the written submissions made by the Respondent, in a just and fair manner. Although the Tribunal would not necessarily expect a reply to the email of 6 August 2020 one would have expected that the closeness in time to the date of the Case Management Discussion would have otherwise prompted the Applicant to join the conference call to put her case for three times the deposit to the Tribunal.
11. Despite the Respondent's candour in accepting his failure to pay the deposit, the Tribunal did not know whether the Applicant accepted what the Respondent had said in his written submissions and in particular with regard to the return of the deposit which it considered relevant with regard to the consideration of any sanction made.
12. The Tribunal found itself in an impossible position; if any order was made in favour of the Applicant, that arguably could be to the detriment of the Respondent without knowing what the Applicant's position was. Similarly, the Applicant, who was seeking three times the amount of the deposit, could have provided the Tribunal with information to justify the sum sought which would have enabled the Tribunal to make such an order. As it was the Tribunal had no information from the Applicant which it would have expected to have obtained from the Applicant as to the factors for consideration had she appeared at the CMD which would allow the Tribunal to come to a decision as to the appropriate level of sanction.
13. The Tribunal has discretion as to the amount of sanction it imposes on a landlord under Regulation 10 of the 2011 Regulations. With reference to Sheriff Welsh in *Jenson v Fappiano*, [2015] SC EDIN 6, Regulation 10 does not however mean an award of an automatic triplication of the deposit as a

sanction. There must be an objective basis and rationale to the sanction. Any sanction level had to be fair, proportionate and just.

14. The 2011 Regulations were intended, amongst other things to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit to the landlord or tenant or divided between both, at the termination of a tenancy. The difficulty the Tribunal found itself in was that it had no information from the Applicant to determine whether the 2011 Regulations had been defeated or indeed to make any award which would be fair, proportionate and just to both parties. The Tribunal found it impossible to carry out a balancing exercise without being aware of all the factors that should be considered, to award an appropriate level of sanction.

15. The Tribunal came to the view that the absence of the Applicant was a failure on her part to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the proceedings justly and fairly.

Decision

16. The Tribunal accordingly dismissed the application under Regulation 27(2)(b) of the 2017 Regulations.

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.

S. Evans

18 August 2020

Date

Legal Member