

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Statement of Decision by the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under Section 48 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/22/1012

The Parties:-

Miss Amber Feng, 17a Forest Park Road, Dundee, DD1 5NZ (“the Applicant”)

Winchester Lettings, 7 Albert Street, Aberdeen, AB25 1XX (“the Respondent”)

The Tribunal comprised:-

Mrs Ruth O’Hare - Legal Member
Mr Mike Scott - Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the Tribunal’) unanimously determined that the Respondent was not in breach of the Letting Agent Code of Practice and therefore made no order.

Background

- 1 By application dated 7 April 2022 the Applicant sought an order against the Respondent due to an alleged failure to comply with the Letting Agent Code of Practice. In particular the Applicant stated that the Respondent had failed to comply with the following provisions of the Code:-
 - (i) Paragraph 16 of Section 2;
 - (ii) Paragraph 32 of Section 3;
 - (iii) Paragraphs 47 to 49 of Section 4;
 - (iv) Paragraphs 65 to 66 of Section 4; and
 - (v) Paragraphs 67 to 72 of Section 4.
- 2 In summary, the Applicant stated that she had signed a lease for the property and paid a deposit. She had subsequently advised the Respondent that she no longer wished to take up the tenancy due to a change of circumstances however the Respondent had requested she give notice and had deducted a payment of rent from her deposit. It was her position that this constituted a

holding deposit, and therefore an unlawful premium. She should have been entitled to withdraw from the contract before the tenancy commenced.

- 3 In support of the application the Applicant submitted email correspondence between the parties and copy Private Residential Tenancy Agreement signed by both the Applicant and Respondent dated 22 March 2022.
- 4 By Notice of Acceptance of Application dated 5 May 2022 the Legal Member with delegated powers from the Chamber President determined that there were no grounds upon which to reject the application. A Hearing was therefore assigned for 15th July 2022, to take place by tele-conference due to the ongoing restrictions imposed by the Covid-19 pandemic.
- 5 The parties subsequently submitted written representations in response to notification of the hearing confirming that they would both take part.

The Hearing

- 6 The Hearing took place by teleconference on 15th July 2022. The Applicant Miss Amber Feng was in attendance. The Respondent was represented by Mr Gareth Winchester.
- 7 The Tribunal heard evidence from both parties at length on the various elements of the Code of Practice the Applicant claimed had been breached. For the avoidance of doubt the following summary is not a verbatim account of what was said at the hearing, but a narration of those submissions relevant to the Tribunal's determination of the application:-

Section 16, paragraph 2

- 8 This paragraph requires the agent to comply with all relevant legislation. Miss Feng advised that the Respondent had asked her to pay the deposit when she wanted to rent the property. Before the tenancy started she had given them notification by email that she would not be moving into the property. She had therefore cancelled the contract. She stated that she had been then made to pay the first months rent, even though she had not physically moved into the property. In her view the Respondent had broken the law. The holding of the deposit by the Respondent was illegal, as was forcing her to start the contract. In response to questions from the Tribunal Miss Feng confirmed that she had paid the deposit around the time the tenancy agreement had been signed on 22 March 2022. She had then sent an email on 28 March 2022 to cancel the contract, which had been due to start on 18 April 2022.
- 9 Mr Winchester expressed concerns about the language used by Miss Feng, in particular the assertion that she had been forced in any way to pay the deposit. She had not been forced to pay anything. Payment of the deposit in advance of the commencement of a tenancy was standard practice. If someone showed

interest in a tenancy the Respondent would request payment of the deposit in advance. The deposit would then be lodged with Safedeposits Scotland, which is what had happened in this case. The tenancy agreement had been signed, the terms were clear, however Miss Feng had subsequently decided not to move into the property. The tenancy agreement was a legal document and legally binding. Mr Winchester confirmed that he had sought advice from the Scottish Association of Landlords in that regard. The Respondent had complied with contract law, as well as housing law. The tenancy agreement had been signed and therefore had to be seen through. Mr Winchester confirmed that Miss Feng had given notice and that notice had been calculated from the start date of the tenancy. The Respondent had requested repayment of the deposit from Safedeposits Scotland, which was permitted on the basis that the tenancy had not yet commenced. Miss Feng had been refunded the equivalent of three days rent, with the Respondent retaining the remaining 28 days to cover the notice period.

Section 3, paragraph 32

- 10 The Tribunal noted that this paragraph of the Code related to the terms of business between the landlord and the letting agent, and on that basis the Tribunal did not consider it relevant to the application before it. The Applicant conceded this therefore the Tribunal did not take this paragraph into account.

Section 4, paragraphs 47-49

- 11 This paragraph requires the agent to abide by the relevant provisions of the Rent (Scotland) Act 1984 and in particular to not charge any fee that would be considered an unlawful premium. Miss Feng advised against that she had been entitled to cancel the contract before the tenancy commenced. She did not need to pay rent as she did not move into the property. On that basis she should not have had to pay the deposit. The Tribunal clarified Miss Feng's position that she considered the payment of the deposit to be an unlawful premium.
- 12 Mr Winchester explained that the Respondent had not charged any fees to Miss Feng in relation to the grant of the tenancy. The rent and deposit had been charged in accordance with the terms of the tenancy agreement. The law was clear, the tenancy agreement had been signed and had to be honoured. The law did not allow Miss Feng to change her mind. The Respondent had not charged any fees. They had been clear throughout about their process. In response to questions from the Tribunal Mr Winchester confirmed that the Respondent had taken steps to relet the property upon receiving notice from the Applicant.

Section 65-66 – Tenancy Deposits

- 13 The Tribunal noted that this paragraph of the Code related to the relationship between the landlord and the letting agent in relation to the management of the tenancy deposit, and on that basis the Tribunal did not consider it relevant to the application before it. The Applicant conceded this therefore the Tribunal did not take this paragraph into account.

Section 4, Paragraphs 67 to 72

- 14 The Tribunal noted that this paragraph of the Code related to the move-in procedures and inventory check-in, and on that basis the Tribunal did not consider it relevant to the application before it. The Applicant conceded this therefore the Tribunal did not take this paragraph into account.
- 15 The Tribunal gave both parties the opportunity to make closing submissions. Miss Feng stated that the contract was illegal, it should allow for the deposit to be refunded and for the contract to be ended before the tenancy started. The payment of the deposit was an unlawful premium. Mr Winchester stated that the Respondent had no wish to act illegally, it was not how they did things. There had been no unlawful premiums charged. The tenancy agreement was signed and had to be seen through. Mr Winchester said he was sorry that Miss Feng's circumstances had changed but the Respondent had to do their job. The Respondent had not charged any fees and had not done anything illegal. They had been clear in all of their communications with Miss Feng. If the Respondent had done something wrong, they would learn from that. They wanted to do the right thing.

Relevant Legislation

- 16 The relevant legislation is section 48 of the Housing (Scotland) Act 2014:-

“48 Applications to First-tier Tribunal to enforce code of practice

(1) A tenant, a landlord or the Scottish Ministers may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.

(2) A relevant letting agent is—

(a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,

(b) in relation to an application by a landlord, a letting agent appointed by the landlord,

(c) in relation to an application by the Scottish Ministers, any letting agent.

(3) An application under subsection (1) must set out the applicant's reasons for considering that the letting agent has failed to comply with the code of practice.

(4) No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.

(5) *The Tribunal may reject an application if it is not satisfied that the letting agent has been given a reasonable time in which to rectify the breach.*

(6) *Subject to subsection (5), the Tribunal must decide on an application under subsection (1) whether the letting agent has complied with the code of practice.*

(7) *Where the Tribunal decides that the letting agent has failed to comply, it must by order (a “letting agent enforcement order”) require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.*

(8) *A letting agent enforcement order—*

(a) must specify the period within which each step must be taken,

(b) may provide that the letting agent must pay to the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

(9) *References in this section to—*

(a) a tenant include—

(i) a person who has entered into an agreement to let a house, and

(ii) a former tenant,

(b) a landlord include a former landlord.”

17 The relevant sections of the Code the Applicant seeks to rely upon are as follows:-

(i) *Paragraph 16 - You must conduct your business in a way that complies with all relevant legislation.*

(ii) *Paragraph 47 - You must comply with all relevant legislation on the charging of fees and premiums or making loans to tenants and prospective tenants in the private rented sector.*

(iii) *Paragraph 48 - In particular you must comply with section 82 of the Rent (Scotland) Act 1984(6), which prohibits any person, as a condition of the grant, renewal or continuance of an assured or short assured tenancy or private residential tenancy, from requiring a tenant or prospective tenant to pay any charges except rent and a refundable deposit of no more than two months’ rent.*

(iv) *Paragraph 49 - You must not, as a condition of granting the tenancy, require tenants to use a third-party service that charges them a fee.*

Findings in Fact and Law

18 The Applicant and Respondent signed a tenancy agreement for the property at Flat 101, 82 Rosemount Viaduct, Rosemount, Aberdeen on 22 March 2022. In terms of Clause 6 of the said tenancy agreement the start date of the tenancy was 18 April 2022.

- 19 In terms of Clause 8 of the said tenancy agreement the rent was payable at the rate of £475 per calendar month payable in advance.
- 20 The Applicant paid a tenancy deposit in accordance with Clause 11 of the said Tenancy Agreement on or around 22 March 2022.
- 21 The Respondent lodged the deposit with Safedeposits Scotland.
- 22 On 28 March 2022 the Applicant emailed the Respondent to advise that she no longer wished to move into the property due to a change in circumstances.
- 23 The Applicant required to give twenty eight days notice in terms of Clause 24 of the said tenancy agreement in order to terminate the tenancy.
- 24 The said notice period was from 18 April 2022 to 15th May 2022.
- 25 The Respondent received the deposit from Safedeposits Scotland upon request.
- 26 The Respondent refunded the Applicant the sum of £37.74, after deduction of the sum of £437.26 in respect of the rent for the said notice period.
- 27 The Applicant was liable to pay the sum of £437.76 in terms of the tenancy agreement between the parties.
- 28 The payment of the deposit was a requirement of the terms of Clause 11 of the said tenancy agreement between the parties which required the deposit to be paid "*at the start date of the tenancy or before*".
- 29 The payment of the deposit did not constitute an unlawful premium as defined by section 90 of the Rent (Scotland) Act 1984.
- 30 The Respondent has acted in accordance with the relevant legislation, namely the Rent (Scotland) Act 1984 and the Tenancy Deposit Scheme (Scotland) Regulations 2011.
- 31 The Respondent is not in breach of the Letting Agent Code of Practice.

Reasons for Decision

- 32 The Tribunal carefully considered the evidence from both parties in its determination of the matter, both in terms of their written representations and verbal submissions at the Hearing. It was noted that the substantive facts in the case were agreed. The dispute related to the application of the relevant legislation to the circumstances surrounding the tenancy agreement.
- 33 The Tribunal accepted the Respondent's argument that the tenancy agreement signed by the Applicant constituted a legally binding document. There is no

“cooling off” period permitted in law that would allow the Applicant to withdraw without given the required notice under the terms of the tenancy agreement, which in this case was 28 days. Whilst the Tribunal did have some sympathy with the position the Applicant had found herself in, it could not identify any legal right available to her to seek to cancel the tenancy agreement once signed. The Applicant had repeatedly referred to the law allowing her to withdraw from the contract but did not identify any specific legal basis upon which she could do so.

34 The Tribunal did not accept that the payment of the deposit was an unlawful premium. The Applicant had paid it to the Respondent in accordance with the terms of the tenancy agreement which required payment of the deposit in the sum of £475 at the start date of the tenancy or before. Clause 11 of the said tenancy agreement is clear in that the deposit can be used for payment of any outstanding rent. The Respondent was therefore entitled to deduct the rent which was lawfully due for the notice period from the deposit held on behalf of the landlord.

35 The Tribunal therefore did not find the Respondent to be in breach of the Letting Agent Code of Practice for the above reasons and determined to make no order.

36 The decision of the Tribunal was unanimous.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed

Ruth O'Hare
Legal Member

15 July 2022