



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Private Housing (Tenancies) Scotland Act 2016

Chamber Ref: FTS/HPC/TE/20/2647

Re: Property at 31 Warmanbie Road, Brydekirk, Annan, DG12 5ND (“the Property”)

Parties:

Mr Joseph Sturgeon, 31 Warmanbie Road, Brydekirk, Annan, DG12 5ND (“the Applicant”)

Mr Ross Anderson, Millriggs Farm, Hutton, Boreland, Lockerbie, DG11 2PB (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that a sanction under S 16 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) should be imposed at the amount of £225.

A Background:

[1] The application under Rule 107 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the rules) and S 16 of the Act was made by the Applicant on 17 December 2020. The Applicant lodged the following documents:

- The Tenancy Agreement for the property between the parties dated 17 October 2019, which is not signed by the Applicant
- The notice under S 14 and 16 of the Private Housing (Tenancies) (Scotland) Act 2016 dated 12 November 2020 with recorded delivery certificate of posting and track and trace service confirmation on 13 November 2020
- The Rent Penalty Notice dated 26 October 2020

- 3 text messages of Mrs Anderson to the Applicant dated 22 April 2020 at 10:20 hours, 22 April 2020 at 13:27 hours, 27 April 2020 at 12:34 hours and the partial reply of the applicant to the latest of these text messages

[2] The FTT had issued two Directions to the Applicant dated 25 January 2021 and 13 April 2021 asking for further particulars with regard to the application under Rule 105. The Applicant had provided email replies to these on 29 January 2021 and 28 April 2021. The Respondent had provided representations in the email of 28 April 2021. The case papers also contain the landlord registration details of the Respondent from the landlord register. All the documents are referred to for their terms and are held to be incorporated herein.

[3] As set out in the Case Management Discussion (CMD) note of 11 May 2021, the CMD took place on 11 May 2021. The date and time and manner of joining the CMD was intimated to the respondent by Sheriff Officers on 21 April 2021.

On 28 April 2021 the Respondent sent in representations from the email address kerrington37@hotmail.com.

At the CMD the Respondent's wife Mrs Anderson attended as his representative. The CMD note is referred to for its terms and held to be incorporated herein.

At the CMD it was agreed that a hearing would be required to determine the application under S 16 of the 2016 Act and that this would take place on either 1 or 2 July 2021, both dates having been indicated as suitable by the Respondent's representative.

The Tribunal issued directions to both parties regarding further documentation required and regarding intimation of witnesses.

The CMD note and directions were issued to the Respondent to the email address provided when sending his representations.

[4] The notification of the hearing date on 1 July 2021 at 10 am together with the participation details was issued to the Respondent again to the email address provided by the Respondent to the Tribunal on 26 May 2021.

B The Hearing:

[5] At the hearing the Respondent did not dial in to the telephone conference call. At about 10:05 am the clerk contacted the Respondent on the telephone number provided by him. Mr Anderson stated that his wife Kirsty was dealing with the matter and he did not intend to participate in the call. His wife thereafter telephoned the clerk at the telephone number provided to Mr Anderson and stated that she had expected the notification for the hearing to be in paper form and thus had not prepared for the hearing. She was not sure if she had seen the CMD note and directions as there were several cases ongoing and she was confused. She stated she would not participate in the hearing as she was going to attend her Covid vaccination today. She then ended the call with the tribunal clerk.

The Applicant had joined the conference call at 10 am.

The first issue the Tribunal had to address was whether or not the hearing should go ahead in the absence of the Respondent.

The relevant provisions in the rules of procedure are rules 6, 24 (1) and (2) and 29.

Service

6.—(1) Where any formal communication requires to be served on any person, it is deemed to be served if—

(a) it is sent to the proper address of the person—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 **FZ**); or

(ii) by a postal service which provides for the delivery to be recorded; or

(b) it is sent to the email address provided by the person.

(2) Where a formal communication is served as mentioned in paragraph (1) it is to be taken to have been received 48 hours after it is sent unless—

(a) the proper address is outwith the United Kingdom; or

(b) the contrary is shown.

(3) Where any formal communication requires to be served upon the parties, it is deemed to have been served on a party if it is served on a person who is acting as the representative of that party.

(4) A member of staff of the Scottish Courts and Tribunals Service may send a formal communication on behalf of the First-tier Tribunal.

(5) Where a party, a representative or an interested party provides an email address, the First-tier Tribunal is to communicate using that address until the party, representative or interested party requests that another method of communication be used.

Hearings

24.—(1) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a hearing (including any adjourned or postponed hearing) and any changes to the date, time and place of a hearing.

(2) The notice period for a hearing must be no less than 14 days from the date of receipt of the notice, unless the parties consent to a shorter period or there are urgent or exceptional circumstances.

Hearing case in the absence of a party

29. If a party or party's representative does not appear at a hearing, the First-tier Tribunal, on being satisfied that the requirements of rule 24(1) regarding the giving of notice of a hearing have been duly

complied with, may proceed with the application upon the representations of any party present and all the material before it.

[6] In this case the Tribunal had served the hearing notification on the Respondent on the email provided by the Respondent, namely kerrington37@hotmail.com. The Tribunal had done so on 26 May 2021 and thus in terms of rule 6 (2) the notification was deemed to have been received on 28 May 2021 by the Respondent. The email address was the email address the Tribunal should use in terms of rule 6 (5) and thus the intimation was valid. It also must be noted that the date of the hearing had been discussed at the CMD and Mrs Anderson, acting on behalf of Mr Anderson, had agreed that the hearing should be either on 1 or 2 July 2021 and thus should have expected notification of the hearing date for one of these two dates, both of which she had identified as suitable for her and the Respondent.

[7] The email notification on 26 May 2021 was a valid notification in terms of rule 6 and provided the 14 day notice period to 1 July 2021 required in terms of rule 24 (1) and (2).

[8] There had been no request for a postponement of the hearing by either party, not even by Mrs Anderson in her brief conversation with the tribunal clerk prior to the hearing on 1 July 2021.

[9] As the Respondent and his representative did not participate despite having been served valid notice of the hearing date in excess of the 14 day notice period required, the Tribunal was entitled to proceed in the absence of the Respondent.

C Evidence of Mr Sturgeon:

[10] The Applicant gave evidence to the Tribunal at the hearing that the tenancy agreement he had lodged in evidence had been sent to him on 22 April 2020 as they had been lodged. He had not received a copy of the Easy Read Notes or Private Residential Tenancy Statutory Terms Supporting Notes as required in The Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017 either at the tenancy start or at any time thereafter.

[11] He still considered that the tenancy terms were incorrect as they provided a right of access to the landlord that should not be in there and there were other matters he considers problematic. He stated that he had been put under a lot of stress as the landlord had not been registered and entered the house without his consent and had tried to illegally evict him. There were other cases ongoing.

He further stated that there had been additional text messages which he had not lodged, including one on 18 February 2020 in which the Respondent's wife had asked: "Hi Joe, need your last name for Tenancy Agreement", which he considers shows that the tenancy agreement was not provided to him at the start of the tenancy but only sent in April 2020.

[12] Two days prior to the hearing Mrs Anderson had arrived at the property to gain access with someone else although the Tribunal in the case for access to the

property raised by the Respondent had ordered that the Applicant grant access to a heating engineer and a builder and Mrs Anderson was not authorised in that order to access the property. There had been a lot said that day and the hearing on 1 July 2021 had also been referred to. He was thus certain Mrs Anderson was aware of the hearing date and was just trying to confuse the situation. He further stated there was another repairs case pending an inspection at the end of July and that he was deliberately withholding rent regarding the state of the property, which the Respondent was aware of.

[13] There had been little negative impact on him regarding not having the supporting notes as such. He had identified the issue with the missing information when he accessed the scot.gov website and found information about the Easy Read Notes, which were like a leaflet.

D Findings in fact:

[14] Based on the documents and representations by both parties, the information provided at the CMD and the evidence the Applicant at the hearing the Tribunal finds the following facts proved or admitted:

1. The parties entered into a Private Residential Tenancy commencing on 17 October 2019 for the property.
2. The property had been advertised on FaceBook and the initial correspondence had taken place between the Applicant's partner and the Respondent's wife via FaceBook Messenger correspondence.
3. The keys to the property had been provided to the Applicant via the neighbour from number 33.
4. On or around 22 April 2020 the Respondent sent to the Applicant the tenancy agreement dated 17 October 2019.
5. The tenancy agreement is a Private Residential Tenancy Agreement drawn up by the landlord rather than the Model Private Tenancy Agreement.
6. This was not accompanied by Easy Read Notes or Private Residential Tenancy Statutory Terms Supporting Notes.
7. Neither document has been provided to the Applicant by the Respondent as at 1 July 2021.
8. The monthly rent for the property is £450.
9. The property is the only property the Respondent rents out.

E Reasons for Decision:

[15] Relevant legislation:

The 2016 Act:

11 Duty to provide specified information

(1)The Scottish Ministers may by regulations impose a duty on any person who is, or is to be, the landlord under a private residential tenancy to provide the person who is, or is to be, the tenant—

(a) with information specified in the regulations,

(b) by a deadline specified in the regulations.

(2) The power to specify information under subsection (1)(a) includes the power to specify the form in which the information is to be provided.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult such persons representing the interests of tenants and landlords under private residential tenancies as they think fit.

(4) But subsection (3) does not apply in any case in which consultation has been carried out by the Scottish Ministers more generally, without specific reference to such tenants and landlords.

16 First-tier Tribunal's power to sanction failure to provide information

(1) On an application by the tenant under a private residential tenancy, the First-tier Tribunal may make an order under subsection (2) where—

(a) the landlord has failed to perform a duty arising by virtue of section 10 or 11 to provide the tenant with information,

(b) at the time the First-tier Tribunal considers the application, the landlord has still not provided the tenant with the information, and

(c) the landlord does not have a reasonable excuse for failing to perform the duty.

(2) An order under this subsection is one requiring the landlord to pay the person who made the application an amount not exceeding—

(a) three months' rent, if the order is in respect of a failure by the landlord to perform—

(i) a duty arising by virtue of section 10, or

(ii) one or more duties arising by virtue of section 11,

(b) six months' rent, if the order is in respect of a failure by the landlord to perform—

(i) a duty arising by virtue of section 10, and

(ii) one or more duties arising by virtue of section 11.

(3) An application under subsection (1)—

(a) may be made only during the course of the tenancy in question,

(b) where the application relates to a failure to perform a duty arising by virtue of section 10, may be made only as part of an application under section 14(1), and

(c) may not be made unless the tenant has given the landlord notice of the tenant's intention to make the application and the notice period described in section 17 has expired.

(4) If—

(a) an application has been made under subsection (1) in respect of a failure to perform a duty arising by virtue of section 11, and

(b) at the time the application was made, an application could have been made in respect of a failure to perform another duty arising by virtue of section 11,

no application may be made in respect of that other duty.

(5) Where two or more persons jointly are the landlord under the tenancy in question, an order by the First-tier Tribunal under subsection (2) may—

(a) be made against all, some or only one of the joint landlords,

(b) state that each person against whom the order is made is liable to pay a specified amount, but the cumulative total of each of the specified amounts must not exceed the maximum set by subsection (2),

(c) state that each person against whom the order is made is jointly and severally liable for the whole amount to be paid.

(6) In a case where two or more persons jointly are the tenant under a tenancy, references to the tenant in this section are to any one of those persons.

(7) In subsection (2), “rent” means—

(a) the amount that was payable in rent under the tenancy at the time that notice of the application was given to the landlord, and

(b) in a case where two or more persons jointly are the tenant under the tenancy, the amount mentioned in paragraph (a) divided by the number of those persons.

The Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017

1.1 Performing the duty to provide written terms of tenancy

2.—(1) Where a duty arises by virtue of section 10(1) of the Act (duty to provide written terms of tenancy) the landlord must provide the tenant with—

(a) a paper document; or

(b) an electronic document.

(2) A document under paragraph (1) may be in the form of—

(a) the Model Private Residential Tenancy Agreement for a private residential tenancy⁽²⁾; or

(b) a tenancy agreement drafted by the landlord.

1.2 Duty to provide specified information

3.—(1) For the purposes of section 11(1)(a) of the Act (duty to provide specified information), the person who is, or is to be, the landlord under a private residential tenancy must provide the person who is, or is to be, the tenant with—

(a) where the written terms of the tenancy are in the form of the Model Private Residential Tenancy Agreement(3), the EasyRead Notes for the Scottish Government Model Private Residential Tenancy Agreement(4); or

(b) where the written terms of the tenancy are in the form of a tenancy agreement drafted by the landlord, the Private Residential Tenancy Statutory Terms Supporting Notes(5).

(2) For the purposes of section 11(1)(b) of the Act, the deadline by which the person who is, or is to be, the landlord under a private residential tenancy must provide the person who is, or is to be, the tenant with the information specified in paragraph (1) is—

(a) before the end of the day on which the tenancy commences, if the tenancy is a private residential tenancy; or

(b) before the end of the day falling 28 days after the day on which the tenancy became a private residential tenancy, if it became one after the day on which the tenancy commenced.

(3) Where a duty arises by virtue of section 11(1) of the Act, the information provided under paragraph (1) by the landlord to the tenant must be in the form of—

(a) a paper document; or

(b) an electronic document.

[16] The Tribunal first notes that S 16 (1) (b) of the 2016 states that the Tribunal can only sanction a failure of the landlord to provide relevant information in terms of sections 10 and 11 of the Act if the information has not been provided by the time the Tribunal considers the application.

The Applicant has submitted in evidence the tenancy agreement sent to him on 22 April 2020 and thus prior to the date on which the Tribunal considered the application. Furthermore in terms of S 16 (3) (b) of the 2016 Act the application for failure to provide information under S 10 must linked to an application in terms of S 14 of the 2016 Act, which is not being pursued by the Applicant. The notice given in terms of S 16(3) (c) of the 2016 Act only related to the issue of the type of tenancy not having been stated on the document.

[17] At the CMD the Tribunal, as set out in the CMD note, had already dealt with the issue of whether or not a tenancy agreement can be a Private Residential Tenancy Agreement although not using the Model Private Residential Tenancy Agreement style and thus not the heading Private Residential Tenancy. It had already advised the parties that it is possible for a landlord to draw up a document which is a Private Residential Tenancy without using the Model and that the only requirements for this are that the tenancy agreement includes the provisions referred to in The Private

Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017. The matters raised by the Applicant in respect of the tenancy agreement, namely the issue of the deposit, landlord registration number, type of property, fire and electrical safety and legionella safety as set out in the Applicant's email of 29 January 2021 are not matters covered by the said Regulations. The Tribunal is thus satisfied that the tenancy agreement provided was a Private Residential Tenancy Agreement including the necessary terms.

[18] Because this was provided to the Applicant, albeit several months late, the Tribunal cannot impose a sanction for failure to provide the tenancy agreement as stated in S 10 of the 2016 Act.

[19] However, the Tribunal considers that no evidence has been provided by the Respondent to show that Private Residential Tenancy Statutory Terms Supporting Notes as required in The Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017 had ever been issued to the Applicant. The only relevant information for this provided by the Respondent's representative at the CMD was that she thought that if her solicitor had told her the documents she had given them to look over were ok, this must have meant that was all that was required.

[20] This is not evidence of what was given to the solicitor, of what the solicitor had been asked to comment on and on what was actually then provided to the Applicant. The Respondent had ample opportunity to lodge documentary evidence of providing the notes to the Applicant and has not done so.

[21] In the absence of any other information and the clear statement of the Applicant that he did not receive any notes with the written tenancy agreement, the Tribunal was satisfied that the required information in terms of S 11 of the 2016 Act had not been provided to the Applicant at any stage. The Applicant had issued the required notice to the Respondent on 12 November 2020.

[22] The Tribunal accepted the statement made at the CMD that the landlord is not an experienced landlord. This was not disputed by the Applicant. However, even an inexperienced landlord cannot rely on their lack of knowledge of their duties imposed by legislation as a reasonable excuse as to why they did not provide the required information in terms of S 16 (1) (c) of the 2016 Act.

[23] The Tribunal thus must impose a sanction for failure of the landlord to provide the information required in S 11 of the 2016 Act and The Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017. In terms of S 16 (2) (a) (ii) of the 2016 Act such a sanction must not exceed three times the value of the monthly rent. The monthly rent in this case is £450.

[24] Considering the impact on the Applicant of the failure to provide the necessary information was rather minimal and considering that from the representations made by the Applicant the Tribunal on balance accepted that the Respondent was an inexperienced landlord and did not deliberately flout the obligations but rather appears to have not taken appropriate steps to inform themselves of all landlord duties, the Tribunal considers a sanction of 1/2 of the monthly rent reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance.

F Decision:

[25] The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £225 in terms of S 16 (1) of the Private Housing (Tenancies) (Scotland) Act 2016

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Petra Hennig-McFatridge

Legal Member/Chair

1 July 2021

Date