

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit
Schemes (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/19/3820

Re: Property at 52 Esplanade, Greenock, PA16 7SD ("the Property")

Parties:

**Mrs Nova Mercan, C/O Raeside Chisholm Solicitors, Tontine House, 8 Gordon
Street, Glasgow, G1 3PL ("the Applicant")**

Mr Robert Fulton, 5 Fife Drive, Greenock, PA16 0PP ("the Respondent")

Tribunal Members:

Andrew Cowan (Legal Member)

Decision (in absence of the Respondent)

Decision

1. The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £2250 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") should be made.

Background

2. This is an application dated 27th November 2019 brought in terms of Rule 102 (Application for order for payment where Landlord has not paid the deposit into an approved scheme) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations



2017 as amended. The application is made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

3. This case called for a Case Management Discussion on 30th January 2020. The Applicant was not present at the hearing, but was represented by Mr Doig, solicitor. The Respondent did not attend and was not represented at the hearing.
4. The Applicant provided with her application copies of the tenancy agreement between the parties and evidence of payment of a tenancy deposit in terms of that agreement
5. The Respondent lodged a written response to the application, by email dated 20th January 2020.

Findings in Fact

6. The following facts were established (and uncontested between the parties)
 - a. The Applicant and the Respondent were parties to a tenancy agreement, being tenant and landlord respectively.
 - b. The tenancy agreement commenced on 13th March 2019.
 - c. The tenancy agreement terminated on 14th September 2019.
 - d. A tenancy deposit of £1500 was paid by the Applicant to the Respondent at that start of the tenancy.
 - e. The Respondent failed to pay the deposit to the administrator of an approved tenancy deposit scheme, and he failed to provide the Tenant with information the information required under regulation 42 of the Regulations.
 - f. The Respondent has not complied with his duties in terms of regulation 3 of the Regulations.
 - g. At the end of the tenancy the Respondent deducted the sum of £410 from the deposit paid by the Applicant. The Respondent claimed the sum deducted was required in respect of various costs incurred by the Respondent as a consequence of the Tenant's liabilities incurred during the term of the Tenancy.

- h. The balance of the tenancy deposit in the sum of £1090 was paid by the Respondent to the Applicant shortly after the end of the tenancy.

Reasons for Decision

7. Regulation 3 of the 2011 Regulations (which came into force on 7 March 2011) provides as follows:

“(1) 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 into the scheme administrator of an approved scheme; and
- (b) Provide the tenant with the information required under regulation 42.”

8. The Respondent as landlord was required to pay the deposit into an approved scheme in order to comply with Regulation 3 of the Regulations. In his written submission to the Tribunal the Respondent accepts that he failed to pay the deposit into an approved scheme. He accordingly admits that he has failed to comply with the requirements of Regulation 3(1)(a). Given that the Respondent states that he was unaware of the requirements of the Regulations until the current application was made, the Tribunal are also satisfied that the Respondent failed to provide to the Tenant prescribed information as required by regulation 3(1)(b)

9. Regulation 10 of the 2011 Regulations provides as follows:

“If satisfied that the landlord did not comply with any duty in regulation 3 of the First-tier Tribunal-

- (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 First-tier Tribunal 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 requires under regulation 42."

10. The Tribunal is satisfied that the Respondent did not comply with his duty under regulation 3, and accordingly it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.
11. In making this decision, regard was taken of the comments of Sheriff Welsh in *Jenson v Fappiano*, 2015 G.W.D 4-89, at paragraph 11. In determining sanction in these cases, the judge is exercising judicial discretion, which he characterised as follows:-
 - "1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement.
 2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.
 3. A decision based on judicial discretion must be fair and just."
12. In the case of *Tenzin v Russell* 2015 Hous. L.R.11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
13. In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the fact that the Respondent has indicated to the Tribunal that he was not aware of the regulations until the application was made by the Tenant. Having been so made aware of the application the Respondent took steps to attempt to offer the Tenant a sum equivalent to one month's rent (being £1250) by way of compensation for his failure. In his written submission the Respondent recognises his failure to comply with the regulations and he apologises for his failure in this respect.

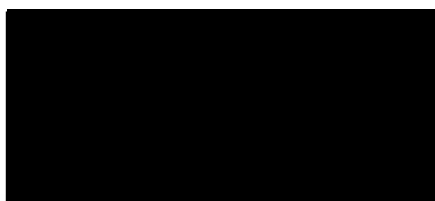
14. The Tribunal note that the Respondent has gone to some lengths to explain why he deducted the sum of £410 from the deposit. The Tribunal do not consider that matter to be relevant to any explanation as to why the deposit was not lodged with an approved scheme.
15. The Tenant has been denied the protection of the deposit in an approved tenancy deposit scheme. The tenant has been denied the opportunity to avail themselves of a deposit scheme adjudication process in relation to the sums deducted by the Respondent from the deposit. The Applicant's deposit was unprotected for the entire period of the tenancy. The terms of the tenancy agreement (which was prepared by the Respondent) make specific reference to the Respondent's duties to lodge the deposit with an approved scheme.
16. The 2011 Regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease.
17. The Tribunal does, however, also accept that the circumstances do provide some mitigation in respect of the sum to be awarded in the exercise of its judicial discretion. In particular the Tribunal accept the Respondent's explanation that he was previously unaware of the Regulations. The Tribunal do not regard the Respondent's actions as a deliberate effort to avoid the requirements of the regulations
18. Balancing all the various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £2250.00 (one and a half times the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

19. For the foregoing reasons, the Tribunal orders the Respondent to make payment to the Applicant of the sum of £2250 in terms of Regulation 10(a) of the 2011 Regulations.

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.



Legal Member/Chair

30 January 2020

Date