



Decision 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/24/0768

Re: Property at Room A, PF3, No.6 Drumdryan Street, Edinburgh, EH3 9LA (“the Property”)

Parties:

Miss Zheyu Xu, 7/7 Castle Wynd South, EDINBURGH, EH1 2JT (“the Applicant”)

Mr Richard Hu, 38/5 Ochiltree Gardens, Edinburgh, EH16 5SN (“the Respondent”)

Tribunal Members:

Rory Cowan (Legal Member) and Helen Barclay (Ordinary Member)

Decision

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

- Background

By application dated 16 February 2024, the Applicant seeks an order against the Respondent under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (as amended) (the Regulations). She contended that the Respondent had a duty under regulation 3 of the Regulations to pay the deposit she paid for her tenancy of the Property into an approved tenancy deposit scheme and issue prescribed information under Regulation 42 to her within 30 working days of the beginning of their tenancy and that the Respondent failed to do so.

A Case Management Discussion (CMD) was fixed for 2 May 2024 to be heard by way of conference call. A Mr Hanman of Edinburgh University Student Union appeared as a representative alongside the Applicant and the Respondent attended and represented himself. That CMD was continued to allow the parties to consider their positions in relation to the question of whether the Property was the only or principal home of the Applicant, what type of tenancy there was between the parties and, if required, to take legal advice on the issue. The CMD Note dated 2 May 2024 set out

matters not in dispute between the parties. A further CMD was fixed for 28 August 2024. Mr Hanman of Edinburgh University Student Union appeared again with the Applicant and the Respondent attended and represented himself.

On behalf of the Applicant, Mr Hanman confirmed that it was the Applicant's position that she occupied the Property as her only or principal home and, as such, the tenancy was a Private Residential Tenancy (PRT) in terms section 1 of the Private Housing (Tenancies)(Scotland) Act 2016 (the 2016 Act). As such, in relation to this application, as the Property was the only or principal home of the Applicant, the deposit paid by her was subject to the Regulations. That the Respondent therefore had a duty under regulation 3 of the Regulations to pay the deposit she paid to him in October 2023 into an approved tenancy deposit scheme as well as to issue prescribed information under Regulation 42 to her within 30 working days of the beginning of a tenancy.

In response, the Respondent indicated that he did not accept that the Property was the Applicant's only or principal home during her occupation of same (during the period 26 October 2023 and 24 December 2023). As such, the tenancy type was not a PRT in terms of the 2016 Act and that he was not under any duty in terms of the Regulations to pay the deposit received into an approved tenancy deposit scheme or to issue prescribed information.

As there was a clear dispute as to underlying facts, the Tribunal resolved to fix an evidential hearing to determine the issues in dispute. The issues identified at that CMD and to be determined at the Hearing were:

1. During the period 26 October 2023 to 24 December 2023, did the Applicant occupy the Property as her only or principal home;
2. What type of tenancy did the Applicant have for the Property during this period; and
3. Was the tenancy under which the Applicant occupied the Property one to which the duties under the Tenancy Deposit Schemes (Scotland) Regulations 2011 applied?

For the purpose of efficient case management, the Tribunal also issued Directions to set out how and when witness lists and documentation should be lodged for the Hearing. Standing the issues to be resolved (which included potential issues of credibility and reliability), the Tribunal determined with the agreement of the parties that the Hearing would be an "in person" hearing rather than a remote one and intimated to the parties that they should therefore make arrangements to have themselves (and any witnesses) present at the venue on the day the Hearing was due to take place. No issues with the arrangements made were raised by either party at that CMD.

Following the CMD on 28 August 2024, the Applicant's representatives wrote (following receipt of the Directions) to tribunal administration by email on 8 September 2024 as follows:

"Hello,

Thank you for sending this through, we are in the process of compiling the documents required for the up coming hearing. However, due to unforeseen circumstances, the applicant is confident they may not be able to attend the hearing in person as she will be outside of the UK. She is keen to continue to be a witness in her upcoming hearing and would like to know if it could be arranged for her to be able to call into the meeting via phone conference or if a written statement submitted as evidence would be sufficient for the purposes of the hearing? I understand that these adjustments were put in place during the COVID-19 pandemic and we were wondering if they were still an option?

We are looking forward to hearing back from you so that we can better prepare for the hearing.

All the best,"

A response was issued by tribunal administration as follows:

"At the CMD on 28 August 2024, the evidential hearing was fixed as an "in person" hearing. The Applicant is seeking a penalty against the Respondent in terms of Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (as amended). The issues that have been identified for determination at the evidential hearing are set out in the CMD note. The fundamental evidential point that requires to be determined is whether or not the Applicant occupied the property as her only or principal home. That is a matter that has been put at issue for the evidential hearing by the Respondent. The issue therefore is one where the credibility and reliability of the parties witnesses which may or may not include the Applicant and the Respondent requires to be determined by the tribunal. To do that effectively, the tribunal decided with the agreement of the parties that an "in person" hearing was appropriate. The fact that the Applicant is now "confident" she may not be able to attend a hearing on a date that has yet to be fixed does not change that requirement.

Further, where parties to proceedings before the First-tier Tribunal seek to lead oral evidence from overseas, it has to be ascertained whether the government of the foreign state where the party or their witness is located has an objection to the giving of evidence from within its territory. That requires reference through the Foreign, Commonwealth and Development Office. As this issue was not raised previously and not at the time the tribunal fixed the evidential hearing, no such request has been made. Indeed, based on the information known, including the fact no date for the hearing has been fixed or even which country the Applicant may be in, it is not possible to make such a request at this stage. As such, there is no basis to change the tribunal's existing decision to fix an "in person" hearing.

It is of course open to the Applicant's representative to have a written statement prepared and lodged and request that this be used as "evidence in chief" (subject to approval by the tribunal and adoption by the Applicant). However, the Applicant would then be expected to be present for the purpose of cross examination by the Respondent and possible questioning by the tribunal."

Following those emails, no application for evidence to be heard remotely was received from the Applicant and documents and submissions were lodged on her behalf by email dated 29 October 2024 and again received by post received on 31 October 2024. The Respondent also lodged his written documents/submissions by email on 29 October 2024. Notwithstanding the terms of the Directions neither party lodged a list of witnesses.

- The Hearing

Mr Hanman appeared on behalf of the Applicant. The Applicant did not appear, and it was indicated that she was in China. The Respondent appeared and represented himself. The Respondent indicated that he had no witnesses to call only himself. The Tribunal enquired of Mr Hanman of the Applicant's intentions regarding the Application as she was not present to pursue matters and give evidence. Mr Hanman mentioned the "personal statement" that formed pages 1 and 2 of the Applicant's bundle. This "statement" was limited in its extent and neither signed by the Applicant nor dated and the Applicant was not present to speak to it. Mr Hanman indicated that he was in a position to make legal submissions in support of the Application but there was no witness available as to facts. After discussion with the Respondent and as identified in the CMD Note for the CMD on 28 August 2024, there was no real dispute as to the applicable law and the only real issue to be determined was whether or not the Property was the only or principal home of the Applicant for the period of her occupation between 26 October 2023 and 24 December 2023. If it was, then the tenancy would have been a Private Residential Tenancy and the deposit paid by the Applicant would be subject to the Regulations, if it was not her only or principal home, it would not.

The Tribunal therefore found itself in the unenviable position of having a hearing fixed to determine the noted issues, but the Applicant was not present, nor had she arranged any witnesses, or sought to request alternative arrangements to allow her to give evidence by remote means. The Tribunal thereafter allowed both parties time to consider their positions and what they would ask the Tribunal to do in the circumstances. After an adjournment, Mr Hanman requested that the Hearing be discharged and continued to allow him to take instructions from the Applicant on whether she would be prepared to return to the United Kingdom to give evidence in support of the Application or seek permission to allow her to give evidence remotely (there was a question mark in his mind as to whether permission would be granted by the Chinese authorities). Mr Hanman indicated that he felt it was his responsibility to discuss the issue of her giving evidence with the Applicant. He indicated that, it may very well be the case that, after doing so, she would decide to withdraw the Application. He indicated that, as far as he was aware, the Applicant had no intention of returning to the United Kingdom and to do so (or to go elsewhere if required to give remote evidence) would involve a "substantial financial loss" in terms of visa costs and flights. Mr Hanman confirmed that he had received the email of 4 October 2024 (set out above) and that he had discussed it with the Applicant at the time. He indicated that "*for the sake of expediency*", whilst the Applicant knew that she would not be attending the hearing to give evidence, she did not want to seek permission to have her evidence heard by remote means. In response, the Respondent indicated that he was not agreeable to such a continuation and sought that the Application be dismissed in terms of Rule 27(2)(b) of the Rules. His view was that the Applicant had

moved to China after leaving the Property and had therefore gone “home”. He felt that he had already spent considerable time, effort and cost dealing with the Application and it should not therefore be continued.

Following another adjournment to consider the motions made, the Tribunal decided to dismiss the Application in terms of Rule 27(2)(b) of the Rules.

- Reasons for Decision

Rule 27(2)(b) of the Rules states as follows:

“(2) The First-tier Tribunal may dismiss the whole or part of the proceedings if the applicant has failed to —.....

(b) co-operate with the First-tier Tribunal to such an extent that the First-tier Tribunal cannot deal with the proceedings justly and fairly.”

Further, Rule 2 of the Rules states as follows:

“(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party’s case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.”

As detailed above, the Tribunal found itself in the unenviable position of having fixed an evidential hearing to determine the disputed issues of fact identified in the earlier CMD Note. An “in person” hearing was discussed and agreed with the parties at that CMD. Notwithstanding, the Applicant was not present, nor had she provided an alternative witness to give evidence as to the main issue to be determined, the question of whether the Property was her only or principal home. Perhaps more importantly, not only was she not there to explain her position on this issue, but she was also not available for either the Respondent or the Tribunal to ask questions of her. It is clear that shortly after the evidential hearing was ordered, she knew she would unlikely be in the United Kingdom to give evidence at any evidential hearing. That is evident from the email dated 28 October 2024 sent by her representatives. Notwithstanding this and even after the date for the hearing was fixed no attempt was made to seek to formally request evidence being dealt with by remote means.

Indeed, it was clear from what Mr Hanman said that the question of her coming back to the United Kingdom or seeking to give evidence remotely was discussed with the Applicant after tribunal administration's email of 4 October 2024 and, that she had decided not to return or to seek such consent. This Mr Hanman stated was for the sake of "*expediency*". Beyond that, Mr Hanman indicated that one outcome of him discussing the issue with the Applicant again was that she may very well withdraw the Applications.

Overall, the Tribunal was of the view that the question of returning to give evidence or to seek permission to do so remotely had already been discussed with the Applicant and that she had already had the opportunity to decide the issue. To allow a continuation for this to be discussed with her again also appeared to be at odds with the Tribunals overriding objective to deal with matters justly. Even though as part of that duty the Tribunal should try and be flexible with parties, this has to be balanced with the additional consideration of avoiding delay where possible. Here the parties agreed to an "in person" hearing and, despite the question of availability being known and discussed in October 2024, the Applicant decided not to attend or seek other arrangements for any evidence to be given by or on her behalf at the Hearing. That being the case, the Tribunal was of the view that due to the Applicant's failure to cooperate with the Tribunal, the Tribunal was not in a position to deal with the proceedings justly and the Application should be dismissed under Rule 27(2)(b) of the Rules.

- Decision

The unanimous decision of the Tribunal was that the Application should be dismissed.

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.

R. Cowan

27 January 2025

Date

Legal Member/Chair