



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

**Chamber Ref: FTS/HPC/PR/21/0581**

**Re: Property at Flat 2, Invergowrie House, George Pirie Way, Dundee, DD2 1UA (“the Property”)**

**Parties:**

**Ms Cindy Wigginton, Mr Don Mills, 4 St Luke's Rd, Dundee, DD3 0LD; 4 St Lukes Rd, Dundee, DD3 0LD (“the Applicants”)**

**Mrs Carole Arrenberg, Flat 2, Invergowrie House, George Pirie Way, Dundee, DD2 1UA (“the Respondent”)**

**Tribunal Members:**

**Ms H Forbes (Legal Member) and Mrs M Lyden (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted in favour of the Applicants in the sum of £900 and orders the Respondent to lodge the tenancy deposit with an approved tenancy deposit scheme.**

**Background**

1. This is an application received on 14<sup>th</sup> March 2021, made in terms of Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (“the Rules”). The Applicants are seeking an order in terms of Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) in respect of a deposit that was not registered in terms of the Regulations. The Applicants lodged a copy of the tenancy agreement between the parties that commenced on 13<sup>th</sup> February 2020 and ended on 17<sup>th</sup> January 2021, and a copy bank statement showing the payment of the tenancy deposit of £600 on 22<sup>nd</sup> January 2020.
2. Both parties lodged written representations.
3. Case Management Discussions (“CMD”) took place on 7<sup>th</sup> May, 2<sup>nd</sup> and 17<sup>th</sup> June 2021.

4. At the CMD on 17<sup>th</sup> June 2021, in the absence of the Respondent, an order was granted in the sum of £900.
5. Following representations from the Respondent and the Applicants, the Tribunal recalled the decision, issuing a recall decision dated 27<sup>th</sup> July 2021.
6. A CMD took place on 20<sup>th</sup> September 2021 and the matter was continued to a hearing on whether the Property is exempt from the Regulations.
7. Both parties lodged further written representations and productions. The Respondent lodged a video that showed the layout of the Property.

### **The Hearing**

8. A hearing took place by telephone conference on 21<sup>st</sup> October 2021. The Applicants were in attendance. The Respondent was not in attendance and was represented by Mr David Arrenberg.

### **The Applicants' position**

9. The Applicants said that the Respondent entered into a tenancy agreement with them, and the tenancy agreement stated that the deposit would be lodged in a tenancy deposit scheme. This was never done. No evidence had been provided by the Respondent to show that the Property was exempt from the Regulations, despite previous discussions in this regard. The case has caused mental anguish to the Applicants.
10. Responding to questions from the Tribunal, with reference to the video lodged by the Respondent, and the layout plan lodged by the Applicants, the Applicants said there was an unlocked door between the Respondent's living area and the Property. The Respondent had told them at the start of the tenancy that this was to be left open as it may be used as a fire escape for the Applicants if they were unable to exit the Property by the main door. The door was never opened by either party. The Respondent accessed her property through her front door, which was off the mutual hallway. The Applicants kept laundry equipment in the corridor, which prevented the door from being opened. On occasions when the Respondent's family required access to the Property for the purposes of checking electricity, the unlocked door was not used, and access was provided through the front door to the Property, which also came off the mutual hallway. The Property had its own kitchen, bathroom and laundry facilities.
11. Council tax was paid by the Respondent. The Applicants paid £67 per month to the Respondent for their share of the council tax. There was a sub-set of electricity meters in the Property that allowed a calculation to be made as to the amount of electricity used in the Property, with the main meters in the Respondent's living area.

12. The Property was advertised for let on Facebook Market Place as a two bedroom, one bathroom flat. It was not advertised as shared accommodation or a lodger type arrangement.

### **The Respondent's position**

13. Mr Arrenberg referred to the video lodged which showed the layout of the larger subjects, including the Respondent's living area and the Property. He said he had not heard of the unlocked door being referred to as a fire escape. He felt the Applicants were using that as an excuse to show why the door was unlocked.
14. There is only one address for both living areas. It has always been one flat. The Property has been used as a granny flat. It has been rented to friends and family. Prior to the Applicants living there, there was another couple that were also given the same tenancy agreement. Storage heaters within the Property are paid for by the Respondent. Council tax and electricity are paid for by the Respondent, with a calculation made for electricity used in the Property. The sum of £67 refers to the single person occupancy discount that the Respondent has lost as a result of letting out the Property.
15. Mr Arrenberg said he accepted that the tenancy agreement referred to the tenancy deposit scheme. He had taken the model agreement from the internet and used it in an attempt to formalise the situation. He thought it was a good agreement to use.
16. With regard to whether or not the Respondent must register as a landlord, the local authority has been contacted and shown a video of the layout of both living areas. There have been discussions about the layout. There has been no visit by the local authority, due to Covid-19 issues. Based on the video and discussions, the local authority have said that the Respondent is exempt from landlord registration as she is a resident landlord.
17. The garage was shared. There was a closet within the Property that had previously been used by the Respondent, but, on request of the Applicants, she had agreed to it being emptied and the contents stored in the garage. The Applicant, Mr Mills, had asked to use the garage as a workshop and this had been agreed. The garden was shared on an *ad hoc* basis. The Respondent did not have a lock on her front door that led off the shared hallway. There had previously been a curtain there, instead of a door. Mail is delivered through a letterbox at the main door. Mail is sorted by whoever picks it up. It is left in the shared hallway. There is a buzzer for each living area.

### **Response by the Applicants**

18. The Applicants said they were told the closet would be emptied and they would have full use of it. It was not emptied before their tenancy commenced.

They emptied it and stored the contents in the garage. They were never told it was to be a shared closet.

### **Amount of any award to be made**

19. The Tribunal invited parties to make representations on the amount of any award to be made should the Tribunal find that the Regulations were applicable to the Property.

### **The Applicants' position**

20. The Applicants said they relied on the validity of the tenancy agreement and felt they did not have to go looking to see if the Property was exempt from the Regulations. There were no shared facilities. They were not aware the deposit had not been placed in a tenancy deposit scheme until the end of the tenancy. They submitted that the Respondent knew about the Regulations and chose not to lodge the deposit with an approved tenancy deposit scheme. It was their submission that this was deliberate and there was an element of malice. They hoped that any award made would at least reflect the award previously made by the Tribunal of one and a half times the tenancy deposit, but asked that the award be increased,

### **The Respondent's position**

21. Mr Arrenberg said the allegation of malice was outrageous. It was his position that the Tribunal should consider the allegations made in a case calling on the same day, FTS/HPC/CV/21/0846, which dealt with the failure to return the deposit. The evidence lodged in that case indicated that the Respondent had incurred significant losses over and above the tenancy deposit. In such circumstances, the Applicants should not benefit financially, as this would be harsh.

### **Order to lodge the tenancy deposit in an approved tenancy deposit scheme**

22. Both parties were agreed that it would be appropriate for the Tribunal to order that the tenancy deposit be lodged in an approved tenancy deposit scheme to allow adjudication on return of the tenancy deposit.

### **Findings in Fact**

- 23.
- (i) The Property is a self-contained flat within the same building as the flat in which the Respondent lives.
  - (ii) Access to the Property and the Respondent's flat is through a common entrance corridor used by both properties within the larger subjects.
  - (iii) The tenancy agreement is a private residential tenancy agreement in terms of the Private Housing (Tenancies) (Scotland) Act 2016.

- (iv) The tenancy agreement is a relevant tenancy for the purposes of the Regulations.
- (v) Parties entered into a private residential tenancy agreement that commenced on 13<sup>th</sup> February 2020 and ended on 17<sup>th</sup> January 2021.
- (vi) A tenancy deposit of £600 was paid by the Applicants on 22<sup>nd</sup> January 2020.
- (vii) The deposit was not lodged with an approved tenancy deposit scheme and remained unprotected throughout the duration of the tenancy.
- (viii) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

### **Reasons for Decision**

24. Regulation 3(b) provides for exemptions to the requirement to lodge a deposit, as set out within Section 83(6) of the Antisocial Behaviour Etc. (Scotland) Act 2004 (“the 2004 Act”). In terms of Section 83(6)(e) such an exemption is created where *‘the house is the only or main residence of the relevant person’*.
25. Section 101(1) of the 2004 Act defines a house as *‘a building or part of a building occupied or intended to be occupied as a dwelling’*. Section 101(2) states, *‘if two or more dwellings within 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.’*
26. For the purposes of the Regulations, the Tribunal found that the Property was ‘the house’. The Property was not the only or main residence of the Respondent. Both parties occupied individual dwellings within the larger subjects, notwithstanding the existence of the unlocked door, or the fact that the Respondent chose not to have a lock on the door into her flat. Other than the access, the garage and the garden, there were no areas shared in common, and access was not taken through the Property to reach the Respondent’s property, or vice versa.
27. The Tribunal took into account the unchallenged evidence that the Property was advertised as a separate dwelling. The Tribunal considered the fact that the local authority had deemed the Respondent as a resident landlord for the purposes of landlord registration, however, the Tribunal took into account that the decision appeared to have been made without viewing the larger subjects. The Tribunal considered that the local authority may have made a different decision had it viewed the larger subjects and discussed matters with the Applicants. In any event, the Tribunal was entitled to come to its own decision regarding whether or not the Regulations apply.

28. The Applicants' deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy as required by Regulation 3. The deposit remained unprotected throughout the duration of the tenancy, which was a little short of one year. The Applicants were denied the opportunity for adjudication in respect of return of the deposit at the end of the tenancy.
29. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised in the manner set out in the case *Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015)* by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal must consider the facts of each case appropriately.
30. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020 which states: '*Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals.*'
31. The Tribunal considered this to be a serious matter, with the deposit unprotected throughout the duration of the tenancy; however, the Tribunal did not consider it to be a case at the most serious end of the scale, attracting an award of the full penalty of three times the tenancy deposit.
32. The Tribunal could not take into account the representations that the Respondent had suffered financially as a result of the Applicants' behaviour.
33. The Tribunal felt there had been a failure by the Respondent to recognise her responsibilities as a landlord, particularly given that she was not a new landlord and was aware of the Regulations, as set out in clause 11 of the tenancy agreement. The Tribunal did not believe there was any malice intended on the part of the Respondent.
34. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £900 to the Applicants, which is one and a half times the tenancy deposit.

## **Decision**

35. An order for payment is granted in favour of the Applicants in the sum of £900. The Respondent is ordered to lodge the tenancy deposit with an approved tenancy deposit scheme.

## **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.**

**Helen Forbes**

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**Legal Member/Chair**

**21<sup>st</sup> October 2021**  
**Date**