



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

Chamber Ref: FTS/HPC/PR/19/3128

Re: Property at 29 Leven Place, Castlepark, Irvine, KA12 9PA (“the Property”)

Parties:

Miss Alanna Forbes, 9 Smith Cres, Kilwinning, KA13 7PG (“the Applicant”)

Mr John Hewitt, 29 Fulwood Avenue, Linwood, PA3 3HH (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

This is an application dated 2nd October 2019 brought in terms of Rule 103 (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”).

The Applicant seeks payment of compensation in respect of an alleged failure by the Respondent to pay the deposit she asserts she provided of £495.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

The Applicant provided with her application copies of the tenancy deposit receipt and information concerning the terms of the tenancy agreement, a full copy of which she does not appear to possess.

The Respondent has been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 27th November 2019, and the Tribunal was provided with the execution of service.

The Case Management Discussion

A Case Management Discussion was held on 8th January 2020 at Russell House, King Street, Ayr. The Applicant appeared, and was not represented. She was accompanied by her father as a supporter. The Respondent appeared, and was represented by his wife, Mrs Adele Hewitt.

Both parties had helpfully e-mailed the Tribunal in advance of the Case Management Discussion setting out their respective positions and explaining the background to this matter. The relevant issues to this application turned out not to be in dispute.

The salient details are that the Respondent had previously employed a letting agent, who had received the deposit payment of £495.00 made by the Applicant on 12th October 2018 at the commencement of the lease.

The Applicant provided a copy of the receipt for that money from the letting agent, KA Lettings. The Respondent had been told by the letting agent that the deposit had been received, and that it had been paid into an approved scheme.

The letting agent subsequently ceased trading, and the current whereabouts of its principal are unknown. The Respondent, who also lets out a number of other properties in respect of which he used the letting agent's services, subsequently discovered that the letting agent's principal had been trading whilst bankrupt, and has spoken with the principal's trustee in bankruptcy, who confirmed that they were unaware of this.

The Respondent has made various other enquiries, and discovered that the letting agent has not been registered as a letting agent, and its principal appears to have absconded with client funds after it ceased trading.

The letting agent did not pay the deposit into an approved scheme as it had stated to the Respondent, and it appears also did not pay any deposits from the other properties the Respondent lets out into a scheme either.

The Respondent has spoken with the police, who are pursuing enquiries in relation to fraud against the letting agent's principal, and the principal is also being sought by others in relation to his bankruptcy.

The Respondent entirely accepted that unfortunately for him, he bears legal responsibility for the failings of his former letting agent. However, he had acted in good faith throughout, understood that the deposit had been lodged and that he had complied with all his legal obligations, and will suffer greatly financially as a result of the fraudulent acts of his former letting agent.

He is very unlikely to be able to recover any of his losses from the letting agent, which has ceased trading, and whose principal is bankrupt and being investigated by the police for fraud.

He is willing and able to repay the Applicant's deposit from his own resources, and indicated that he accepts that he will have to do so in relation to the deposits from his other properties which he lets. He invited the Tribunal to be as lenient as it felt it could be with regard to an award of compensation standing the unusual and unfortunate situation he has found himself in, and which was not of his making nor one he could have anticipated.

The Applicant entirely accepted that the Respondent was the innocent victim of his former letting agent's misbehaviour, and she attributed no blame to him personally in this matter. She principally wished repayment of her deposit, which the Respondent was very willing to do.

Both parties accepted that the Applicant moved out of the Property on 3rd July 2019, and that this application was brought timeously.

Reasons for Decision

This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

Regulation 3 of the 2011 Regulations (which came into force on 7th 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 to the scheme administrator of an approved scheme; and
 - (b) provide the tenant with the information required under regulation 42.”

The Respondent as landlord was required to pay the deposit into an approved scheme. He accepted that his then agent, for whose actions he bore legal responsibility, failed to do so.

Regulation 10 of the 2011 Regulations provides as follows:

- “If satisfied that the landlord did not comply with any duty in regulation 3 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 required under regulation 42.”

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.

In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

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.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the unusual and exceptional background circumstances.

The Respondent is blameless in his conduct, and been subject to this application due to the fraudulent behaviour of his former letting agent, from whom he is extremely unlikely to be able to recover any of his losses. To his great credit, he recognised and accepted at the first opportunity before the Tribunal that he bore legal responsibility for the contravention of Regulation 3 of the 2011 Regulations.

In these exceptional circumstances, the Tribunal considers that the foregoing factors do represent substantial mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

However, balanced against these mitigating factors, are the fact that the Respondent's letting agent received payment of the deposit on 12th October 2018, and that accordingly the period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (approximately fifteen months to today's date).

Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the exceptional circumstances of this application, the Tribunal considers that the restricted sum of £247.50 (half the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

For the foregoing reasons, the Tribunal orders the Respondent in respect of his breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £247.50 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.

N Kinnear

Legal Member/Chair

08/01/20

Date