



Statement of decision (incorporating reasons) of the First-tier Tribunal for Scotland (Housing and Property Chamber) under regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations")

Chamber Ref: FTS/HPC/PR/18/0793

Re: Flat 3, 14 Harvesters Square, Edinburgh, EH14 3JN ("the Property")

Parties:

Miss Carolyn Crombie and Mr Stephen Brown, formerly residing at Flat 3, 14 Harvesters Square, Edinburgh, EH14 3JN and currently residing at address(es) not permitted to be disclosed in connection with this case ("the Applicants")

Mr Les Rowan and Mrs Carolyn Rowan, 314 Calder Road, Edinburgh, EH11 3TB ("the Respondents")

Tribunal Member:

Pamela Woodman (Legal Member)

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

BACKGROUND

1. A case management discussion ("**CMD**") was held at 10am on Wednesday 27 June 2018 in George House, 126 George Street, Edinburgh EH2 4HH. The Applicants were neither present nor represented at the CMD. The Respondents were not present but were represented by Ashley Puren of Pure Property Management ("**the Respondents' Representative**") at the CMD.
2. Notwithstanding the failure of the Applicants to be present in person or represented at the CMD (or to provide any advance notice of such non-attendance or explanation for such failure), the Respondents' Representative was present at the CMD and so the Legal Member considered it appropriate to proceed to hear the CMD.
3. The Applicants had made an application to the Tribunal under regulation 9 of the 2011 Regulations and in accordance with the First-tier Tribunal for Scotland Housing

and Property Chamber Rules of Procedure 2017 ("**HPC Rules**") which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, ("**2017 Regulations**"). More specifically, the application was made in terms of rule 103 (*Application for order for payment where landlord has not paid the deposit into an approved scheme*) of the HPC Rules.

4. Following the CMD, the "*Notes (including direction) on a Case Management Discussion*" dated 27 June 2018 ("**CMD Notes**") were issued to the Applicants and the Respondents/Respondents' Representative. A copy of the CMD Notes is attached to this statement of decision and such CMD Notes are deemed to be incorporated herein in full.
5. The address given for the Applicants in the application form had been the address of the Property but, prior to the CMD, it was confirmed to the Tribunal in connection with case reference FTS/HPC/RP/18/0773 (see paragraph 7 of the CMD Notes) that the Applicants had left the Property.
6. The Applicants had been asked by the Tribunal to provide their current address prior to the CMD but had refused to do so, as referred to in paragraphs 8, 9, 17, 19 and 33 of the CMD Notes.
7. The direction set out in paragraph 35 of the CMD Notes was in the following terms:

"In terms of rule 16 of the HPC Rules, the Tribunal hereby directs the Applicants to provide to the Tribunal a current postal address for the Applicants (or, if they do not have the same postal address, a current postal address for each of them respectively) by no later than 18 July 2018. For the avoidance of any doubt, such address(es) would then be included in an order for payment, a copy of which would be provided to the Respondents."

8. In addition, paragraph 36 of the CMD Notes was in the following terms:

"Should the Applicants fail to comply with the direction in paragraph 35 above, then (as provided for in rule 27 of the HPC Rules) the Tribunal may dismiss the proceedings in relation to case reference FTS/HPC/PR/18/0793."

9. By e-mail on 16 July 2018, Carolyn Crombie, one of the Applicants, provided a "New address" but did not confirm if that was only for her or for both of the Applicants. She also stated the following:

"I would appreciate it if you keep this address private and confidential (not on public record)
I believe that we are protected by the new data protection act
Not only us, but our 3 landlords need their data protected also"

10. E-mail was the desired method of communication as requested by Carolyn Crombie, one of the Applicants, by e-mail to the Tribunal on 23 June 2018.

11. The letter from the Tribunal to the Applicants dated 12 October 2018 (which was sent by e-mail) was in the following terms:

"We have received your e-mail dated 16 July 2018 providing a current address for you, but requesting that it remain private and confidential.

Firstly we require you to confirm that address is also the current address for Stephen Brown.

We have consulted with the Legal Member in this case with regard to your request. We have been advised that there are two issues with this request:

1. It does not comply with the direction issued as a result of the case management discussion which was held on 27 June 2018 which clearly provided that the address(es) provided would be "included in an order for payment, a copy of which would be provided to the Respondents".
2. As per our letter to you dated 29 May 2018, you were advised that "all correspondence received from a party will be sent to the other party". Accordingly, we require to disclose correspondence from you to the Respondents.

To date, we have not sent the Respondents the correspondence received from you based on your request that it remain private and confidential. However, we cannot accept the correspondence (or information included in it) from you on that basis. Accordingly, you have a choice. You have the option either:

- (a) to confirm to the Tribunal that your address may be included in an order for payment and disclosed to the Respondent; or
- (b) to refuse to allow this disclosure and so refuse to comply in full with the direction. You will also be deemed to have withdrawn the relevant correspondence, such that it does not then require to be sent to the Respondents, but will be retained on file by the Tribunal.

Please confirm, by no later than 26 October 2018, which of the two options set out above that you wish to select. Should you fail to respond confirming which option you are selecting by this date, you will be deemed to have selected option (b) above, i.e. that you refuse to allow the disclosure and this case will be determined accordingly.

As set out in the note of the case management discussion, if the direction is not complied with in full by you, the Tribunal may then dismiss the proceedings in relation to case reference FTS/HPC/PR/18/0793.

We look forward to hearing from you."

FINDINGS OF FACT

12. No response has been received by the Tribunal from the Applicants to such letter dated 12 October 2018. Accordingly, the Applicants are deemed to have selected option (b) set out in that letter and so have refused to allow the disclosure of the new address provided and so have also refused to comply in full with the direction.
13. The completed and signed application form from the Applicants in relation to this case dated 4 March 2018 contained the following statements and then question:

“In order to process your complaint, the Chamber may need to contact other relevant organisations and we may require to write to obtain reports from relevant specialists. In terms of the legislation which governs the application process, we will require to send copies of any application, attachments, correspondence and representations to the other party. Do you authorise the Chamber to disclose information received from you relating to the complaint and to send copies of any documents to the other party, their representatives, any relevant organisation, or any specialist who is asked to provide a report?”

The Applicants had ticked the “Yes” box in response to this question. The application form (above the signature box) then goes on to state:

“Please note if you are unwilling to let us disclose information or obtain further details, then we will be unable to process your application. Please also note that legislation requires the Chamber to make any tribunal decisions and statements of reasons publicly available.”

14. This is also very clearly set out in the Tribunal’s privacy notice which is available online at <https://www.housingandpropertychamber.scot/privacy-note>. The privacy notice also sets out the legal basis for processing of personal data relied upon by the Tribunal.
15. Furthermore, the letter from the Tribunal to the Applicants dated 29 May 2018 includes the following notification: “Please note that all correspondence received from a party will be sent to the other party.”

REASONS FOR DECISION

16. Paragraphs 17 to 24 (inclusive) and paragraph 33 of the CMD Notes set out the reasons for the granting of the direction. The information referred to at paragraphs 13 to 15 above sets out additional reasons which would also have justified the granting of the direction.
17. The Applicants failed to comply in full with the direction of the Tribunal within the required period as set out in paragraph 35 of the CMD Notes, or within the extended period allowed to them by letter dated 12 October 2018.
18. In light of both the explicit terms of paragraph 36 of the CMD Notes and the Tribunal’s letter dated 12 October 2018, the Applicants could (and should) have been in no

doubt as to the result and implications of their failure to provide a new address for each of the Applicants which would then be disclosed to the Respondent.

DECISION

19. For the reasons set out above, the application with case reference FTS/HPC/PR/18/0793 is dismissed and the order for payment sought is refused.

Right of Appeal

In terms of Section 46 of the Tribunals (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.

P Woodman

Legal Member

11 November 2018

Housing and Property Chamber
First-tier Tribunal for Scotland



Notes (including direction) on a Case Management Discussion of the First-tier Tribunal for Scotland (Housing and Property Chamber) under regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations")

Chamber Ref: FTS/HPC/PR/18/0793

Re: Flat 3, 14 Harvesters Square, Edinburgh, EH14 3JN ("the Property")

Parties:

Miss Carolyn Crombie and Mr Stephen Brown, formerly residing at Flat 3, 14 Harvesters Square, Edinburgh, EH14 3JN and currently residing at an unknown address ("the Applicants")

Mr Les Rowan and Mrs Carolyn Rowan, 314 Calder Road, Edinburgh, EH11 3TB ("the Respondents")

Tribunal Member:

Pamela Woodman (Legal Member)

Present: None of the Applicants or the Respondents was present at the case management discussion ("**CMD**") held at 10am on Wednesday 27 June 2018. The Applicants were not represented at the CMD. The Respondents were represented by Ashley Puren of Pure Property Management ("**the Respondents' Representative**") at the CMD. Also present at the CMD was Holly Brown in the capacity of clerk to the Tribunal.

SUMMARY OF DISCUSSION

Background

1. The Applicants made an application to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("**the Tribunal**") under regulation 9 of the 2011 Regulations and in accordance with the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("**HPC Rules**") which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber

(Procedure) Regulations 2017, as amended, ("**2017 Regulations**"). More specifically, the application was made in terms of rule 103 (*Application for order for payment where landlord has not paid the deposit into an approved scheme*) of the HPC Rules.

2. The order sought from the Tribunal was an order for payment of three times the amount of the tenancy deposit as a result of the Respondents (as landlords) not having paid the tenancy deposit into an "approved scheme" (as defined in the 2011 Regulations) within the required period.
3. The application form was accompanied by copies of the following:
 - a. One page (undated but signed) document entitled "SHORT ASSURED TENANCY AGREEMENT" ("**the Tenancy Agreement**");
 - b. E-mail exchange between Les Rowan and Stephen Brown on 3 and 4 January 2018;
 - c. Deposit protection certificate issued by SafeDeposits Scotland confirming that it had received the tenancy deposit on 6 March 2018 ("**Deposit Certificate**");
 - d. Prescribed information in terms of regulation 42 of the 2011 Regulations issued by Pure Property Management Edinburgh LTD on behalf of Mr Leslie Rowan and Mrs Carolyn Rowan ("**Prescribed Information Document**");
4. A notice of acceptance of the application was issued by the Tribunal dated 12 April 2018 under rule 9 of the HPC Rules ("**Notice of Acceptance**"), which confirmed that the application paperwork had been received by the Tribunal on 5 April 2018.
5. The Applicants, the Respondents and Pure Property Management were each sent a letter by the Tribunal dated 29 May 2018 confirming that the application had been received, intimating the date of the scheduled case management discussion and noting that written representations from the Respondents must be received by 19 June 2018.
6. The Legal Member was provided with copies of two certificates of intimation from Christopher Andrew, sheriff officer of Walker Love, in respect of service of the letter from the Tribunal dated 29 May 2018 respectively on Mr Les Rowan and Mrs Carolyn Rowan on 30 May 2018.
7. A copy of a minute of abandonment dated 11 June 2018 in relation to case reference FTS/HPC/RP/18/0773 in respect of the Property ("**Minute of Abandonment**") was provided by Pure Property Management in advance of the CMD, in which it was confirmed by the Legal Member (Nicola Weir) that the "Tenant" (being the Applicants in this case) had confirmed that they had left the Property.
8. The Tribunal sent a letter to the Applicants dated 21 June 2018 requesting their current address.

9. Various e-mails were exchanged between the Tribunal and respectively Carolyn Crombie (one of the Applicants) and Pure Property Management (on behalf of the Respondents) with regard to the Applicants not having provided their current address.

Key relevant legal provisions

10. Regulation 9(1) (*Court orders*) of the 2011 Regulations is in the following terms:

“A tenant who has paid a tenancy deposit may apply to the sheriff for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.”

11. Regulation 3(1) (*Duties in relation to tenancy deposits*) of the 2011 Regulations is in the following terms:

“A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy –

- (a) pay the deposit to the scheme administrator of an approved scheme; and
- (b) provide the tenant with the information required under regulation 42.”

12. Regulation 9(2) (*Court orders*) of the 2011 Regulations is in the following terms:

“An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended.”

13. Regulation 10 (*Court orders*) of the 2011 Regulations is in the following terms:

“If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff –

- (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and
- (b) may, as the sheriff considers appropriate in the circumstances of the application, order the landlord to –
 - (i) pay the tenancy deposit to an approved scheme; or
 - (ii) provide the tenant with the information required under regulation 42.”

14. With effect from 1 December 2017, the functions and jurisdiction of the sheriff on matters arising out of the 2011 Regulations (and various other civil matters) in relation to any “assured tenancy” (as defined in section 12 of the Housing (Scotland) Act 1988) were transferred to the Tribunal by virtue of section 16 of the Housing (Scotland) Act 2014.

15. Rule 17(4) of the HPC Rules is in the following terms:

"The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision."

The proceedings, namely the CMD on 27 June 2018

16. The Respondents' Representative provided the following information at the CMD:

- a. Pure Property Management became the agent for the Respondents in respect of the Property in February 2018. Another agent had previously been engaged but had decided not to act any longer allegedly because the Applicants were difficult to deal with. Pure Property Management had also found that Stephen Brown (one of the Applicants) had behaved towards their staff in a manner which they did not consider to be acceptable.
- b. The Respondent's Representative did not know if the tenancy deposit had been paid by the Applicants to the Respondents or if/when this took place. He had no evidence of this but he confirmed that it may be assumed by the Tribunal that it had been paid by the Applicants.
- c. The amount of the tenancy deposit as stated in the Tenancy Agreement and as paid over by the Respondents to Pure Property Management, when the Respondents were made aware of the requirement to lodge the tenancy deposit in an "approved scheme" (as defined in the 2011 Regulations), was £550.
- d. This amount was then paid by Pure Property Management to SafeDeposits Scotland. The Deposit Certificate stated that this had been done on 6 March 2018 and the Respondents' Representative confirmed this to be correct.
- e. The tenancy deposit was still with SafeDeposits Scotland. There were rent arrears of £3,193.55 and so the Respondents had lodged a claim with SafeDeposits Scotland to be paid the tenancy deposit in respect of (part payment of) the unpaid rent.
- f. The Respondents' Representative explained that the information in the Prescribed Information Document with regard to particular clauses of and provisions in the tenancy agreement were not applicable in this case and did not relate to the Tenancy Agreement. They related to Pure Property Management's own standard lease which was not used in this case.
- g. The Tenancy Agreement was the complete and only tenancy agreement in relation to the tenancy of the Property by the Applicants since 18 September 2008.
- h. The Property was the only property which the Respondents let out but, after their experience as landlords over the past months, the Respondents had decided to put the Property on the market for sale.

- i. The Respondents had not been aware of their obligations regarding paying the tenancy deposit into an "approved scheme" but were trying to comply with the law now that they were aware.
 - j. The Respondents' Representative acknowledged that the Respondents had not complied with their obligations in the 2011 Regulations and that Pure Property Management had made the Respondents aware of this. He acknowledged that an order for payment would require to be made. He submitted that, in the circumstances, an order for payment of 3 times the amount of the tenancy deposit did not appear to be fair. Given that there were substantial rent arrears, he requested that any amount which the Tribunal may order the Respondents to pay be set off against those arrears. He submitted that the Applicants had not been disadvantaged in any way and that the tenancy deposit was with SafeDeposits Scotland now, albeit lodged late.
 - k. The tenancy constituted by the Tenancy Agreement terminated on 11 June 2018 when entry was taken. When entry was taken (after following the proper legal processes for taking entry), it was found that the Applicants had abandoned the Property prior to 11 June 2018. This is also the date of the Minute of Abandonment in which it was noted that the Applicants had confirmed to the Tribunal that they had left the Property.
 - l. The Applicants and the Respondents had been friends but the relationship had deteriorated over past months.
17. As noted above, there had been a number of e-mails between the Tribunal and respectively Carolyn Crombie (one of the Applicants) and Pure Property Management (on behalf of the Respondents) with regard to the Applicants not having provided their current address.
18. The Legal Member noted that one of the mandatory requirements of rule 103 of the HPC Rules (in terms of which the application for this case was submitted) for acceptance of an application was that "the name and address of the tenant or former tenant" was provided. At the time of the making of the application, this was given by the Applicants as the address of the Property. However, in light of the confirmation provided to the Tribunal and recorded in the Minute of Abandonment that the Applicants had now left the Property, it was clear that the address of the Property was no longer the current address of the Applicants.
19. The Tribunal requested a current address for the Applicants by letter dated 21 June 2018 which request has, to date, been resisted by Carolyn Crombie (one of the Applicants stating that she does not wish this to be "on public record for my own privacy and data protection". The Tribunal advised them that a contact address would be required if an order was to be granted in this case.
20. Rule 21(1)(b) of the HPC Rules allows the Tribunal to require a person to give the Tribunal "such documents or information as it may reasonably require". The letter

from the Tribunal dated 21 June 2018 arguably made a request for such information, albeit without express reference to this particular rule.

21. Given that an application may only be accepted by the Tribunal under rule 103 of the HPC Rules if the address of a (former) tenant was provided, it appeared to the Legal Member to be entirely consistent with this principle that, where there was a change in the circumstances of an applicant which resulted in a change to the details set out in the (previously accepted) application form, it was reasonable for the Tribunal to require up to date details. This was the case whether or not an order was granted. An applicant has a choice as to whether or not to pursue an application and so whether or not a respondent is going to have access to their address details as a result.
22. The Respondents' Representative indicated that the Respondents may wish to "counter-claim" against the Applicants.
23. However, as noted on the FAQs on the Tribunal's website: "The counter-claim is an action that is associated with court proceedings, but this is not catered for by the Tribunal Rules. You can at any time make an application in terms of the claim you wish to make, and where it is appropriate the tribunal may direct the new application to be heard at the same time as the original claim by the other party."
24. In making such a (new) application, the applicant in that case (being the respondent in the case in which it would otherwise wish to make a counter-claim) would require to provide the name and address of the party against whom it wished to claim (and who had already claimed against it). It appeared to the Legal Member to be fair and just that a respondent in such a case should be provided with a current address for the person claiming against him.

Findings of fact

25. The Legal Member was satisfied, on the balance of probabilities and based on the documentation provided, that:
 - a. The application related to an "assured tenancy" (as defined in section 12 of the Housing (Scotland) Act 1988) and so the Tribunal had jurisdiction to hear the case.
 - b. There was a landlord (i.e. the Respondents, which were not a local authority, registered social landlord or Scottish Homes) who had received a tenancy deposit (which was expressly referred to in the Tenancy Agreement and which it was agreed during the CMD may be assumed to have been paid) in connection with a relevant tenancy (the Applicants being an "unconnected person" relative to the Respondents and the use of the Property not falling within any of the types set out in section 83(6) of the Antisocial Behaviour etc. (Scotland) Act 2004, as amended). This was all relevant in order to allow the Legal Member to find that regulation 3 of the 2011 Regulations was applicable in the particular circumstances of this case.

26. For the purposes of regulation 9(2) of the 2011 Regulations and based on the confirmation of the termination date of the tenancy provided by the Respondents' Representative, the Legal Member was satisfied, on the balance of probabilities, that the application was made "in time" by being "made no later than 3 months after the tenancy has ended".
27. The Tenancy Agreement stated that the term of the tenancy was a "minimum of 6 months", did not state any end date and provided for termination by either party giving one month's notice of termination. Accordingly, in this case and based on the documentation provided, the Legal Member was satisfied, on the balance of probabilities, that this tenancy had continued since September 2008 and that there had been no "renewal" since that date.
28. Given that the tenancy commenced before the day on which the 2011 Regulations came into force (as per regulation 47 of the 2011 Regulations) and had not "renewed" in the circumstances set out in regulation 47(1) of the 2011 Regulations, the Legal Member considered that the tenancy deposit should have been paid into an "approved scheme" by 15 May 2013 (in terms of regulation 47(2) of the 2011 Regulations).
29. The tenancy deposit was not paid into an "approved scheme" until 6 March 2018, a period of almost 5 years later.
30. Accordingly, in terms of regulation 10(1) of the 2011 Regulations, the Legal Member was satisfied that the Respondents had not complied with a duty in regulation 3 of the 2011 Regulations and so the Tribunal "must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit". The 2011 Regulations provide for strict liability for non-compliance with the regulation 3 duties.
31. The amount of the tenancy deposit was £550. Therefore, the Tribunal was required to grant an order against the Respondents to pay the Applicants an amount between £1 and £1,650 (£1,650 being 3 times £550).
32. The Tribunal had discretion as to the amount of the order for payment within the range set out but noted that any sanction should be a fair, proportionate and just sanction in the circumstances of the case.
33. However, one of the details required for any order for payment is the address(es) of the Applicants. This/these had not been provided as noted at paragraphs 17 to 24 above. This matter is dealt with in the directions to the Applicants noted at paragraphs 35 and 36 below.
34. The HPC Rules did not appear to allow the Legal Member to issue a conditional order for payment and so a decision on the amount of such order for payment would require to be referred to a further case management discussion at a time when it would be possible actually to grant the order for payment.

OUTCOME

DIRECTION TO APPLICANTS

35. In terms of rule 16 of the HPC Rules, the Tribunal hereby directs the Applicants to provide to the Tribunal a current postal address for the Applicants (or, if they do not have the same postal address, a current postal address for each of them respectively) by no later than 18 July 2018. For the avoidance of any doubt, such address(es) would then be included in an order for payment, a copy of which would be provided to the Respondents.

36. Should the Applicants fail to comply with the direction in paragraph 35 above, then (as provided for in rule 27 of the HPC Rules) the Tribunal may dismiss the proceedings in relation to case reference FTS/HPC/PR/18/0793.

FURTHER CASE MANAGEMENT DISCUSSION

37. The case with case reference FTS/HPC/PR/18/0793 is referred to a further case management discussion for either (a) dismissal if the Applicants fail to comply with the direction in paragraph 35 or (b) the grant of an order for payment (in an amount to be determined at that case management discussion).

38. In the interests of dealing with matters (from the perspective of both the Applicants and the Respondents) justly and efficiently, the Legal Member recommends that such a case management discussion might be done based on papers (including this note and any written representations) or by conference call, rather than having a case management discussion in person.

INTIMATION TO RESPONDENTS' REPRESENTATIVE

39. The outcome noted above was explained to the Respondents' Representative prior to conclusion of the CMD. The Respondents' Representative indicated that he was disappointed that the matter had not been finalised at the CMD but understood the reasons why that was the case.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

P Woodman

Legal Member

27 June 2018

Date