Decision with Statement of 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 ("the 2011 regulations")

Chamber Ref: FTS/HPC/CV/21/2200

Re: Property at 96/6 Marchmont Road, Edinburgh, EH9 1HR ("the Property")

Parties:

Miss Amy McGirck, 1/2 115 Buccleuch Street, Glasgow, G3 6QN ("the Applicant")

Dr Euan Ballantyne, 19 South Avenue, Paisley, PA2 7SP ("the Respondent")

Tribunal Members:

Sarah O'Neill (Legal Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") refused the application on the basis that it was not a valid application, as it had not been made within three months after the tenancy had ended.

Background

1. An application was received from the applicant on 9 September 2021. The application was made on form F (application for civil proceedings) and stated that it was being made under rule 111 (application for civil proceedings in relation to a private residential tenancy) of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ('the 2017 rules').

2. Attached to the application form were:

    i) a copy of an unsigned, undated tenancy agreement (which purported to be a short-assured tenancy agreement) between the parties commencing on 29 June 2020.

ii) copy unsigned and undated guarantee agreement between the respondent and Paul James McGirk (who appeared to be the applicant's father).

iii) screenshots of a text message exchange which the application stated showed the agreed date of moving out, said to be 13 June 2021.

3. The tribunal administration wrote to the applicant on 29 September 2021, asking her for further information. The letter asked the applicant to confirm whether she believed that the tenancy agreement was a private residential tenancy, and if so, to give reasons why she considered that to be the case, given that her application stated that she had moved in with the landlord named in the tenancy agreement (i.e. the respondent).The letter set out the terms of Schedule 1 paragraphs 8 and 9 of the Private Housing (Tenancies) (Scotland) Act 2016 (" the 2016 Act"), which provide that a tenancy cannot be a private residential tenancy where there is a resident landlord.

4. The letter of 29 September 2021 also:

i) asked the applicant to clarify what order she was seeking

ii) asked the applicant to provide a further copy of the screenshot which was included with her application, as the original copy was not clear and could not be read.

iii) advised that an order in relation to the protection of a tenancy deposit, which the applicant had referred to in her application, would have to be made in a separate application under rule 103 and under the 2011 regulations, but that the three-month time limit for making such an application had already expired if the tenancy ended on 13 June 2021.

5. The applicant responded to the letter on 11 October 2021, stating that she had entered into the tenancy on the understanding that it was a private residential tenancy, as the respondent was named as a landlord and the applicant was named as the tenant. She also said that she was seeking an order under rule 103 of the 2017 rules. She enclosed further screenshots of text messages between herself and the respondent, which appeared to confirm that they had agreed a moving out date of 13 June 2021.

6. A further letter was sent to the applicant on 9 November 2021, asking her to provide further information about the nature of the living arrangements under her tenancy, again with reference to Schedule 1 paragraphs 8 and 9 of the 2016 Act. No response was received, and a further letter was sent to the applicant on 10 December 2021. This letter again stated that if she was

seeking the return of her deposit under rule 111, she must clarify the nature of her tenancy, and that if she was a lodger at the property and the respondent also lived there, the tribunal was unable to deal with her application. The letter also said that if she was seeking an order under rule 103 (application for order for payment where landlord has failed to carry out duties relation to tenancy deposits), this could also only be considered by the tribunal if the respondent was not a resident landlord. The letter pointed out that an application under rule 103 must be lodged no later than 3 months after the tenancy ended.

7. No response was received from the applicant, and a further letter was sent to her on 19 January 2022 asking her to respond with the information requested. No response was received from the applicant.

8. The application was accepted under rule 103 on 17 February 2022. The application papers, together with notice of the case management discussion (CMD) scheduled for 26 April 2022, were sent to the applicant by email on 7 March 2022. The papers were served on the respondent by sheriff officer on behalf of the tribunal on 8 March 2022.

9. The tribunal issued a direction to the parties on 25 March 2022. This notified the parties that the tribunal intended to consider the application under rule 103 of the 2017 rules. The direction also stated that the tribunal intended to consider the following preliminary issues at the CMD:

   a) whether the application was made within the three-month time limit for a rule 103 application, in terms of rules 5 (1) and 103 of the 2017 rules and regulation 9 (2) of the 2011 regulations.
   b) whether the tenancy between the parties was a ‘relevant tenancy’ in terms of regulation 3 (3) of the 2011 regulations, with particular reference to whether the property was the “only or main residence” of the respondent as landlord during the tenancy.

   Both parties were invited to submit written representations in relation to the above issues by 19 April 2022.

10. Written representations were received from the respondent on 10 April 2022 and from the applicant on 12 April 2022.

The CMD

11. A CMD was held by remote teleconference call on 26 April 2022. The respondent was present on the teleconference call and represented himself.

The applicant was not present and was not represented. The tribunal delayed the start of the discussion by 10 minutes, in case the applicant had been detained. She did not appear, however, and no telephone calls or messages had been received from her. The tribunal noted that the applicant had responded to its direction on 12 April 2022 and had also been in contact with the tribunal administration on 23 March 2022. The tribunal was therefore satisfied that the applicant was aware that a CMD was due to take place, and that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date, time and place of a CMD had been duly complied with. The tribunal therefore proceeded with the CMD in the absence of the applicant.

12. The tribunal noted that neither party had clearly addressed the question of whether the application had been made within the three-month time limit for rule 103 applications in their written representations. The main focus of the representations received from both parties concerned the question of whether the tenancy deposit paid to the respondent should be returned to the applicant. That was not, however, the issue under consideration by the tribunal in relation to the present application.

13. The tribunal noted that regulation 9(2) of the 2011 regulations states that an application under paragraph 9 (1) [i.e. a rule 103 application] *"must be made no later than 3 months after the tenancy had ended"*. The respondent said that he was still slightly unclear as to the date when the tenancy had ended, but he noted that the tenancy agreement stated that the termination date was 30 May 2021. He agreed however that the applicant had stayed on beyond this, as she had an exam on 8 June 2021, and had therefore left after this date. The tribunal noted that the text message screenshots provided by the applicant appeared to support her contention that the tenancy ended on 13 June 2021. If that was the case, then any rule 103 application would require to be made no later than 13 September 2021.

14. The tribunal had regard to rule 5 (1) – 5 (3) of the 2017 rules, which state:

*"**5. Requirements for making an application***

(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 rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111, as appropriate.

(2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the 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 that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement."

15. The practical effect of this is that an application is held to have been made on the date when all documents required in terms of the relevant rule, in this case rule 103, have been received.

16. Rule 103 of the 2017 rules provides:

103. Application for order for payment where landlord has failed to carry out duties in relation to tenancy deposits

Where a tenant or former tenant makes an application under regulation 9 (First-tier Tribunal orders) of the 2011 Regulations, the application must—

(a)state—

(i)the name and address of the tenant or former tenant;

(ii)the name, address and profession of any representative of the tenant or former tenant; and

(iii)the name, address and registration number (if any) of the landlord;

(b)be accompanied by a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the tenant or former tenant can give;

(c)evidence of the date of the end of the tenancy (if available); and

(d) be signed and dated by the tenant or former tenant or a representative of the tenant or former tenant.

17. In this case, the original application was made under rule 111, rather than rule 103. The applicant confirmed that she wished to seek an order under rule 103 in her email of 11 October 2022. She also provided legible evidence of the end date of the tenancy as required by rule 103 (c) on the same date.

Statement of reasons

18. For the reasons set out above, the tribunal determines that the application under rule 103 was not made until 11 October 2022. It was not therefore made within three months of the date the tenancy between the parties ended, as required under regulation 9 (2) of the 2011 regulations. The tribunal therefore refuses the application for that reason.

Observations by the tribunal

19. The tribunal notes, however, that even if the application had been made in time, it is likely that it would have been refused on the grounds that the tenancy between the parties was not a 'relevant tenancy' in terms of regulation 3 (3) of the 2011 regulations. The duty to pay a tenancy deposit into an approved scheme in terms of regulation 3 of the 2011 regulations applies only in connection with a "relevant tenancy". Under regulation 3 (3), a 'relevant tenancy' means any tenancy or occupancy arrangement –

    a) in respect of which the landlord is a relevant person; and
    b) by virtue of which a house is occupied by any unconnected person,

    unless the house is of a type described in section 83 (6) of the Antisocial Behaviour etc. (Scotland) Act 2004 ('the 2004 Act').

20. While the term 'house' is not defined in the regulations, it is defined in section 101 (1) of the 2004 Act as *"a building or part of a building occupied or intended to be occupied as a dwelling*". This is qualified by section 101 (2) which states that *"if two or more dwellings in a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part."*

21. One of the types of house listed in section 83(6) of the 2004 Act is *"a house which is the only or main residence of the relevant person".* Therefore, in terms of regulation 3(3) of the 2011 regulations, there would be no duty on the respondent to place the tenancy deposit into an approved scheme if the property was his only or main residence during the tenancy. While the tribunal did not hear evidence on whether the property was the "only or main residence" of the respondent during the tenancy, it appeared on the basis of the written evidence before it that this was likely to have been the case.

22. The tribunal also notes that, while it remains open to the applicant to make a further application under rule 111 of the 2017 rules for return of the deposit sum, to do so it would be necessary to demonstrate that the tenancy between the parties was a private residential tenancy. This may not be the case if the respondent was a resident landlord during her tenancy, in terms of of Schedule 1 paragraphs 8 and 9 of the 2016 Act. If the tenancy was not a private residential tenancy, any application seeking return of the deposit sum would not be within the tribunal's jurisdiction and would therefore require an application to the sheriff court.

Decision

The tribunal refuses the application for the reasons stated above.

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.

S. O

Legal Member/Chair

26 April 2022
Date