



**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/21/1658

Re: Property at 1/4 Clearburn Gardens, Edinburgh, EH16 5ET (“the Property”)

Parties:

Ms Emma Wilson, 26 Westerlands Drive, Newton Mearns, G77 6YB (“the Applicant”)

Ms Gillian Stefaniuk, Flat 4, 296 Old Brompton Road, Earl's Court, London, SW5 9JF (“the Respondent”)

Tribunal Members:

Graham Harding (Legal 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 £975.00.

Background

1. By application dated 10 July 2021 the Applicant applied to the Tribunal for an order for payment alleging that the Respondent was in breach of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicant submitted a copy of the tenancy agreement, evidence of the tenancy end date, a reservation form, email regarding advance rent and additional written representations.
2. By Notice of Acceptance dated 23 July 2021 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion (“CMD”) was assigned.
3. A CMD assigned for 22 September 2021 was adjourned as case papers were not served on the Respondent and a further CMD assigned.

The Case Management Discussion

4. A CMD was held by teleconference on 26 January 2022. Both parties attended in person.
5. The Applicant confirmed that the tenancy had ended on 27 April 2021. She said she had paid a holding fee of £650.00 at the commencement of the tenancy to the Letting Agents O'Neill (Property) Edinburgh. She said that she had requested the return of these funds at the end of the tenancy but despite several requests the funds had not been returned. They had not been lodged in an approved Tenancy Deposit Scheme.
6. The Respondent explained that she had not taken any active role in the management of the letting of the property but had left this to O'Neill, her Letting Agents. She explained that until 2021 she had spent the last 10 years living in Australia and had let the property through her agents.
7. The Respondent went on to say that she had been advised by the agents that the Applicant had wished to terminate her lease in October 2020 but as it was a joint tenancy and the other tenant did not want to leave the tenancy had continued until April 2021. The Respondent said it was her understanding that no deposit had been paid but that the Applicant had paid advance rent of £650.00 at the commencement of the tenancy to cover her share of the final two months rent. The Respondent confirmed that these funds had been retained by O'Neill and had not been lodged in an approved scheme. She said that the Applicant had paid her rent in full up to December 2020 but had not paid rent thereafter and the funds held by O'Neill had been used to pay the rent due by her.
8. The Applicant explained that she had wanted to leave on 1 October 2020 but had accepted that she would have to stay as there was a joint and several liability and had remained until the end of October but had then left due to discovering mould in her bedroom. She said she had continued paying the rent until the end of December whilst liaising with her flatmate to try to find a replacement person to take over the lease. She said they had found someone but they had cancelled at the last minute.
9. The Applicant went on to say that an agreement had been reached in January 2021 that the Respondent would accept half the rent for that month. The Applicant said she then discovered her flat mate was making no effort to find a replacement and the lease came to an end on 27 April 2021.
10. The Applicant said she had sought advice from the Scottish Welfare Reform Advisory Service and Living Rent, the tenant's union and had discovered that the practice carried out by O'Neill was unlawful.
11. The Tribunal queried with the Respondent why it should not consider the payment made by the Applicant to be anything other than a deposit when it was

being used as security for rent. The Respondent referred the Tribunal to the terms of the tenancy agreement and to a letter she had received from her letting agents in 2011 in which they claimed they had sought legal advice and had come up with a scheme to avoid the costs involved in taking deposits from tenants and putting them in a Tenancy deposit scheme.

12. The Respondent confirmed that she continued to let the property through the same letting agents although they had changed their name to Cadzow Ltd. She explained that she relied entirely on their expertise in these matters and took no part in the letting of the property herself. She only had the one property that she rented out.
13. The Tribunal asked the Applicant what level of sanction she thought the Tribunal should apply in the event that it found in her favour. The Applicant said that she did not know although she was aware that the Tribunal could award up to three times the deposit of £650.00.

Findings in Fact and Law

14. The parties along with Miss Ana Barrera entered into a Private Residential Tenancy Agreement that commenced on 15 January 2020 and ended on 27 April 2021.
15. At the commencement of the tenancy the Applicant paid her share of the initial rent together what was called a “holding fee” of £650.00.
16. This fee was retained by the Respondent’s letting Agents, O’Neill Property Edinburgh as security for the Applicants share of the last two month’s rent.
17. O’Neill did not lodge the Applicant’s funds in an approved scheme throughout the duration of the tenancy
18. The Respondent relied on the professional expertise of her letting agents for the letting and management of the property.
19. The £650.00 paid by the Applicant at the commencement of the tenancy was a deposit in terms of Section 120 Housing (Scotland) Act 2006).
20. The Respondent was in breach of Regulation 3 of the 2011 Regulations.

Reasons for Decision

21. The Tribunal was satisfied that the application was timeous as it was submitted within three months of the tenancy coming to an end.
22. Section 120 of the Housing (Scotland) Act 2006 states:-

120 Tenancy deposits: preliminary

(1) A tenancy deposit is a sum of money held as security for—

(a) the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b) the discharge of any of the occupant's liabilities which so arise.

(2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

It is quite clear to the Tribunal that the purpose of the payment made by the Applicant at the commencement of the tenancy was as security for the rent that might be due at the end of the tenancy. There is therefore no doubt that despite it being specified in the tenancy agreement that no deposit was paid the "holding fee" was indeed a deposit by another name and therefore should have been lodged in an approved Tenancy Deposit Scheme.

23. Regulation 3 of the 2011 Regulations provides:-

3.—(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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

The funds were not lodged in an approved scheme throughout the duration of the tenancy a period of more than 15 months during which the Applicant's funds were unprotected.

24. Where there has been a breach of Regulation 3 and an application made in terms of Regulation 9 then in terms of Regulation 10 of the 2011 Regulations it is incumbent upon the Tribunal to impose a sanction upon the Landlord of an amount not exceeding three times the deposit. In reaching a decision it is well settled that any award by the Tribunal should be fair, just and proportionate. In

reaching a decision the Tribunal has taken account of the length of time the funds were unprotected, the fact that the Respondent is not a professional landlord, this it is the first time she has been before the Tribunal and that she totally relied upon her letting agents to manage her property. In the circumstances therefore having carefully considered all of the oral and written submissions the Tribunal finds the Applicant entitled to an award of £975.00. The Tribunal would also hope in making the award that the Respondent will have some recourse against her letting agents who have to all intents and purpose been the authors of her misfortune.

Decision

25. The Tribunal finds the Applicant entitled to an order for payment by the Respondent in the sum of £975.00.

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

26 January 2022

Date