



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3329

Re: Property at 5/5 Cables Wynd, Edinburgh, EH6 6DU (“the Property”)

Parties:

Mrs Despoina Bonou, 81/2 Lochend Gardens, Edinburgh, EH7 6DQ (“the Applicant”)

Mr Dimitrios Moudouris, 14/3 Sandpiper Road, Edinburgh, EH6 4UA (“the Respondent”)

Tribunal Members:

Lesley Johnston (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be refused.

Introduction

The Applicant seeks an Order for Payment in the sum of £1,800 by way of a payment under the Tenancy Deposit Schemes (Scotland) Regulations 2011 (‘the 2011 Regulations’), regulation 9.

The Respondent’s primary position is that the application is out of time in terms of regulation 9(2). His secondary position is that the property was the Respondent’s only and principal residence throughout the term of the tenancy, meaning that the tenancy was not a ‘relevant tenancy’ in terms of regulation 3 and in terms of section 83(6)(e) of the Antisocial Behaviour etc (Scotland) Act 2004.

Procedural Background

The Applicant (via her then agents, Shelter) submitted an application to the Tribunal by email at 2122 hrs on 15 October 2019 seeking an Order for Payment in terms of

the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the 2011 Regulations') in respect of a failure by the Respondent to pay a tenancy deposit into an approved scheme.

The application was date-stamped by the Tribunal as having been received 16 October 2019. The application was accompanied by a bank receipt dated 9 August 2018 in the sum of £1,970 and a receipt from the Respondent dated 10 August 2018.

On 18 October 2019 the Tribunal requested, amongst other things, a copy of the Tenancy Agreement. The Tribunal provided the Applicant's agents until 25 October 2019 to provide the information. The Tenancy Agreement was provided to the Tribunal on 24 October 2019.

The application was accepted for determination by the Tribunal on 11 December 2019.

A Case Management Hearing was fixed for 29 January 2020.

The Case Management Hearing on 29 January 2020 required to be postponed on the basis that the Greek interpreter failed to appear at the hearing. The circumstances of the CMD are set out in a Note on the CMD dated 29 January 2020.

A new CMD was due to take place on 19 March 2020 in this case, however, that hearing was postponed due to the Coronavirus pandemic.

A rescheduled CMD was fixed to take place on 22 July 2020. That hearing also required to be postponed on the basis that the Greek interpreter failed to appear at the hearing.

In accordance with a Direction issued by the Tribunal on 22 July 2020, the parties lodged submissions and documents in relation to the following issues for determination:

1. Was the application made timeously, in terms of paragraph 3 of the Regulations and taking account rules 5 and 103 of the Tribunal Rules;
2. If the application was made timeously, was the tenancy a 'relevant tenancy' in terms of regulation 3 of the Tribunal Rules?
3. Should an award be made in terms of regulation 9 and if so, at what level?

The Case Management Discussion on 2 September 2020

A rescheduled CMD took place on 2 September 2020 by telephone.

The Applicant was personally present. She was accompanied by a Supporter (Alex Henrikson). A Greek interpreter was present for the Applicant. The Applicant and the interpreter confirmed that they understood one another.

The Respondent was personally present. He was represented by Duncan Hamilton, Solicitor of ELP Arbuthnott McClanachan, Solicitors.

At the CMD, the parties were agreed of the following matters:

1. The Applicant had resided in the property until 15 July 2019 on which date the tenancy ended;
2. The tenancy ended on 15 July 2019;
3. The Applicant paid to the Respondent £1,970 in respect of a tenancy deposit. £170 was refunded to Applicant. The outstanding sum of £1,800 was not paid into a tenancy deposit scheme by the Respondent.

Submissions from the parties

The parties lodged written submissions in advance of the hearing and made oral submissions at the hearing.

The Applicant

The Applicant's position was that regulation 9(2) required that an application must be made "no later than 3 months after the tenancy has ended." Since the application was made on 15 October, the application was made timeously.

The Tenancy Agreement was provided to the Tribunal on 24 October 2019 at the request of the Tribunal Administration, in order to comply with rule 103(b). It would be unfair to postpone the date the application was deemed to have been lodged to 24 October because it was the Applicant's understanding that (i) the application had been accepted as valid; and (ii) it seemed unfair for the Tribunal to have requested further documents by 25 October if documents received by that date would be rejected as out of time.

The Applicant lodged a letter from Shelter dated 18 August 2020. The letter confirmed that the tenancy agreement was not lodged with the application due to their oversight and it would be unreasonable for the Tribunal to penalise the Applicant for their error.

As to whether the tenancy was a relevant tenancy, the Applicant's position was that the property was not the Respondent's only or principal residence. There were three bedrooms in the property. One was occupied by the Applicant. The second was occupied by the Applicant's son (the other tenant in the property). The third was rented out by the Respondent on Airbnb. The Applicant lodged documentary evidence in support of her position, including documents showing the Respondent resided at an alternative address. In addition, her position was that, since the parties had entered into a Private Residential Tenancy, in terms of section 19 of the tenancy agreement, the Respondent had no entitlement to reside within the property during the course of the tenancy.

The Respondent

The Respondent's position was that the application had been lodged out of time. The application had been received by the Tribunal on 16 October, which was out of time. In any event, in terms of rule 103, the application required to be accompanied by a copy of the tenancy agreement if it is available. The tenancy agreement had been available, but had not been included with the application. The tenancy agreement was not lodged until 24 October 2019. In terms of rule 5(3) the application is held to be made on the date the Tribunal receives the last of any documents which are necessary. Therefore, this application should be held to be received on 24 October 2019 and accordingly, was out of time.

If the application had been lodged on time, the Respondent's position was that the tenancy did not constitute a relevant tenancy under the regulations as the house was the only or main residence of the Respondent (Antisocial Behaviour (Scotland) Act 2004, section 83(6)(e)). The Respondent submitted that he was resident at the property throughout the tenancy, although was latterly choosing not to reside there due to a deteriorating relationship with the Applicant and her son. The Respondent lodged documents in support of his position including council tax bill, a copy of the electoral register, and utility bills showing the property as his address.

Decision

Findings in Fact

1. The Applicant and the Respondent entered into a tenancy agreement on or around 6 September 2018;
2. The Applicant had resided in the property until 15 July 2019 on which date the tenancy ended;
3. The tenancy ended on 15 July 2019;
4. The Applicant paid to the Respondent £1,970 in respect of a tenancy deposit. £170 was refunded to Applicant.
5. The outstanding sum of £1,800 was not paid into a tenancy deposit scheme by the Respondent.
6. The application to this Tribunal was submitted by email on 2122 hrs on 15 October 2019.
7. The application was not accompanied by the Tenancy Agreement.
8. The Tenancy Agreement was submitted to the Tribunal by email on 24 October 2019.

Reasons for Decision

In terms of regulation 9(2) of the 2011 Tenancy Deposit Schemes (Scotland) Regulations 2011, any application in respect of a failure by a landlord to comply with their duties under regulation 3 "must be made no later than 3 months after the tenancy has ended."

To lodge an application with the Tribunal in respect of regulation 9(2), the application requires to be made in accordance with rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017. In terms of rule 103,

the application must, amongst other things, be accompanied by a copy of the tenancy agreement (if available) or, if that is not available, as much information about the tenancy as the tenant or former tenant can give (rule 103(b)).

In terms of rule 5(1) an application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rule 103.

In terms of rule 5(3) if, as in this case, it is determined that an application has not been lodged in the prescribed manner, First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date the First-tier Tribunal receives the last of any outstanding documents necessary to meet the requirement manner for lodgement. In this case, that was the submission of the Tenancy Agreement on 24 October 2019. The application was deemed to have been received on that date.

Unfortunately for the Applicant, by the time the Tenancy Agreement was provided to the Tribunal, the application was outwith the 3 month time-limit provided for in regulation 9(2).

The Applicant's position, outlined in the letter from her former agents dated 18 August 2020 was that the Applicant should not be prejudiced for their oversight in failing to submit the Tenancy Agreement. In addition, she considers it unfair that the Tribunal would have asked for the Tenancy Agreement to be provided by a date that was after the 3 month timescale.

The timescales set out in the regulations are clear. The application "must" be lodged within 3 months after the tenancy has ended. The onus is on the Applicant to submit the application timeously within that period. Where, as was the case in this application, the Applicant submits the application to the Tribunal on the last day for lodging it or very close to the end of the 3 month period, the Applicant runs the risk that if the application is deficient in terms of rule 103, the Applicant will lose the opportunity to cure any deficiency on time. It is not the responsibility of the Tribunal administration to ensure that an application is lodged in compliance with the rules and lodged on time.

The Tribunal therefore finds that the application was not lodged timeously and refuses the application on that basis.

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.

Lesley Johnston

Legal Member

2 September 2020
Date