



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/CV/19/3100

Re: Property at 5/2 Minto Place, Hawick, TD9 9JL (“the Property”)

Parties:

Mrs Jinnan Zhang, c/o Bannerman Burke, 28 High Street, Hawick, TD9 9BY (“the Applicant”)

Miss Lesley Rafferty, 37C Oliver Park, Hawick, TD9 9PL (“the Respondent”)

Tribunal Members:

Ewan Miller (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant should be granted a payment order against the Respondent in the sum of TWO THOUSAND SEVEN HUNDRED AND SEVENTY ONE POUNDS and 80p (£2,771.80) ONLY

Background

The Applicant was the owner of the Property. She had let the Property to the Respondent by way of a Short Assured Tenancy. The Applicant alleged that the Respondent had ceased paying rent and as a result she had required to raise an application for a payment order against the Respondent with the Tribunal.

The Tribunal had before it the following documentation:-

- The Applicants application to the Tribunal received 1 October 2019;
- A copy of the lease between the Applicant and the Respondent commencing 27 January 2017;
- A rental arrears statement showing outstanding rental arrears of rent of £3400 up to the termination of the lease between the parties in April 2019;

- A copy of the Applicant's Land Certificate evidencing ownership of the Property;
- A copy of a previous Case Management Discussion dated 30 January 2020;

Case Management Discussion ("CMD")

The Tribunal held a continued CMD at Heart of Hawick, Kirkstile, Hawick on 10 March 2020 at 10am. The Applicant was not present but was represented by Ms Kandyba-Callis of Messrs Bannerman Burke, Solicitors, Hawick. The Respondent was neither present nor represented.

The Tribunal noted that the details of the previous CMD and the current CMD had been timeously notified and served upon the Respondent. The paperwork made it clear a decision could be made in her absence. Accordingly the Tribunal was satisfied that it was appropriate to make a decision in her absence.

Findings in Fact

The Tribunal found the following facts to be established:-

- The Applicant was the owner of the Property;
- The Applicant had leased the Property to the Respondent from 27 January 2017 under a Short Assured Tenancy;
- The Respondent had ceased to pay rental until the tenancy was terminated in April 2019;
- There were gross rental arrears of £3,221.80 outstanding due by the Respondent at termination;
- The Respondent had paid a deposit of £450 at the commencement of the lease;
- The Applicant had placed the tenancy deposit of £450 with an approved scheme and had received it back from the approved scheme at termination of the lease.
- The Tribunal found that the Applicant had used the tenancy deposit of £450 to reduce the arrears;
- A net sum of £2,771.80 was accordingly due and payable to the Applicant by the Respondent.

Reasons for Decision

The Tribunal noted the terms of the lease. £450 was payable per calendar month. A deposit of £450 was had also been paid. A rental arrears statement was produced which showed the sum of £3400 outstanding by the Respondent. There was nothing produced for the Respondent to suggest that they disputed that they had been in arrears of rent and the Tribunal therefore accepted the Applicant's position that there had been arrears.

A number of points had arisen in relation to the level of arrears at the first CMD. Firstly a payment of £450 on 1 October 2018 had been made and it had been queried whether this had reduced the sums due overall. It was evidenced at the Tribunal that this sum had been used to clear earlier arrears from August 2018 and that the net balance due

had not changed at that time as another payment had fallen due. The Tribunal accepted the position in this regard.

A further payment of £178.20 had been made by the Respondent or via the local authority. The Applicant's representative confirmed that after investigation it was accepted that this had, in fact, reduced the arrears and had not been accounted for. This left a balance of £3,221.80.

The previous CMD had also raised the question of the deposit paid by the Respondent. The agent for the Applicant had been requested to obtain confirmation of whether this had been retained (and not lodged) on a scheme or whether it had been retrieved from a scheme and used to reduce the arrears. The CMD note had requested this information to be lodged in advance of the continued CMD.

At the continued CMD the agent was unable to produce any documentation that relating to the deposit. However she indicated that her clients had advised her that it had been in an approved scheme and had been retrieved from the scheme. However, the agent advised that the Applicant had claimed the return of the deposit for damages to the Property rather than for arrears.

The Tribunal was dissatisfied with the position. The CMD note was clear that the deposit information was to be produced in advance of the continued CMD. There was no substantive evidence before the Tribunal to show the funds had been released in relation to damage and had not been set against rent arrears. The Tribunal was prepared to allow a small window of opportunity of 7 days to the Applicant to produce confirmation of the position. In the absence of suitable evidence the Tribunal would then determine that either the monies had always been held by the Applicant or had been released from an approved scheme on the ground of rent arrears. The sums due would be reduced by £450 if this was the case.

In due course the agent for the Applicant produced evidence by way of a bank statement and paperwork from an approved scheme that the deposit had been lodged on an approved scheme and returned. The agent advised that her clients had been unable to produce any confirmation or evidence that the deposit had been reclaimed due to damage to the Property rather than in relation to rent arrears.

The Tribunal considered this point. Other than the agents submission on behalf of the Applicant there was no evidence that the deposit had been reclaimed due to the damage to the Property. The sums sued for only related to arrears of rental. There was no correspondence to the Respondent demanding other sums for damage or the like. In the experience of the Tribunal a landlord will normally claim a deposit for rent arrears if they exist rather than for damage – thus avoiding getting in to a debate with a tenant as to the condition of the Property. Accordingly, in the absence of any substantive evidence that the deposit had been claimed for damage the Tribunal was of the view, on the balance of probabilities, that the deposit had been claimed to set against rent arrears. As a result the sum due by the Respondent was reduced by a further £450 to reflect that the deposit had been utilised for arrears by the Applicant, leaving balance of £2,771.80 due by the Respondent.

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.

Ewan Miller

Legal Member/Chair

6th July 2020

Date