



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/23/4341

Re: Property at 8/2 Sienna Gardens, Edinburgh, EH9 1PF (“the Property”)

Parties:

Miss Karolina Zawislak, residing at 24 Carrick Knowe Road, Edinburgh, EH12 7BH and Maria Elzbieta Adhikari, residing at 24 Rigley Terrace, Prestonpans, EH32 9ND (“the Applicants”)

Mr Hasan Kasem, 25 Southbrae Gardens, Glasgow, G13 1UB (“the Respondent”)

Tribunal Members:

Jim Bauld (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent should be ordered to make payment to the Applicants of the sum of THREE THOUSAND POUNDS (£3,000)

Background

1. By application dated 1 December 2023 the applicants sought an order in terms of Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”) in respect of an alleged failure by the respondent to comply with those regulations.
2. The application was accepted by the Tribunal and referred for determination by the tribunal.

3. A Case Management Discussion (CMD) took place on 11 March. The applicants attended personally. The respondent was neither present nor represented.
4. The tribunal explained the purpose of the CMD and the powers available to the tribunal to determine matters. The tribunal asked various questions of the applicants with regard to the application.
5. The tribunal explained to the applicant the maximum award which could be made in terms of the 2011 Regulations
6. The tribunal indicated that it would be entitled to utilise the power within regulation 17 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the tribunal rules”) and that the tribunal could make a final decision at the case management discussion without remitting the matter to a further full hearing.

Discussions at the CMD

7. The applicants agreed that the First named applicant Ms Zawislak would present their application and answer any questions from the tribunal
8. She can confirm that the tenancy started on 9 May 2022, and that a deposit of £1300 have been paid to Gilson Gray who were the letting agents acting for the respondent landlord. At the commencement of the tenancy, Miss Marta Borowiak was also a joint tenant. During the course of the tenancy, she obtained other accommodation and left. The tenancy continued with the applicants as joint tenants. This was all agreed with the letting agent. The applicants made arrangements to repay to Miss Marta Borowaiak her “share” of the deposit which had been paid initially by her at the commencement of the tenancy.
9. The tenancy came to end on 31 October 2023, and the applicants contacted the letting manager at Gilson Gray and discussed with him the process for the return of their deposit. They asked him to provide appropriate evidence that the deposit had been lodged with a deposit scheme together with the relevant reference number to allow them to reclaim the deposit after they had agreed a deduction of approximately £300.
10. They were advised by the manager that the information was on file and would be sent to them. The information was never sent to them. The applicants discovered that the deposit had never been lodged with any of the deposit

protection schemes until 21 November 2023. They had lodged with their application a series of emails with a customer service advisor from Safe Deposit Scotland Ltd who advised them that the deposit had not been protected until 21 November 2023. In the emails, the customer service advisor indicated that the letting agent had advised that they had only received the deposit on 17 November 2023.

11. The applicants had provided evidence with their application, showing that three different payments had been made to Gilson Gray on 5 May 2022 totalling £1931.77. That amount represented the rent for the part period of the month of May 2022, together with £1100 towards the deposit. They had previously paid £200 as a reservation deposit in or around March or April 2022. The applicants did not accept the statement from Gilson Gray that the deposit had only been received on 17 November 2023.

12. The application was lodged with the tribunal on 1 December 2023, and the applicants had written to Gilson Gray asking them to provide the landlord's current address. Ms Zawislak indicated that she had a telephone conversation with Stan Paolo, the head of letting at Gilson Gray. He had called her asking why she needed the information about the landlord. She told him that an application was being lodged with the tribunal seeking an order in respect of the failure to lodge the deposit. She was advised by the head of letting that he did not understand why the deposit had not been lodged, and that Gilson Gray usually lodged deposits as a lump sum with one of the approved deposit schemes. Ms Zawislak indicated that no attempt was made to resolve this issue with her, nor was any offer made in respect of the failure.

13. In their application, the applicants asked the tribunal to award the maximum sum allowable in terms of the regulations of £3900, being three times the deposit. They indicate that such an order would be fair and reasonable on the basis that the deposit was unprotected throughout the entire tenancy and was not protected until after the tenancy ended. They note that the letting agent appears to have untruthfully indicated to the deposit scheme that they had only received the deposit on 17 November 2023, and not on 5 May 2022. The applicants also indicated that the award should be made at the highest end of the possible range as the letting agent involved are a very large law firm with a letting agency business. They hold themselves out as experts in the field of property law and should be well aware of the duties in terms of the deposit scheme regulations. The applicants also stated that not only was the deposit

unprotected, they were never given the required information in terms of regulation 42 of the 2011 regulations

Findings in fact

14. A tenancy agreement was entered into between the parties (with a Ms Marta Borowiak as a third joint tenant at the start of the tenancy) which commenced on 9 May 2022
15. Gilson Gray Property Services , 29 Rutland Square Edinburgh EH 1 2BW acted as the respondent's letting agent.
16. A deposit of £1,300 was paid by the tenants and was taken on behalf of the respondent prior to the commencement of the tenancy by Gilson Gray
17. Ms Marta Borowiak removed with the consent of the landlord from the tenancy agreement prior to its termination. The tenancy continued between the parties
18. The tenancy ended on 31 October 2023
19. The deposit was not paid into an approved tenancy deposit scheme until 21 November 2023
20. The deposit was repaid to the applicants under deduction of an agreed amount on 12 December 2023.

Discussion and decision

21. This application relates to the failure of the Respondent to place a tenancy deposit within an approved tenancy deposit scheme. It was noted that the respondent as the landlord had no direct involvement in the creation or ongoing management of the tenancy. However, he is liable for the actions of his agent in the management of the tenancy. Landlords have been required since the introduction of the 2011 Regulations to pay tenancy deposits into an approved scheme within 30 working days of the commencement of the tenancy. In this case it is abundantly clear that the letting agent acting for the Landlord had failed to do so. Accordingly there is a clear breach of the duties contained in Regulation 3 of the 2011 Regulations. Those duties are twofold. There is a requirement to pay the deposit to a scheme administrator and the

requirement to provide a Tenant with specified information regarding the tenancy deposit. The Respondent failed in both duties.

22. Regulation 9 of the 2011 Regulations indicates that if a Landlord does not comply with any duty in regulation 3 then the Tribunal must order that a Landlord makes payment to the Tenant of an amount “not exceeding three times the amount of the tenancy deposit”.
23. Accordingly in this case the Tribunal is required to make an order for payment. The only matter to be determined by the Tribunal is the amount of the payment.
24. In this case the Tribunal carefully considered the evidence which had been produced by the applicants. There was clear evidence that the respondent's letting agent had failed to pay the tenancy deposit into the appropriate scheme for the whole period of the tenancy (a period of approximately eighteen months). The deposit was only lodged in accordance with the requirements of the 2011 Regulations three weeks after the tenancy had been terminated..
25. The Regulations were introduced to safeguard deposits paid by Tenants. They were introduced against a background of Landlords abusing their position as the holder of deposit moneys. The parliament decided that it should be compulsory to put the deposit outwith the reach of both the Landlord and the Tenant to ensure that there was a dispute resolution process accessible to both Landlord and Tenant at the end of a tenancy and which placed them on an equal footing. The Regulations make it clear that the orders to be made by Tribunals for failure to comply with the Regulations are a sanction or a penalty
26. In this case, the Respondent was in clear breach of the 2011 Regulations.
27. The tribunal notes that in a recent Upper Tribunal decision, (*Ahmed v Russel* UTS/AP/22/0021 2023UT07) Sheriff Cruickshank indicates (at Para 38) that **“previous cases have referenced various mitigating or aggravating**

factors which may be considered relevant. It would be impossible to ascribe an exhaustive list. Cases are fact specific and must be determined on such relevant factors as may be present". The amount awarded should represent "**a fair and proportionate sanction when all relevant factors have been appropriately balanced**".

28. The sanction to be imposed is intended to mark the gravity of the breach which has occurred. It should reflect the level of overall culpability in each case measured against the nature and extent of the breach of the 2011 Regulations. The tribunal is required to determine a fair and proportionate sanction based on the facts as recorded.
29. Prior to the jurisdiction to determine these applications becoming part of the jurisdiction of the First-tier Tribunal, the applications were determined in the Sheriff Court. There were numerous Sheriff Court decisions which have been reported.
30. In many of these cases, the Sheriff Courts have indicated that the Regulations were introduced to address what was a perceived mischief and that they will be meaningless if not enforced.
31. In a decision by Sheriff Principal Stephen at Edinburgh Sheriff Court in December 2013, the Sheriff Principal indicated that the court was "entitled to impose any penalty including the maximum to promote compliance with Regulations". (***Stuart Russell and Laura Clark v. Samdup Tenzin*** 2014 Hous.L.R. 17)
32. In this case, the Respondent, via his letting agent, was in clear and blatant breach of the 2011 Regulations. The tribunal considered whether it should make an award at the maximum level. The respondent had not attended the CMD. The apparent statement about the date of receipt of the deposit made by the letting agent to the customer service adviser at the deposit scheme appears to be untruthful. It is to be hoped that it was not a deliberate attempt to mislead. The statement is directly contradicted by the evidence of the applicants at the CMD and the bank statements lodged with the application which show payments made by each of the original three joint tenants on 5 May 2022. The tribunal has no hesitation in accepting the evidence that the deposit was paid to the letting agent prior to the commencement of the tenancy. The tribunal does not accept that the deposit funds were only paid to the letting agent on 17 November 2023. Neither the landlord nor the letting

agent have provided an explanation of the failure to lodge the deposit in accordance with the Regulations nor any mitigation of that failure. The deposit was unprotected for the entire period of a tenancy which lasted for just over seventeen months

33. The tribunal accordingly considered that this was a very significant breach of the regulations which required to attract a penalty towards the higher end of the available range.
34. Both the landlord and certainly the letting agent should be well aware of the requirement to lodge deposits in accordance with the 2011 Regulations. The letting agent in particular cannot remotely be said to fall within the category of “amateur” landlord or agent. No mitigation had been offered to the tribunal by the landlord or the agent. Indeed the letting agent in their statement to the deposit scheme about the date of receipt of the deposit seems to be attempting to suggest that they had not failed at all. That suggestion is not accepted by the tribunal.
35. The tribunal considered whether the award should be made at the maximum level available to the tribunal which based on the deposit being £1,300 would have been £3,900. The tribunal took the view that this case involves an egregious failure by a professional letting agent and that, in the absence of any mitigating factors, the award requires to be at a significant level. Having considered the submissions from the applicants and taking into account the guidance from Upper Tribunal cases, the tribunal has decided that the appropriate award should be £3,000, reflecting the very serious failure by the landlord via his letting agent in this case.
36. The tribunal also decided to exercise the power within rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 and determined that a final order should be made at the CMD.

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.

11 March 2024

Legal Member/Chair

Date