



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16, Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/19/0892

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

Re: 9/7 Rennie's Isle, Edinburgh, EH6 6QA ("the Property")

Parties:

Mr Zsombor Welker, 11/15 Comely Bank Row, Edinburgh, EH4 1EA ("the Applicant")

Mrs Andrea Barbalunga or Wood, 56 Silverknowes Drive, Edinburgh, EH4 SHY ("the Respondent")

Tribunal Members:

Shirley Evans (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent failed to comply with her duty as a Landlord in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations") as amended by The Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 by failing to pay the Applicant's Tenancy Deposit to the scheme administrator of an Approved Tenancy Deposit Scheme, grants an Order against the Respondent for payment to the Applicant of the sum of SIX HUNDRED AND FORTY SEVEN POUNDS AND FIFTY PENCE (£647.50) Sterling.

Background

1. By application dated 17 March 2019 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property) Chamber for an order for payment where a landlord has not paid a deposit into an approved scheme in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). The Applicant sought one and a half times the deposit of £1295. The Applicant lodged a

copy Private Residential Tenancy Agreement between the Applicant and the Respondent, a Deposit Protection Certificate from Safe Deposits Scotland ("SOS") and 6 pages of email correspondence between the parties dated from 12 November 2018 until 31 January 2019.

2. On 26 March 2019, the Tribunal issued a Notice of Acceptance of the Application under Rule 9 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations").

3. The Tribunal advised both parties on 13 April 2019 that a Case Management Discussion under Rule 17 of the Regulations would proceed on 13 May 2019. On 13 April 2019 the Tribunal enclosed a copy of the application and invited the Respondent to make written representations to the application by 1 May 2019. This paperwork was served on the Respondent by Carol Nicol, Sheriff Officer, Edinburgh on 16 April 2019. A certificate of execution of service was received by the Tribunal administration.

4. The Respondent did not make any written representations by 1 May 2019.

Case Management Discussion

1. The Tribunal proceeded with the Case Management Discussion on 13 May 2019. The Applicant was personally present. The Respondent also appeared personally and was accompanied by a Mr Wood. She explained that her married name was Mrs Wood and that Barbalunga was her maiden name.

2. The Tribunal referred to a Private Residential Tenancy Agreement between the Applicant and the Respondent in relation to the Property dated 15 November 2018 ("the tenancy agreement"). The Respondent accepted this was the tenancy agreement she had with the Applicant and that this terminated on 31 January 2019.

3. Section 1 "Key Terms" "Payments" of the tenancy agreement, provided that the Applicant would pay a deposit of £1295. This Section also provided that the Deposit Scheme was SOS and gave the address of SOS. This was accepted by the Respondent.

4. Mrs Wood explained to the Tribunal that she used to live in the property and that Crombie and Co had previously carried out the management of the property. She went on to explain that Murray and Currie took over Crombie and Co at the time viewings had started at the Property. She acknowledged that the deposit and the first months' rent had been paid at the start of the tenancy on 17 September 2018. However there were various issues with their management of the Property. During a conversation on 19 October 2018 with Murray and Currie she discovered the tenancy deposit had not been paid into an approved scheme.

5. Mrs Wood then went onto explain that she set up the SOS account for the tenancy deposit on 22 October 2018. Despite doing so she did not pay the deposit to SOS at

that time. She put this down to the fact that she was waiting for a revised agreement in the form of the correct paperwork to be issued as the name of a party was wrong.

6. The Tribunal referred parties to an email of 12 November 2018 when the Applicant had written to the Respondent amongst other matters to raise the fact that the agreement had the incorrect deposit amount of £1095 and not £1295. He also asked for details of the deposit scheme. The Tribunal referred to Mrs Wood's email in response of 13 November 2018 when she advised "*The deposit is with Safe Deposits Scotland (Reference DAN443178)*".

7. Both the Applicant and the Respondent agreed that the correct paperwork was issued on 17 November 2018 which amended the deposit amount to £1295. The Tribunal asked why Mrs Wood had not lodged the deposit at that time based on her earlier explanation that she had not lodged the deposit on 22 October 2018 as she was waiting for the correct paperwork to be issued. She had no explanation other than to advise it slipped through, she just had not done it and she had three children to look after.

8. The Applicant advised that he had met with the Respondent on 20 November 2018 at which stage she had promised to look into the deposit position. The Applicant explained that he had not received any information or confirmation that the deposit had in fact been lodged with SOS or indeed with any of the other two approved tenancy deposit schemes by 2 December 2018. He contacted SOS who advised they did not have a deposit for the Property. He also contacted the other two approved schemes.

9. The Tribunal referred to the Applicant's email of 11 December 2018 when he advised the Respondent that he was thinking of moving and that he had been in contact with SOS and that the deposit had not been placed with them. The Tribunal also referred to the Respondent's email of 13 December 2018. This email asked the Applicant to give her 28 days' notice if he decided to leave and advised that "*the deposit had been registered with Safe Deposits Scotland under DAN443178*".

10. Mrs Wood explained that she had paid SOS the deposit on 13 December 2018 and that it had come out of her account on 14 December 2018. Both parties accepted the Certificate received from SOS showed that the deposit had been registered with SOS under DAN443178, but not until 18 December 2019.

11. The Applicant explained this Certificate was the first notification he had received from any of the scheme administrators about the deposit.

12. Parties were in agreement that the tenancy agreement terminated on 31 January 2019 and that the deposit was returned to the Applicant in full by SOS within 3 days of termination.

13. The Applicant explained that at the point that he first let the Respondent know that he was thinking of leaving the tenancy he was doing so without knowing where

his deposit was. He was anxious about that. He explained that he knew there was something was not quite right with regard to the deposit from mid-November 2019. He accepted that by the time he received the Certificate from SDS on 18 December 2018 he knew his deposit was protected. However he felt that the Respondent had had multiple chances to put the deposit into SDS but had not done so. Her emails in December 2018 did not even acknowledge that she had made a mistake. As per his application the Applicant confirmed he was still seeking one and a half times the deposit for failure to lodge the deposit on time and for providing "*false and misleading information*".

14. The Respondent appreciated that there had been a few issues but did not accept that she had provided "false and misleading information". She explained she had been a good Landlord and had otherwise done everything she should have.

Finding in Facts

15. The Applicant lived in the Property between 17 September 2018 - 31 January 2019 in terms of a Private Residential Tenancy Agreement. This was subsequently amended.

16. Section 1 "Key Terms" "Payments "of the tenancy agreement, provided that the Applicant would pay a deposit of £1295. This Section also provided that the Deposit Scheme was SDS and gave the address of SDS.

17. The Applicant duly paid the deposit of £1295 together with the first month's rent on or about 17 September 2018.

18. Murry and Currie were the managing agents of Property at the time the tenancy commenced. They did not place the deposit into an approved scheme on behalf of the Respondent. This came to the Respondent's attention during a conversation with the Respondent on or about 19 October 2018.

19. On 22 October 2018 the Respondent set up an account with SDS for the Property. She did not pay the deposit into SDS on 22 October 2018.

20. On 12 November 2018 the Applicant emailed the Respondent amongst other matters to raise the fact that the agreement had the incorrect deposit amount of £1095 and not £1295 in it and asked for details of the deposit scheme.

21. On 13 November 2018 the Respondent emailed the Applicant to advise that "*The deposit is with Safe Deposits Scotland (Reference DAN443178)*" in the knowledge she had not in fact paid the deposit into SDS.

22. The amended tenancy agreement was dated 17 November 2018.

23. The Respondent paid the deposit into SDS on or about 13 December 2018.

24. SDS issued a Certificate on 18 December 2018 to the Applicant to advise the deposit had been paid.

25. By email of 2 January 2019 the Applicant gave notice that he was terminating the tenancy agreement. The tenancy agreement with the Respondent came to an end on 31 January 2019. The deposit was repaid in full to the Applicant within 3 days of the tenancy terminating.

Reasons For Decision

26. For the purpose of Regulation 9(2) of the 2011 Regulations the Tribunal found that the application was made in time within 3 months of the tenancy termination. 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.

27. The amount to be paid to the Applicant is not said to refer to any loss suffered by the Applicant. Accordingly, any amount awarded by the Tribunal in such an application cannot be said to be compensatory. The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach. The Regulations do not distinguish between a professional and non-professional Landlord such as the Respondent. The obligation is absolute on the Landlord to pay the deposit into an Approved Scheme.

28. In assessing the amount awarded, the Tribunal has discretion to make an award of up to three times the amount of the deposit, in terms of Regulation 10 of the 2011 Regulations. The Applicant sought one and a half times the deposit.

29. The Tribunal considered that whilst the Respondent's failure was not initially wilful as the Property was under the management of Murray and Currie, the Tribunal was concerned that the Respondent had not placed the deposit into SDS when she set up the account with SDS on 22 October 2018. The Tribunal was also concerned the Respondent told the Applicant in an email on 13 November 2018 that the deposit was with SDS in the knowledge that she had not done so. On the Respondent's own account she did not pay the deposit to SDS until 13 December 2018, nearly 2 months after she set up the SDS account. The Respondent provided no explanation for her failure to do so other than she had not got round to it as she had three children to look after. She only did so after the Applicant advised he was thinking of leaving. The Tribunal took into account that the Applicant by mid- November was becoming anxious about his deposit as he had not heard where it had been placed. This continued until 18 December 2018 when he received the Certificate from SDS. The Tribunal took into account the purpose of the 2011 Regulations had not been defeated.

30. The Tribunal was also concerned the Respondent had failed to comply not only with her duties under Regulations 3 (1) (b), but also under Regulation 42 of the 2011 Regulations to provide the Applicant with information as to where the deposit was protected.

31. In assessing the sum awarded the Tribunal has discretion to award a sanction that is fair, just and proportionate in the circumstances.

Decision

32. In all the circumstances, the Tribunal was not inclined to order the maximum amount of three times the Tenancy Deposit. The Tribunal considered that a fair, proportionate and just amount to be paid to the Applicant was £647.50 and accordingly made an Order for Payment by the Respondent to the Applicant.

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.

Since an appeal is only able to be made on a point of law, a party who intends to appeal the tribunal's decision may wish to request a Statement of Reasons for the decision to enable them to identify the point of law on which they wish to appeal. A party may make a request of the First-tier Tribunal for Scotland (Housing and Property Chamber) to provide written reasons for their decision within 14 days of the date of issue of this decision.

Where a Statement of Reasons is provided by the tribunal after such a request, the 30 day period for receipt of an application for permission to appeal begins on the date the Statement of Reasons is sent to them.

S. Evans



Legal Member/Chair

Date

13 May 2019.

Date