

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 & 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/21/2148

Re: Property at 16/3 Marchmont Crescent (1f3), Marchmont, Edinburgh, EH9 1HL (“the Property”)

Parties:

Michael Lynch, Sam Doble Thomson, Mr Patrick Jefferson, 73 St Albans Road, Edinburgh, EH9 2PQ; Daymer Cottage, Alde House Drive Aldeburgh, Suffolk, IP155EE; 1/2 Strathfillan Road, Edinburgh, EH9 2AG (“the Applicant”)

Ms Ann Stirling, 78 Newton Crescent, Dunblane, FK15 0DZ (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member)

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1. This Hearing was a Case Management Discussion (hereinafter referred to as a “CMD”) fixed in terms of Rule 17 of the Procedure Rules and concerned an Application under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (hereinafter referred to as “the Deposit Regulations”). The purpose of the Hearing being to explore how the parties dispute may be efficiently resolved. The purpose of the hearing was explained and it was understood a final decision could be made. The hearing took place by teleconference due to the covid-19 pandemic.

2. Decision (In Absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £3200 in terms of Regulation 10(a) of the Regulations should be made.

3. Attendance and Representation

The Applicant's Patrick Jefferson and Sam Thomson were present. Michael Lynch was not present.

The Respondent was present and represented by Caroline Franceschi, Umega Lettings, 10 Lister Square Edinburgh EH3 9GL

4. Preliminary Matters

The Applicant's confirmed that the tenancy ended on 7th June 2021. There were no other preliminary matters or evidence other than what had been lodged that parties wanted to refer to. The Respondent had lodged a number of supporting documents which all present had had sight of.

5. The Case Management Discussion

- The Applicants set out their position for the purpose of the CMD summarised as follows;
 - The Applicant's said that after making payment of the deposit of £1600 at the outset of the Tenancy which commenced on 18th August 2020 they were were informed by an email from safe deposit Scotland on 23rd July 2021 that the deposit had not been lodged with an approved deposit scheme.
 - The Applicant's said that Safe Deposit Scotland after the Respondent had lodged the deposit on 21st July 2021 emailed the Applicant's to advise that an Application to the Tribunal was an option.
 - The Applicant's set out that they felt the conduct from the respondent's was to mask over that the deposit had not been protected. They said that they are students and they were fully aware of our status. Despite this the Applicant's said at the end of the tenancy after requesting the deposit the Respondent's did not return it and instead asked about liabilities for council tax and utilities. The Applicant's said the deposit was returned around 23rd July 2021 by Safe Deposit Scotland.
 - The Applicant's position was that the deposit not protected for the entirety of the lease and after the end of the tenancy they said they chased Umega up regularly for the deposit.
 - The Applicant's said the delay in getting back the deposit was compounded by the fact it was not protected through the duration of the lease
 - The Applicant's said they had no communication about any errors from the letting agency and they had to find out from safe deposit Scotland.
- The Respondent's representative set out that she agreed in full that the deposit had not been lodged as per the regulations and this was for the duration of the tenancy. she set out her position as summarised:
 - The Respondent's representative said that it was a genuine human error and mistake which meant the deposit was not lodged with Safe Deposit Scotland.

- She set out further that when the deposit was received it was recorded by her colleague as rental income and as they do not hold a landlords funds it was sent directly to the Respondent. This was an administrative error in the Umega accounts department.
- She said further that the Respondent contacted Umega to tell them they had paid a flooring contractor directly and a refund was made to Umega. Further deductions for contractors had been made on the property rental account and as such the Respondent had not noted the error.
- At the end of the tenancy on 7th June 2021 a check out inspection was carried out some days later and a cleaning contractor instructed. Umega sought to deduct the cleaning contractor invoice from the deposit so did not contact Safe Deposit Scotland until they received that.
- When Umega then contacted Safe Deposit Scotland they realised the error and having sought the deposit back from the Respondent they then lodged the deposit with Safe Deposit Scotland after the tenancy had ended on 21st July 2021.
- The Respondent's representative said that there was now a change to the system following this error and that Umega was carrying out a full audit to identify any further errors.
- Umega in their letter to the Tribunal of 14th October 2021 confirmed they had over 1395 deposits lodged with Safe Deposit Scotland.

6. Findings in Fact and Reasons for Decision

1. Rule 17 of the Procedure Rules provides that a Tribunal can do anything at a CMD which it may do at a Hearing, including making a decision. The Legal Member was satisfied that the Tribunal had everything before it that it would require in order to make a decision having regard to the Overriding Objective. The sufficiency of facts and evidence lodged and submitted by the Applicant allowed a decision to be made. No further evidence not already before the Tribunal was referred to by the Applicant or Respondent. The Respondent's representative admitted that all the material facts in the Application were agreed.
2. The Application was brought timeously in terms of regulations 9(2) of the Deposit Regulations.
3. In terms of Deposit Regulation 10 if the FTT is satisfied that the landlord did not comply with any duty detailed in Regulation 3 then the FTT must order a landlord to pay the tenant or tenants an amount not exceeding three times the amount of the tenancy deposit.
4. The FTT was satisfied that the Respondent did not register the deposit with a deposit protection scheme as required by Regulation 3 for the entire duration of the tenancy and further they registered the deposit after the tenancy had ended rather than returning it to the Applicants.

5. The FTT was also satisfied that a deposit had been paid by the Applicants to the Respondent due to the various evidence lodged by the Applicant and this was agreed by the Respondent's representative.
6. If the FTT was satisfied a breach of the regulations had occurred the FTT had to make an order in terms of Regulation 10.
7. In terms of Regulation 10 the FTT is obliged to make an order up to 3 times the deposit of the applicants to the respondent.
8. When considering the Order and level of sanction the FTT must have regard to the severity of the breach and any mitigating factors.
9. The deposit was unsecured for duration of the tenancy. The deposit was not returned when the tenancy ended and the Applicants did not have the benefit of the tenancy deposit scheme with the Respondent sought to make deductions.
10. In the case of *Jenson v Fappiano* 2015 G.W.D 4-89 in relation to the amount of such an Award under regulation 10 of the Regulations it was noted that a judicial analysis of the nature of the non-compliance was required and a value attached to reflect a sanction which was fair and proportionate and just given the circumstances.
11. It was further noted that the Sheriff said in said case that the value was not the starting point of three times the deposit minus the mitigating factors it was what was fair and proportionate in the exercise of balanced judicial discretion.
12. The Court of Session in *Tenzin v Russell* 2015 Hous. L.R 11 held that any payment in terms of Regulation 10 of the Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
13. The FTT was therefore of the view that an Award should be made in the middle to higher end of the scale as the deposit had not been lodged with the approved scheme throughout the whole tenancy. The Applicant's were students and did not receive the deposit despite the failures until some weeks after end of the tenancy and did not find out the error until Safe deposit Scotland told them. In mitigation it was accepted it was an error but the Respondent's letting agency was a large firm and the error was not noted in any checks until the end of the tenancy. Rather than return the tenancy deposit and advise on the error the Respondent's representative informed the Respondent to return the monies then sent it to Safe Deposit Scotland, all after the tenancy had ended. Whilst the Respondent did return the monies to allow the deposit to be paid to Safe Deposit Scotland the breach was a serious one and had significance given the limited income of the Applicants during the delay in them receiving same returned and the inability to contact an approved deposit scheme. Accordingly in balancing the circumstances of both parties the Tribunal found the Applicants entitled to an award of two thirds of the initial deposit to the sum of £3200

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.

Karen Kirk

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5 November 2021

Legal Member/Chair

Date