



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/21/0592

Re: Property at 13 Smithstone Court, Girdle Toll, Irvine, KA11 1QB (“the Property”)

Parties:

Mr Alastair Wilson, 13 Smithstone Court, Girdle Toll, Irvine, KA11 1QB (“the Applicant”)

Pauline Murray Hendry, Mr Martyn Hendry, 8 Archers Avenue, Irvine, KA11 2GB (“the Respondents”)

Tribunal Members:

Sarah O'Neill (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined that the respondents failed to comply with their duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“ the 2011 regulations”). The tribunal therefore makes an order requiring the respondents to pay to the applicant the sum of £950.

Background

1. By application received on 16 March 2021, the applicant submitted an application under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. In terms of his application, the applicant was seeking an order for payment for the sum of £1425 in respect of the respondents’ alleged failure to lodge the deposit paid to the respondents within 30 working days of the beginning of the tenancy as required by regulation 3 of the 2011 regulations.
2. Attached to the application form were:

- i. copy tenancy agreement between the respondents and the applicant and his former co-tenant, Ms Kirsteen Leckenby commencing on 27 July 2012.
 - ii. copy tenancy agreement between the respondents and the applicant commencing on 1 July 2013.
 - iii. copy letter from SafeDeposits Scotland to the applicant dated 7 May 2020 stating that his tenancy deposit was protected by the scheme from 6 May 2020, that the scheme's records indicated that the applicant's tenancy start date was 27 July 2012, and that this suggested that his deposit was protected outside the required 30 working day period.
3. The application was accepted on 7 May 2021. Notice of the case management discussion (CMD) scheduled for 16 June 2021, together with the application papers and guidance notes, were served on both respondents by sheriff officers on behalf of the tribunal on 17 May 2021. The respondents were invited to make written representations in relation to the application by 4 June 2021. No written representations were received from the respondents prior to the CMD.

The case management discussion

4. A CMD was held by remote teleconference call on 16 June 2021. The applicant was present on the teleconference call and represented himself. Mr Martyn Hendry, one of the respondents, was present on the call and represented both respondents.
5. The applicant confirmed that he sought an order for £1425, being three times the amount of his £475 tenancy deposit, as the respondents had not paid his tenancy deposit into an approved scheme within 30 working days of the commencement of his tenancy. His tenancy had begun on 27 July 2012 and he had paid a tenancy deposit of £475 at the start of the tenancy as stated in the tenancy agreement. His tenancy deposit had not been paid into an approved tenancy deposit scheme until 6 May 2020, as evidenced by the letter of 7 May 2020 from SafeDeposits Scotland. He said that he was concerned that the respondents had not complied with their duties with regard to the tenancy deposit, and that they could have used the money for other purposes without his knowledge.
6. The applicant told the tribunal that his tenancy had initially been a joint tenancy with Ms Leckenby, but she had moved out some time later. The parties had therefore signed a new tenancy agreement commencing on 1 July 2013 in his sole name. He confirmed that he was still living in the property, but had been given notice to quit by the respondents.
7. Mr Hendry said that he entirely accepted that he had not paid the tenancy deposit into a scheme at the time the tenancy started. He did not believe that the approved tenancy deposit schemes were in place at the time the tenancy

had started. He said that he had thought he had paid it in shortly after that, but that he had had a lot of work and family issues to deal with at the time. He became aware at the beginning of the covid-19 lockdown in early 2020 that he had not in fact paid the deposit into a scheme. He said that while he knew that there was no excuse for the failure, it had been a genuine error, and he had paid the deposit into the scheme as soon as he became aware of his mistake.

8. The tribunal noted that the 2011 regulations came into operation on 2 July 2012, shortly before the tenancy commenced, and that all three approved tenancy deposit schemes also became operational on the same day. In terms of regulation 4 of the 2011 regulations, the duties under regulation 3 applied from the date which fell on the expiry of a period of 3 months beginning with the first date on which an approved scheme becomes operational. Therefore, the duty to pay the tenancy deposit into an approved scheme had applied from 2 October 2012. In terms of regulation 3(1), the respondents then had 30 working days from that date to pay the deposit into a scheme. The deposit should therefore have been paid into a scheme no later than 13 November 2012.

Findings in fact

9. The tribunal made the following findings in fact:
 - Mr Hendry owns the property and is the registered landlord for the property.
 - Mrs Hendry was named as joint landlord (as Pauline Murray, as the respondents were not married at that time) alongside Mr Hendry on both of the tenancy agreements before the tribunal.
 - The parties initially entered into a short-assured tenancy agreement with the applicant and Ms Leckenby in respect of the property on a 'six month rolling contract' from 27 July 2012. The respondents and the applicant then entered into a further short assured-tenancy agreement on the same basis from 1 July 2013.
 - The current tenancy is a 'relevant tenancy' in terms of the 2011 regulations.
 - The rent payable under the current tenancy agreement is £475 per month.
 - The applicant paid a tenancy deposit to the respondents at the start of the first tenancy which commenced on 27 July 2012.
 - The respondents did not pay the tenancy deposit into an approved scheme on or before 13 November 2012.
 - The respondents paid the tenancy deposit into the SafeDeposits Scotland approved scheme on or around 6 May 2020.
 - The applicant's tenancy deposit was therefore unprotected from 13 November 2012 until 6 May 2020.

Reasons for decision

10. The tribunal considered that it was able to make sufficient findings to determine the case without the need for a hearing, and that to do so would not be contrary to the interests of the parties.
11. Mr Hendry admitted that the respondents had failed to comply with the duty under regulation 3(1) of the 2011 regulations to pay the applicant's deposit into an approved tenancy deposit scheme within 30 working days of 2 October 2012. The tribunal was therefore obliged to make an order requiring the respondents to make payment to the applicant. The tribunal then went on to consider the amount which the respondents should be ordered to pay to the applicant in terms of regulation 10 of the 2011 regulations.
12. In considering the appropriate level of payment order to be made in the circumstances, the tribunal considered the need to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach (*Sheriff Welsh in Jenson v Fappiano* 2015 GWD 4-89). The applicant's deposit had been left unprotected for a total of seven and a half years, which was a very substantial length of time.
13. The respondents had, however, eventually lodged the deposit within a scheme, albeit more than seven years late. Mr Hendry told the tribunal that he let out two other properties, and that the tenancy deposit for one of these was also protected within a tenancy deposit scheme, while no deposit had been paid in respect of the other property. Mr Hendry freely admitted that he had failed to lodge the deposit in a scheme at the appropriate time.
14. The tribunal noted the view expressed by Sheriff Ross in *Rollet v Mackie* ([2019] UT 45) that the level of penalty should reflect the level of culpability involved, and in particular *that "The admission of failure tends to lessen fault: a denial would increase culpability."*
15. The tribunal also considered that none of the aggravating factors noted by Sheriff Ross (including repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; very high financial sums involved; or actual losses caused to the tenant) which might result in an award at the most serious end of the scale appeared to be present in this case.
16. Taking all of the above considerations into account, the tribunal determined that an order for £950, representing twice the amount of the tenancy deposit paid, would be appropriate in this case.

Decision

17. The tribunal determines that the respondents have failed to comply with the duty in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to pay a tenancy deposit to the scheme administrator of an approved scheme within the prescribed timescale. The tribunal therefore makes an order requiring the respondents to pay to the applicant the sum of £950.

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.

16 June 2021

Legal Member/Chair

Date