



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/19/3815

Re: Property at 79 Park Road, Hamilton, ML3 6PD (“the Property”)

Parties:

Ms Alison Miller, 79 Park Road, Hamilton, ML3 6PD (“the Applicant”)

Mr Andrew Frame, 2 Windyridge, Hamilton, ML3 7PS (“the Respondent”)

Tribunal Members:

Graham Harding (Legal Member) and Janine Green (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant was entitled to an order for payment by the Respondent in the sum of £675.00.

Background

1. By application dated 25 November 2019 the Applicant’s representatives, Lay Representation Project, Hamilton C.A.B., Caird Street, Hamilton applied to the Tribunal for an order under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicant’s representative submitted a copy of the Tenancy agreement, the deposit Protection Certificate, Entry from the Landlord’s register, Letter to Landlord’s Agent and letter to Tenant’s agent in support of the application.
2. By Notice of Acceptance dated 9 December 2019 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion was assigned.
3. A Case Management discussion assigned for 27 January 2020 was adjourned due to case papers not being served on the Respondent.

4. A Further Case Management Discussion was assigned to take place on 2 March 2020 following which a hearing was assigned to take place on 7 April 2020. This hearing was adjourned due to the Covid-19 outbreak and a further hearing assigned to take place on 29 July 2020.
5. Due to a misunderstanding by both parties' representatives the hearing on 29 July was converted to a Case Management Discussion and a further hearing assigned to take place on 27 August 2020. The Respondent's representative was directed to lodge written representations not later than 12 August 2020. Written submissions were not submitted until 25 August 2020.

The Hearing

6. A Hearing was held by teleconference on 27 August 2020. The parties were in attendance. The Applicant was represented by Mr Bruce Clayson and the Respondent was represented by Mr James Moore.
7. By way of preliminary matters, the Tribunal queried with Mr Moore why the written representations had not been submitted timeously. Mr Moore explained he had suffered from a severe bout of food poisoning that had lasted two weeks and had only returned to work on Monday 24 August and had submitted the documents on 25 August. Mr Clayson for his part confirmed he had an opportunity to review the submissions and there had been nothing that he had not been aware of from the earlier Case Management Discussion. Mr Clayson confirmed he was content to proceed with the hearing. That being the case the Tribunal determined to proceed.
8. The Tribunal also noted that the Respondent was in the same room as Mr Moore and queried whether it would be possible for him to give his evidence from a separate room. Mr Moore advised the Tribunal that this would not be possible but gave an undertaking not to attempt to influence the Respondent's answers to any questions that may be put to him by the Tribunal or the parties' representatives.

The Applicant's Evidence

9. The Applicant confirmed her name and address and that she was a student. She said that the tenancy commenced on 13 November 2012. She said she could not recall the name of the person who dealt with the tenancy but that it was a lady from a letting agency. She confirmed that the rent was as stated in the tenancy agreement and was £450.00 per month.
10. When asked if she had paid a deposit the Respondent said she had paid a deposit of £450.00 and that at the commencement of the tenancy she had paid the letting agent £900.00. She said this had been paid in cash taken from her bank account and from other places. She said she was certain she had paid this amount as she would not have been given the keys if she had not paid the full amount.

11. In response to a question regarding a period when rent was not paid the Applicant said that the rent had been brought up to date after the boiler at the property had been serviced. She said previously it had not been serviced for five years. Once it was, she paid up and had continued to pay the rent on time.
12. The Applicant was referred to the Respondent's written statement and asked if the first time she had become aware of the deposit not being in an approved scheme had been when she received the Deposit Protection Certificate. The Applicant said this was not the case as when she had been given a Notice to Quit by Sheriff Officers she had looked into where the deposit was and had found out it was not in any of the three schemes. She said that after she had started to withhold rent the Respondent had contacted her and had shouted at her and at that point, she had asked him where her deposit was. The applicant said that the Respondent had said "that was nothing to do with you". The Applicant said that following that telephone conversation she had contacted her representative as she had been upset.
13. Mr Moore queried how much the Applicant had taken out of her bank and the Applicant said she had taken £200.00 which was the amount needed to make up the amount required with the cash she already had. Her son had given her cash for a food mixer that he had sold for her. She said she had previously paid £200.00 to secure the property and paid the rest of the money when she collected the keys. In reply to a question from Mr Moore the Applicant confirmed she had paid the money in either two or three payments. She could not recall if the first payment was £100.00 or £200.00. She could not recall exactly when she had withdrawn the £200.00 from her bank account and did not have the bank statement but it had all happened within the space of a week and she had collected the keys on 13 September 2012 which she thought was a Tuesday. The Applicant recalled she had paid the £200.00 to secure the property the previous week. The Applicant confirmed she had been given receipts for the money but she no longer had them. She explained she had mental health problems for five years and the receipts could be anywhere. She recalled signing the lease and picking up the keys and handing over the money all at the same time. She could not recall exactly how much money she handed over as it was almost eight years ago.
14. When asked if she was not sure how much she paid when she got the keys how could she be sure she paid a total of £900.00 the Applicant said that she had not known anyone at the letting agency and had not been given any preferential treatment. The letting agency would not have given her the keys if she had not paid the right amount of money. The Applicant again confirmed that all the money had been paid to the letting agent in cash. She confirmed she had been given receipts and a copy of the lease which she had mislaid and had obtained a copy from the council. She could not remember the name of the person to whom she had paid the money.
15. In reply to a question about the servicing of the boiler the Applicant confirmed the boiler had not been serviced for five years and should have been serviced annually. She explained the boiler had been installed through a government

scheme that she had applied for and the Respondent had approved. The Applicant said she had not done anything about the failure to service the boiler for five years because of her mental health issues as she had a mental breakdown. She said it was not a coincidence that she had stopped paying rent at the same time as repossession proceedings had been commenced but that there had been three reasons for stopping paying namely the boiler, the deposit and she didn't know if the Respondent was paying the mortgage on the property as she kept receiving people at the door telling her she was being evicted. The Applicant went on to say that it had taken over a year for her bathroom to be fixed. She had been very ill at the time. Confrontation was horrid and so she was reluctant to go to her landlord about the servicing of the boiler. It was not something she could do when she was ill.

16. The Applicant confirmed that it was sometime after Sheriff Officers had served a Notice to Quit that she had stopped paying rent. She confirmed that she had contacted Letting Protection Services, Safe Deposits Scotland and My Deposits to enquire if her deposit had been lodged. She had contacted them by telephone. Two of them had responded in writing and one did not.
17. In response to further questions from Mr Clayson the Applicant confirmed she had retained the rent payments in a separate account with a credit union and a copy of the account had been sent to the Respondent's representative. The Applicant also confirmed that whilst she could not recall the exact split of the payments made the total amount came to £900.00.

The Respondent's Evidence

18. Mr Moore confirmed he was content to rely on the written submissions submitted on behalf of the Respondent as the Respondent's evidence and for the Tribunal to ask some questions of the Respondent subject to Mr Clayson and Mr Moore being given a further opportunity to ask further questions if they wished.
19. In response to a question from the legal member the Respondent confirmed he was not an experienced landlord and did not rent out any other properties. He confirmed on deciding to become a landlord he had registered as a landlord but had not really looked into any other legalities as to what was expected of a landlord. He said he had taken the lead from the letting agents he had instructed.
20. The Respondent confirmed he had received the tenancy agreement from the letting agents a few months after the commencement of the tenancy. He said that he probably had read it at the time. When asked if he had been familiar with the Tenancy Deposit Scheme Regulations when he became a Landlord the Respondent said that he had not because he was not an experienced landlord and was taking a lead from the letting agent at the time. He said that the letting agent did not provide him with any information about the Tenancy Deposit Scheme and that he had relied upon the letting agent and had believed everything was being done correctly.

21. The Legal member pointed out that the tenancy agreement made no mention of the deposit being lodged in an approved scheme and queried if there was not a need for a landlord to be familiar with the legislation. The Respondent agreed there was but that he felt taking advice from a letting agent was adequate and that the agents had done everything and he had relied on their advice.
22. The legal member asked if on receiving the tenancy agreement the Respondent had enquired of the letting agent where the deposit was. The Respondent said that he had not as once the Applicant was in the property; he just collected the rent and he had no idea about the deposit.
23. The Respondent confirmed that once the Applicant had stopped paying rent, he had contacted Mr Moore who had made him aware of the issues regarding the deposit. The Respondent denied ever being aggressive to the Applicant on the phone. He said that the Applicant had contacted him by text asking about the deposit and he had told her to contact the letting agent.
24. The ordinary member queried why the Respondent had chosen the particular letting agent and the Respondent said it was because they were local. He said he had used their services at the beginning only and had expected the Applicant to go back to the letting agent to get her deposit back.

Submissions for the Applicant

25. Mr Clayson asked the Tribunal to accept the Applicant's evidence that she had paid £900.00 at the commencement of the tenancy of which 50% was the deposit.
26. Mr Clayson went on to say that it was not disputed that the deposit should have been put into a scheme within 30 days and that it was not disputed that it was not and that it was unprotected for eight plus years.
27. Mr Clayson referred the Tribunal to a previous decision **FTS/HPC/PR/18/2189** in which it had been argued that the landlord had relied upon the actings of the letting agent. The legal member in that case had said "the responsibility to pay the deposit into an Approved Scheme lies on the landlord and the obligations cannot be passed to another party, in this case CMC Property. Put simply the Landlords cannot subcontract their obligations in this regard to another party. Accordingly, and whilst not doubting that the Respondents have acted in good faith throughout this matter, they remain responsible for the fact that the deposit was not paid into an Approved Scheme." Mr Clayson went on to suggest that the Respondent had been cavalier in his attitude to his legal obligations. He said that whilst the Tribunal should recognise the guidance of the Upper Tribunal in respect of professional landlords that given the Respondent's occupation as a mortgage advisor he should be more aware of statutory duties incumbent on people than others and although this was not the worst example and making an allowance for the fact that he only has one property the Tribunal

should make an award not exceeding twice the amount of the deposit as he had not carried out the duties of a landlord as he should have done.

Submissions for the Respondent

28. Mr Moore submitted that the Applicant's evidence that she had paid a deposit was dubious. There was no written confirmation of payment. The lease said the deposit needed to be paid but that was not evidence of it actually being paid. The Applicant had to prove it was paid and Mr Moore did not believe she had. The large sum was paid in cash and differing amounts were said to have been paid without receipts being lodged. Mr Moore asked the Tribunal to accept the Respondent's evidence that he never received any sums from the letting agent either by way of rent or deposit.
29. With regards to quantum, Mr Moore referred the Tribunal to the recent case of **Young and Ortiz-Echeverria v Industrial and Commercial Advances (1972) Limited FTS/HPC/PR/20/0651** in which reference is made to an Upper Tribunal decision that the First-tier Tribunal should differentiate between professional landlords and individuals with one property and he suggested this was an important factor to take into account. Mr Moore also asked the Tribunal to take into account the fact that the Respondent had paid the deposit into an Approved Scheme from his own funds at a time when he was under severe financial pressure. The deposit was now protected. Mr Moore also suggested that it was no coincidence that the Applicant had stopped paying rent shortly after a repossession notice had been served. At the time the Respondent paid funds into the deposit scheme no rent had been paid for ten months. The Respondent was not a professional landlord he had become a landlord following the resolution of his matrimonial difficulties rather than selling the property he had been living in. Mr Moore disputed that being a mortgage advisor should mean the Respondent understand letting regulations rather he had relied on professional advice and had been genuinely unaware of the issue and had rectified it as soon as he found out.

Findings in Fact and Law

30. The parties entered into a Short Assured Tenancy Agreement that commenced on 13 November 2012 and continued until 12 May 2013 and thereafter by tacit relocation.
31. The Respondent employed the services of Life In Limited to find a tenant for the property.
32. The Applicant paid a total of £900.00 to Life In Limited in respect of the first month's rent of £450.00 and a deposit of £450.00 by 13 November 2012.
33. Life In Limited was dissolved as a company on 26 July 2016.
34. The Applicants deposit was not lodged in an approved Tenancy Deposit Scheme within 30 working days in accordance with Regulation 3 of the 2011 Regulations.

35. The Respondent paid £450.00 into Safe Deposits Scotland on 13 September 2019.
36. The Applicant's deposit was unprotected from 13 November 2012 until 13 September 2019.
37. The Respondent was unaware of his responsibilities as a landlord to protect a tenant's deposit until advised by his legal representative shortly before funds were lodged with Safe Deposits Scotland.
38. The Respondent does not have any other let properties.

Reasons for Decision

39. The Tribunal was satisfied from the evidence of the Applicant and in the balance of probabilities that she did pay a deposit of £450.00 to the letting agents instructed by the Respondent at the commencement of the tenancy. Although the Applicant could not recall exactly how much she had paid when she was adamant that she had paid a total of £900.00 between an initial payment to secure the property and signing the lease and collecting the keys on 13 November 2012. The Tribunal found the Applicant to be a credible witness. The Tribunal was satisfied that a professional letting agent would not allow a tenant to occupy the property if the tenancy agreement clearly stated that a deposit was due unless it had been paid or unless the landlord had agreed to waive such payment. There was no evidence to suggest that this was the case and therefore on balance the Tribunal was satisfied the Applicant had paid the deposit as she claimed.
40. The Tribunal accepted that the Letting Agent had not paid the deposit to the Respondent but although he had been a new landlord there had been an obligation on him to adopt a professional approach, irrespective of his occupation and to familiarise himself with the legislation not only in respect of Tenancy Deposits but also any other relevant legislation affecting landlords such as ensuring that a property meets the repairing standard, has the proper smoke and heat detectors and gas safety certificates. The Tribunal was concerned that the Respondent seemed to rely totally on the letting agent when in reality it appeared the contract in that regard was simply to find a tenant and set up the tenancy agreement.
41. The Tribunal noted that the Respondent confirmed that he had read the tenancy agreement after it had been sent to him but had not raised the issue of the deposit with the letting agent at that time.
42. The Tribunal was satisfied that the Applicant's deposit was not lodged within the time period prescribed in Regulation 3 of the 2011 Regulations and indeed was unprotected for almost seven years and during that time the Respondent was in some financial difficulty that could have seen the property being

repossessed by his lenders. The deposit was therefore at some risk for a considerable period.

43. In reaching its decision the Tribunal must exercise its discretion in a fair and proportionate way, taking account of all of the factors before it. The Tribunal in arriving at its decision acknowledged that the deposit was now protected and that the Respondent was not a professional landlord and only had one property that he rented out. The Tribunal was therefore prepared to accept that a sanction at the upper end of the scale would be inappropriate in this case. On the other hand, the Tribunal was concerned that the Applicant's deposit had been unprotected for a very long period and at least during some of that time the Respondent was experiencing some financial difficulties that could have impacted adversely on the Applicant. The Tribunal felt that the Respondent had relied too heavily on his letting agent when in reality all that the letting agent had been contracted to do was find a tenant. The Tribunal considered that the Respondent ought to have made himself more aware of the Tenancy Deposit legislation particularly as it had recently come into force at the time he was registering as a landlord.

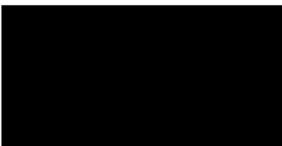
44. Taking everything into account including that it appeared that the Respondent had not received the deposit from the letting agents and that company was now dissolved and he had therefore used his own funds to lodge a deposit with Safe Deposits Scotland the Tribunal was satisfied that an award of one and a half times the deposit was an appropriate sanction and found the Applicant entitled to a payment by the Respondent of £675.00.

Decision

45. The Tribunal having carefully considered the documentary and oral evidence and submissions on behalf of the parties finds the Applicant entitled to an order for payment by the Respondent in the sum of £675.00.

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.



Graham Harding
Legal Member/Chair

27 August 2020
Date

