

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 Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/CV/18/2393

Re: Property at 14C McColgan Place, Ayr, KA8 9PU (“the Property”)

Parties:

Mr Philip Zanella, 1231 Kine Edwards Wharf, 25 Sheepcote Street, Birmingham, B16 8AT (“the Applicant”)

Mr Craig Paton, Flat D 87 Cleveden Road, Glasgow, G12 0JN (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member), Melanie Booth (Ordinary Member)

Decision (in absence of the Respondent)

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

Background

This is an application for a payment order dated 17th September 2018 and brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the 1988 Act) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant sought in his application payment of arrears in rental payments of £3,485.52 inclusive of interest plus various costs in terms of the contract between the parties in relation to the Property from the Respondent, and provided with his application copies of the short assured tenancy agreement, rent arrears statement, and substantial quantities of correspondence and e-mails.

The short assured tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied.

Case Management Discussion

A Case Management Discussion was held on 22nd January 2019 at Russell House, King Street, Ayr. The Applicant did not appear, nor was he represented. He had previously e-mailed the Tribunal to indicate he was unable to attend in person, and provided a written summary of his claim. The Respondent did not appear, nor was he represented.

The Legal Member identified and set out a list of the issues in dispute in her Case Management Discussion Note, and also issued Directions. She continued the application to a Hearing.

Hearing

A Hearing was held on 7th March 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant appeared, but was not represented. The Respondent again did not appear, nor was he represented.

To deal with the proceedings justly, the Tribunal administration before commencing the Hearing telephoned the Respondent at the telephone number he had previously provided, but obtained no answer. The Respondent had been intimated with the details of the Hearing in advance by recorded delivery letter dated 19th February 2019.

That being so, the Tribunal in terms of Rule 29 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, being satisfied that due notice had been given to the Respondent of the Hearing, proceeded with the application upon the representations the Applicant and all the material before it.

The Applicant invited the Tribunal with reference to the application and papers to grant an order for payment of rental from 1st March 2018 to 17th February 2019 with interest of £5,649.18, together with an award for costs of £338.42.

In order to understand the basis of the Applicant's claim, an explanation of the background to this matter is as follows.

The parties entered into a short assured tenancy agreement commencing on 18th August 2017, and ending on 17th February 2018. The rental was £475.00 per month. The tenant paid £234.25 at the commencement of the lease for the 14 days of August, and thereafter £475.00 on or in advance of the first day of each month until he made payment due for the 1st February 2018. He has made no further rental payments since then.

The wording of the lease agreement is of some importance to this application, and is in the following terms:

"2 Period of Lease

The initial period of lease shall be from Eighteenth August Two thousand and seventeen (hereinafter referred to as "the Date of Entry") to Seventeenth February Two thousand and eighteen (hereinafter referred to as "the End Date") inclusive. Unless either party shall have given to the other party at least two months written notice of their intention to terminate the lease on the aforementioned End Date, the lease shall continue from month to month thereafter until terminated by prior written notice given by either party to the other."

The Respondent by e-mail to the Applicant of 8th February 2018 gave written notice of his intention to terminate the lease. By e-mail of the same date, the Applicant responded accepting the Respondent's written notice of termination, but indicated that two months' notice was required to terminate the agreement on the End Date of 17th February 2018, and that therefore the lease would end in April.

The Applicant subsequently obtained legal advice to the effect that to end the agreement on 17th February 2018, two months written notice was required. If that was not given, the lease would continue from month to month, and any notice of termination given after 17th December 2017 would end the lease on the 17th day of the month which fell over two months from the date of the written notice given.

Subsequently, the relationship between the parties deteriorated considerably. The Respondent appeared to not accept that he was due further rental payments until April, and refused to return the keys to the Property until he had his deposit returned. The Applicant in turn responded that the deposit was held by one of the approved schemes, and that it would not be returned until after the end of the tenancy under deduction of any costs or outstanding rental due in terms of the tenancy agreement.

The Applicant contacted the tenancy deposit approved scheme holding the deposit, The Letting Protection Service (The LPS Scotland). It commenced an adjudication, and subsequently confirmed to the Applicant by e-mail of 14th March 2018 that the Respondent had confirmed to it that he had left the Property.

Unfortunately, as things transpired, at this point the Applicant sought advice on his position from a letting agent who advised him that "Under no circumstances then should you take back possession of the property without going through the necessary procedures. You would leave yourself open to an unlawful eviction and harassment claim...".

Thereafter, on the basis of his understanding from his letting agent that he was not allowed to regain possession of the Property without obtaining some form of judicial order, the Applicant served a notice to quit and form AT6 by sheriff officer at the Property on 23rd March 2018. Service was effected via the letterbox, but the sheriff officers reported that they obtained no reply when they called and that there was no name displayed on the door. They also reported that the Property appeared empty and unoccupied.

The Applicant then brought an eviction application to the Tribunal. On attempting service on the Respondent, the Tribunal was advised by its sheriff officers that he was no longer resident at the Property. Thereafter, the Applicant withdrew the eviction application and regained possession of the Property with the assistance of a locksmith to change the locks in November 2018.

Statement of Reasons

Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

“16. Regulated and assured tenancies etc.

(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2) But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3) Part 1 of schedule 1 makes minor and consequential amendments.”

Accordingly, the Tribunal now has jurisdiction in relation to claims by a landlord (such as the Applicant) for payment of unpaid rental and other sums due under a tenancy agreement against a tenant (such as the Respondent) under a short assured tenancy such as this.

The Tribunal accepted that in terms of clause 2 of the tenancy agreement, the Respondent required to give two months' prior notice of termination if he wished to quit the Property on the End Date of 17th February 2018. As his notice was given on 8th February 2018, he clearly did not comply with that provision.

However, his notice was a prior written notice of his intention to terminate the lease, and indeed that notice was accepted by the Applicant. That raises the legal question of the date when the lease ended.

The Applicant's legal advisor considered that the prior written notice required to give two months' notice, and accordingly if that were correct then the lease would end on the *ish* date of 17th April 2018.

The Tribunal is not persuaded that that analysis is correct. The lease agreement provides for two months' prior written notice being required to terminate the lease on the end date of 17th February 2018. However, if the lease has not been validly terminated as at that End Date, then it continues on a monthly basis “until terminated by prior written notice given by either party to the other”. In the latter situation the lease agreement is silent as to what if any period of notice is required.

Fortunately, little turns on this point, as if the lease is silent regarding what period of notice is required, then the common law period of forty days applies (see the decision of an Extra Division of the Inner House of the Court of Session in *Lormor Ltd v Glasgow City Council* 2015 SC 213, which albeit it concerned section 34 of the *Sheriff Courts (Scotland) Act 1907* which is not at issue in this application, confirmed that in the absence of stipulation in the lease agreement a tenant at common law requires to give not less than forty days' notice of termination in order to prevent tacit relocation).

As notice was given by the Respondent on 8th February 2018, then the period of forty days expired on 21st March 2018, and the lease accordingly came to an end on the next *ish* date of 17th April 2018.

In the Tribunal's opinion, as the lease ended on 17th April 2018, it was confirmed by the Respondent to LPS Scotland (which LPS Scotland in turn passed on to the Applicant) that he had vacated the Property by 14th March 2018, and that sheriff officers instructed on behalf of the Applicant confirmed on 23rd March 2018 that the Property appeared empty and unoccupied, the Applicant would have been legally entitled to attend on 18th April 2018 with a locksmith to change the locks and regain possession (as he subsequently did in November 2018 without any change of circumstance). The Respondent would not obtain security of tenure in terms of the *Housing (Scotland) Act 1988* in circumstances where the lease has ended and he does not retain possession of the Property, and accordingly the Applicant would not have required any order from the Tribunal against the Respondent before regaining possession.

The fact that the Respondent had failed to return the keys to the Property is not legally the same situation as him refusing to quit and remaining in possession of the Property, in which latter circumstances the Applicant would undoubtedly require to obtain an order from the Tribunal before regaining possession.

That being so, the Tribunal considers that the Applicant is entitled to rental from 1st March 2018 to 17th April 2018 from the Respondent, but is not entitled to any further rental thereafter where the lease had been ended and the Respondent has quit the premises.

Applying the *pro rata* daily rate for the rental to the 48 days outstanding produces a figure of £749.58 for the period 1st March to 17th April 2018.

The Tribunal noted that the Applicant appears to have miscalculated the rental due *pro rata* for August 2018 as £234.25, instead of the correct figure of £218.63 applying a daily rental rate. Accordingly, the Respondent's overpayment of £15.62 for August 2018 requires to be deducted from the figure of £749.58 in order to produce an outstanding rental figure of £733.96.

Clause 3.1 of the lease agreement provides that interest of four percent above the base rate of the Bank of Scotland will be payable on any instalment of rent which is not paid on the due date, from the date due until payment, and the Tribunal will apply that provision to the outstanding rental figure due.

Finally, clause 3.3 of the lease agreement provides that “Monies may be deducted from the Deposit in respect of all reasonable costs and expenses incurred by the Landlord (including but not limited to the costs and fees of the Landlord’s solicitors and other professional advisors)”, and goes on to set out a list of such items included within the definition of costs and expenses.

The Applicant confirmed to the Tribunal that LPS Scotland still holds the deposit in respect of the Property of £475.00, and that the adjudication in respect of return of that deposit has not yet occurred.

It appeared to the Tribunal more appropriate standing the terms of the lease that LPS Scotland utilise its procedures to determine what, if any, of the deposit should be returned to the Respondent after deduction of any costs and expenses deducted which it finds are due to the Applicant, and accordingly the Tribunal will leave consideration of that aspect to the approved deposit scheme procedures.

Decision

In these circumstances, the Tribunal will make an order for payment by the Respondent to the Applicant of the sum of £733.96 with interest thereon at 4% above the base rate of the Bank of Scotland payable on any instalment of rent which is not paid on the due date, from the date due until payment.

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.

Neil Kinnear

Legal Member/Chair

07/03/19

Date