

**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/22/3984

Re: Property at 50 Beatty Avenue, Raploch, Stirling, FK8 1PX (“the Property”)

Parties:

Mr David Muir, Mr Cristian Medina Main, Ms Jenny Robinson, Ms Amber Robinson, 125 Lomondside Avenue, Clarkston, Glasgow, G76 7UH; 60 Hogganfield Street, Glasgow, G33 1DE; Flat 3/1 330 St Georges Road, Glasgow, G3 6JR; 69 Hogganfield Street, Glasgow, G33 1DE (“the Applicants”)

ACF Properties Ltd, Mr Andy Forbes, 5 Commercial Centre, Stirling Enterprise Park, Stirling, FK7 7BF (“the Respondents”)

Tribunal Members:

Valerie Bremner (Legal Member) and John Blackwood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent should pay to the Applicants Mr Cristian Main and Ms Amber Robinson the sum of £1900 having found that the Respondent has breached the duties set out in Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in relation to a tenancy at the property between 18th November 2021 and 10th August 2022, and dismissed the application as it relates to Mr David Muir and Ms Jenny Robinson in terms of Rule 27 of the Tribunal rules of procedure as their application is made in breach of Regulation 9(2) of the 2011 Regulations and cannot be considered by the Tribunal

Background

1. This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland)) Regulations 2011 and Rule 103 of the Tribunal Rules of procedure in

respect of an alleged failure to comply with the duties required of a landlord under Regulation 3 of the 2011 Regulations.

2.The application was first lodged with the Tribunal on 27th October 2022 and accepted by the Tribunal on 7th November 2022.A case management discussion was initially fixed for 24th February 2023 at 10am.

The Case Management Discussions

3.At the case management discussion on 24th February 2023 all the Applicants attended but there was no appearance by the Respondents, but the Respondent Mr Andy Forbes had made representations on behalf of the Respondents and the application and papers had been served on the Respondents, and the Tribunal was able to proceed in their absence.

4.The Tribunal had sight of the application, a tenancy agreement which had commenced on 1st August 2019,a bank statement showing payment of a deposit to agents acting for the landlord, text messages, and further submissions from the Applicants dated 17th February 2023, together with a number of texts and emails from the approved tenancy deposit scheme providers together with representations from the Respondent Mr Forbes which included images taken from a video showing parts of the property and garden. At a later case management discussion, the Applicants lodged the most recent tenancy agreement between the Respondents and the Applicant Mr Cristian Main, the Applicant Ms Amber Robinson and a third party who was not party to this application.

5.During the initial case management discussion it became apparent that a tenancy entered into by all 4 Applicants had ended in February 2020 when the Applicant Mr David Muir left the property. A new tenancy agreement had been entered into by the remaining three Applicants and this had ended when Ms Jenny Robinson had left the property in November 2021.The remaining two Applicants Mr Christian Main and Ms Amber Robinson had entered into a further tenancy at the property with a third party with effect from 18th November 2021 and this had ended on 10th August 2022.The Applicants' position was that the deposit paid by all four of them had remained as the deposit for the subsequent tenancies and the third party, a tenant in the most recent tenancy, had not paid a deposit. The Tribunal Legal Member explained that this might affect whether the application could be considered as regards all of the Applicants given that two of them had been tenants in tenancy agreements which appeared to have ended more than 3 months before the application had been submitted. Regulation 9 of the Regulations required that an application for sanction of a landlord required the application to be made no later than 3 months of the end of the tenancy.

6.The Case management discussion on 24th February 2023 was adjourned to allow the Applicants to provide further information in the form of the two tenancy agreements entered into after Mr Muir left the tenancy and to take advice on their position.

7.An application for a payment order with reference HPC/CV/22/3983 was also lodged with the Tribunal seeking the return of the deposit paid by the Applicants and this

called on 24th February 2023 but was later withdrawn when the deposit was repaid In March 2023 subject to an agreed deduction for carpet cleaning.

8.A second case management discussion took place on 14th April 2023, and this was attended by the 2nd, 3rd and 4th Respondents and the Respondent Mr Forbes. Those Applicants attending were able to deal with the matter on behalf of the First Applicant. During this discussion the final tenancy agreement was provided showing the tenancy agreement entered into by the Applicants Cristian Main, Amber Robinson and a third party between 18th November 2021 and 10th August 2022.

9.The Respondent Mr Forbes indicated at this stage that he had understood that the Tribunal was dealing only with the return of the tenancy deposit, and he requested an adjournment as he had not understood that he could be sanctioned as a landlord for failing to comply with duties and wanted to seek legal advice. After discussion the Tribunal allowed the case management discussion to be continued for Mr Forbes to seek legal advice.

10.A case management discussion was fixed for 9th June 2023 at 1130am.All of the Applicants attended, and the Respondent Mr Forbes also attended. He confirmed that he had been able to source legal advice on his position and could represent the position of the Respondents.

11.The Applicants had entered into a private residential tenancy at the property with the first Respondent as landlord, the second Respondent company being the owner and registered landlord of the property. This company is essentially Mr Forbes' company. This tenancy had commenced on 1st August 2019 but ended in February 2020 when the Applicant Mr Muir moved out and by agreement a new tenancy with the three remaining Applicants had commenced. This tenancy came to an end in November 2021 when the Applicant Jenny Robinson moved out and again by agreement a new tenancy was created with the Applicants Cristian Main, Jenny Robinson and a third party and this tenancy ended on 19th August 2022.The Applicants explained that the original deposit paid by the four of them had been left across the tenancies by agreement between them and those Applicants who had left by agreement had not asked for their share of the deposit back when they left but had agreed with the remaining Applicants who had entered into further tenancy agreements that the deposit would be split when their tenancy had ended. The third party who entered in a tenancy with the Applicant Mr Main and Ms Amber Robinson had not paid a share of the deposit and so no deposit share had been refunded to Mr Muir or Ms Jenny Robinson during the period of the three tenancies.

12.Mr Forbes explained that the payment of the deposit and issues around this were dealt with on the Respondents' behalf by Letting Agents. It was not disputed that a deposit of £695 had been paid and he did not dispute that this deposit had been held across the three tenancies discussed in the application and that this was the deposit referred to in the most recent tenancy agreement.

13.The Applicants Mr Main and Ms Amber Robinson indicated that at the end of the tenancy in August 2022 messages were sent by Ms Amber Robinson to the individual dealing with the tenancy on behalf of the Second Respondent to secure the return of their deposit and to find out where it was being held. They had never received any

information as to where it was held or any information about it at all. They had checked with the approved deposit schemes. They had lodged text messages showing contact regarding their move out date and the deposit. The Applicants indicated that they had not seen the invoice for carpet cleaning which the Respondents sought to deduct from the Deposit until they had raised an application for the return of the deposit. The Respondent Mr Forbes indicated that he had always been willing to return the deposit minus the cost of carpet cleaning and that this had been explained in the text messages, but he had been unable to secure bank details from the Applicants in order to do this.

14.The Tribunal invited the parties to make any representations on the issue of whether the Tribunal could deal with the Application as it related to Mr Muir and Ms Jenny Robinson given that their tenancies had ended in 2020 and 2021 and the application had not been lodged by the Applicants until October 2022.Mr Muir indicated that this was a matter for the Tribunal to consider and Ms Jenny Robinson indicated that they were not aware of the law but would accept that the application by them was too late the Tribunal felt that their hands were tied on the law. For the Respondents Mr Forbes objected to Mr Muir and Ms Jenny Robinson making an application if they were not entitled to do so legally.

15.The Tribunal considered the terms of Regulation 9 of the 2011 Regulations as amended by the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017/329 which states:-

9.—(1) A tenant who has paid a tenancy deposit may apply to the [First Tier Tribunal] for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made [...] must be made no later than 3 months after the tenancy has ended.

16.There was no dispute between parties in this application that the tenancies involving Mr Muir and Ms Jenny Robinson had ended in February 2020 and November 2021 respectively and they had left their deposit share to be used by the remaining Applicants for a tenancy in which they were not involved. The Tribunal considered that the application could not be considered as far as it related to them as Applicants as they had applied for sanction too late after the end of the tenancies in which they had been involved and well outwith the timescale set down in Regulation 9 of the 2011 Regulations. The Tribunal dismissed the application as it related to them in terms of Rule 27 of the Tribunal rules of procedure.

17.The Tribunal Legal member explained that the Tribunal was now only dealing only with the most recent tenancy which had commenced on 18th November 2021 and the Application as it related to Mr Main and Ms Amber Robinson.

18.The Tribunal then dealt with the question of the duties in terms of the 2011 regulations. Mr Forbes on behalf of the Respondents accepted that the deposit which had been paid and considered to be paid for the tenancy of the remaining Applicants had not been protected in an approved deposit scheme and the information required to be given in terms of Regulation 3 and 42 of the 2011 Regulations as to the deposit, when it was received, when it had been protected and in which scheme it was held and the circumstances in which it could be retained had not been given to the remaining Applicants Mr Main and Ms Amber Robinson.

19.The Applicants were invited to make any submissions as to the amount of any sanction to be imposed by the Tribunal, a breach of the Regulations having been accepted on behalf of the Respondents. Mr Main expressed concern that in discussions regarding the return of the deposit Mr Forbes had been intimidating to them indicating that they could have the deposit back with a deduction or not at all. No other submissions were made for the Applicants as to sanction.

20.Mr Forbes for the Respondents indicated that the Applicants had been very reasonable tenants and the property had been in an almost brand-new condition when let out but when the tenancy ended the garden was overgrown and the property was in a poor condition. He had always been willing to return the deposit subject to a deduction for cleaning the carpet. He felt that he had been reasonable in his approach and was disappointed at the way matters had turned out. He stressed that the deposit had been returned minus the deduction for the carpet cleaning. He said that the matter of the deposit not being protected had been brought to his attention when the Applicants raised it and he had tried to repay the deposit several times. He said that the Respondent company had one or two properties of which he was landlord and he had discovered when this issue was raised that deposits in those tenancies were not protected and had ensured those deposits were then protected. He said that the failure was not deliberate, and he apologised for the oversight. He said that this would not happen again, and this had been a mistake. He denied trying to intimidate the Applicants regarding the deposit.

21.As the facts surrounding the duties on a landlord were not in dispute and the breach of the Regulations was accepted the Tribunal was satisfied that it had sufficient information upon which to make a decision and that the proceedings had been fair.

Findings in Fact and Law

22.The four Applicants entered into a tenancy agreement at the property with the Second Respondent as landlord on 1st August 2019.

23.The First Respondent company is the owner of the property and the registered landlord. The second Respondent Mr Forbes is essentially the owner of this company.

24.This tenancy ended in February 2020 when Applicant David Muir left the property and by agreement the remaining three Applicants entered into a new tenancy at the property with the First Respondent named as landlord in the agreement.

25.In November 2021 Ms Jenny Robinson left the property and by agreement the remaining Applicants Cristian Main and Amber Robinson entered into a new tenancy

agreement with a third party at the property with the Second Respondent as the landlord in the agreement and the First Respondent being the registered landlord.

26.This tenancy agreement ended on 10th August 2022.

27.The four Applicants in this application paid a deposit of £695 in total before the start of the first tenancy which ended in February 2020.

28.By agreement between the four Applicants this deposit of £695 was left to be the deposit for the subsequent tenancies and was to be split between them after the tenancy of Mr Main and Ms Amber Robinson ended.

29.No other deposits were paid by any party to the tenancy agreement which started on 18th November 2021 and ended on 10th August 2022.

30.The Applicants David Muir and Jenny Robinson have applied to the Tribunal for sanction on the landlord when they ceased to be tenants at the property in February 2020 and November 2021 respectively and the application to the Tribunal was first made on 27th October 2022.

31.The application by David Muir and Jenny Robinson for sanction on a landlord was made outwith three months of the end of their tenancies at the property and is therefore in breach of Regulation 9(2) of the Tenancy Deposit Schemes (Scotland) Regulations 2011

32.The deposit of £695 paid by all four Applicants was the deposit paid in relation to the tenancy agreement entered into by the Applicants Cristian Main and Amber Robinson at the property and dated 18th November 2021.

33.All the tenancies referred to in this application are relevant tenancies within the meaning of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

34.The Applicant Amber Robinson sent text messages to the person dealing with the tenancy on behalf of the second Respondent regarding the deposit asking where this deposit was protected.

35.In the discussion in these text messages it was indicated on behalf of the Respondents that the deposit could be returned less the amount of a carpet cleaning fee.

36. The deposit paid by all four Applicants was returned to them in March 2023 by the Second Respondent less an agreed deduction after they submitted an application for payment to the tribunal.

37.The deposit paid by the Applicants was not secured by on behalf of the Respondents in any of the approved tenancy deposit schemes at any time during the tenancy of Cristian Main and Amber Robinson at the property between 18th November 2021 and 10th August 2022.

38. The information required to be given to the Applicants by the Respondents in terms of Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 was not given to them by on behalf of the Respondents at any time during the tenancy of Cristian Main and Amber Robinson at the property between 18th November 2021 and 10th August 2022.

39. The requirement to protect the deposit in an approved scheme and to comply with the obligation to provide required information in terms of regulations 3 and 42 of the

2011 Regulations should have been complied with in respect of this tenancy within 30 working days of 18th November 2021.

40. The first Respondent company owns a few rented properties of which the second Respondent is landlord and when the failure to protect the deposit in relation to this property came to light the second Respondent checked the other rented properties and paid deposits held for these properties into an approved scheme at that time.

Reasons for Decision

41. The tribunal having found that there was a breach of the Regulations, it then fell to the tribunal to consider what sanction should be made in respect of the failure to protect the deposit and give the information required in terms of Regulations 3 and 42 of the 2011 Regulations within the required timeframe. The tribunal had regard to the case of ***Russell Smith and others against Uchegbu [2016] SC Edinburgh 64***. In particular the tribunal required to consider what was a fair proportionate and just sanction in the circumstances of the case always having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend on its own facts and in the end of the day the exercise by the tribunal of its judicial discretion is a balancing exercise.

42. The tribunal considered all of the information before it and found there were a number of factors to be weighed in the balance in this application. The first was that the deposit had been unprotected for the entire period of the tenancy under consideration, a period of almost 9 months. The tribunal had sight of text messages between one of the Applicants in this final tenancy with the second Respondent Mr Forbes on the question of the deposit and where it was protected. Although the second Respondent did ask for bank details in order to return the deposit in the context of these text messages, communication appeared to cease when one of the Applicants asked to know of the whereabouts of the deposit. Although Mr Forbes the second Respondent explained that he had always been prepared to return the deposit minus the deduction for carpet cleaning, it appeared to the tribunal that the whole dispute and delay in relation to return of the deposit was unnecessary and had the deposit been protected as it should have been, then the Applicants could have had recourse to the alternative dispute resolution mechanisms available in the approved tenancy deposit schemes. Instead, communication had broken down and the Applicants had required to raise an application to the First Tier Tribunal in order to secure return of the deposit. The failure to protect the deposit appeared to have completely frustrated the ability of the Applicants to have the matter of the deposit resolved quickly by an independent process. The tribunal also considered the Second Respondent's apology for what was described as an oversight and noted that when this failing had been brought to the Respondents' attention the position regarding other rented properties had been checked and deposits immediately protected at that time. Nevertheless, the tribunal took the view that this was a breach requiring sanction at the higher end of the range of possible sanctions given the circumstances, in particular the fact that the deposit was unprotected for the entire tenancy and the fact that the Applicants could not have recourse to a tenancy deposit scheme dispute resolution service, designed to deal with deposit disputes of this nature. The maximum sanction which could be

imposed in this application is £2085 and in all of the circumstances the Tribunal considered that a sanction of £1900 was appropriate.

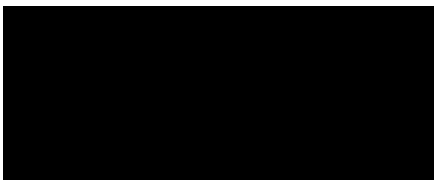
43.The Tribunal dismissed the application as regards the Applicants David Muir and Jenny Robinson and noted that they had ended their tenancies well before the application was made and outwith the timeframe set out in the Regulations for making an application and their application was effectively “time barred” in the circumstances.

Decision

The Tribunal determined that the Respondents should pay to the Applicants Cristian Main and Amber Robinson the sum of £1900 having found that the Respondents have breached the duties set out in Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in respect of the tenancy at the property between 18th November 2021 and 10th August 2022 and dismissed the application as it relates to Mr David Muir and Ms Jenny Robinson in terms of rule 27 of the Tribunal rules of procedure as their application is made in breach of Regulation 9(2) of the 2011 Regulations and cannot be considered by the Tribunal.

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

9.6.23
Date