



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

Chamber Ref: FTS/HPC/PR/22/0321

Re: Property at 1/4 Glengyle Terrace, Edinburgh, EH3 9LL (“the Property”)

Parties:

Mr Mark Donaldson, 49/2 Balfour Street, Edinburgh, EH6 5DP (“the Applicant”)

Mr Owen Gerard, Mr Paul Gerard, 16, Craigmount Bank West, Edinburgh, EH4 8HG; UNKNOWN, UNKNOWN (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member)

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

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £800 in terms of Regulation 10(a) of the Regulations should be made.

3. Attendance and Representation

The Applicant was present and unrepresented.

The Respondents was present and unrepresented.

Ruby Marshall, 4/8 Upper Gilmore Terrace, EH3 9NN attended, she has an almost identical application which called at the same time. Parties were in agreement that the applications proceeded together.

4. Preliminary Matters

The Tribunal discussed how the CMD would proceed given that there were 2 applications for 2 tenants for the same property, tenancy, Respondents and subject matter assigned for the same time. All parties were in agreement to how it should proceed after discussion.

Both Applicants raised that the Respondents had lodged written submissions a few days before the CMD. They felt unable to properly to respond to them as they had not been sent 7 days before the hearing. They both determined they could proceed verbally to respond to the submissions.

There were no other preliminary matters raised by any party.

5. The Case Management Discussion

- The Applicant set out his position for the purpose of the CMD summarised as follows;
 - He said he moved into the property owned and leased by Respondents in June 2021. He moved in after Miss Marshall who also has a similar application.
 - He told the Tribunal he paid the deposit of £400 at the same time as he signed a group lease.
 - The Applicant said neither of the deposits from himself or Miss Marshall were registered in a deposit scheme as required by the regulations.
 - The Applicant said it was not noticed until much later on that the deposits had not been secured when both he and Miss Marshall had issues with one of the other tenants.
 - The Applicant said he asked the deposit schemes about the deposit and noted it had not been secured.
 - The Applicant said that he and Miss Marshall had been concerned about the deposits not being secured because there was he said an agreement before he moved in between the Respondent and another tenant for that tenant to pay less rent than he and Miss Marshall and he felt there was a lack of trust.
 - The Applicant said that he was concerned about return of deposits and what might happen if they left the property.
 - The Applicant wanted to move out and gave notice that the relationship with the other tenant was untenable. The Respondent Mr Owen Gerard said the Applicant's could move out whenever they wanted without full notice.

- Miss Marshall moved out on 21st November 2021 and then the deposit not returned until a time later in January 2022.
 - The Applicant said he moved out 3rd December 2021 and then the deposit was received in January 2022.
 - The Applicant said the Respondent explained the deposit would not be returned until a dispute between bills was resolved with the other tenant. The Applicant said this has not resolved yet with the last communication being in May 2022 regarding this.
 - The Applicant said that when he became aware it was illegal for the deposit not to be secured in a scheme he explained the Respondent cannot hold his deposit.
 - The Applicant said the deposit was returned on 7th January 2022 after he had sent Whats app messages directly asking for it to be returned.
 - The Applicant said he made 3 direct requests for the deposit to be returned.
- The Respondents set out their position for the purpose of the CMD summarised as follows;
 - Mr Paul Gerard told the Tribunal that he was in effect a silent partner – but narrated that his brother is a kindly person who is thoughtful and it was not accurate to say there was a previous agreement with the other tenant.
 - The Respondents position was that the summary of events made by the Applicant was fairly accurate. Miss Marshall moved into the property on 1st May 2021 and a deposit was taken at same time as the Applicant moved in on 11th June 2021.
 - A previous 3rd tenant had moves in in March 2021 and the deposit was lodged within 3 days of payment.
 - The Respondents said that due to personal life and work life at the time the focus was not what it should have been which meant the deposits were not placed in a deposit scheme. He said at the time he had his kids birthdays, it was school summer holidays, he was working long hours and was working from home and his focus was not there
 - Both Respondents were clear that the deposits were not secured at any time with a deposit scheme.
 - The Tribunal was told that the first time it was realised of the error was when the Applicant raised that there had been breakdowns in relationship between the tenants and the Applicant and Miss Marshall wanted to leave. The Respondents sought to assist in the tenant issues.
 - The Respondent said that he then discussed an exit strategy and thought it was in everyone's interest that tenants could leave as soon as possible.
 - The Applicant provided notification to leave on 30th November 2021 and then moved out on the 3rd December 2021.

- The Respondent said that when the Applicant left this point there was still quarterly bills to be calculated by the 4th tenant whose name was on all the bills etc. He said he explained that once it was confirmed how much everyone owed or owes then he would return the deposit.
- The Respondent said that this took a few weeks before it was resolved. The matter was not resolved but the Respondents decided to wipe the slate clean and had received messages from the Respondent seeking the deposit. The deposit was returned on 7th January 2022.
- The Respondent said he did not put the deposit into a scheme when he realised the error as he thought the Applicant and Miss Marshall sounded like they were going to leave very soon. The position was he would return deposit once the bills were cleared and that he has asked them to get in touch with utility companies to work this out.
- The Respondents said this was their only rental property and there was no malicious reason for the failure and although the timing looked to be a long time the Applicant had vacated before the notice period.

6. Agreed Facts

- Parties agreed the Tenancy commenced on 11th June 2021.
- Parties agreed the Tenancy Agreement referred to a deposit was to be paid for the property.
- Parties agreed the Applicant paid a deposit of £400 on 11th June 2021 to the Respondents.
- Parties agreed that the Respondents did not as required register the tenancy deposit in connection with the property within 30 days of commencement of the Tenancy.
- Parties were in agreement that at no point did the Respondent's secure the deposit within an approved scheme.
- Parties agreed that the Applicant left the property on 3rd December 2021.
- Parties agreed the Applicant requested the deposit be returned.
- Parties agreed the deposit was returned directly from the Respondent's on the 7th January 2022.

7. 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 agreed by parties allowed a decision to be made. No further evidence not already before the Tribunal was referred to by parties as necessary. Parties were in agreement that a decision be made at the CMD.
2. The Application was brought timeously in terms of regulations 9(2) of the Deposit Regulations.

3. A Private Residential Tenancy was in place between parties dated 11th June 2021. Same ended on 3rd December 2021 when the Applicant left the property.
4. The Applicant paid a deposit of £400 on 11th June 2021.
5. 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.
6. The FTT was satisfied that the Respondent did not register the deposit with a deposit protection scheme as required by Regulation 3. The Applicant had lodged written evidence from the safe deposit schemes confirming same and confirmation the deposit was returned directly from the Respondent. The matter was not disputed by the Respondents who agreed it had not been secured.
7. The FTT was also satisfied that a deposit of £400 had been paid by the Applicant to the Respondent.
8. If the FTT was satisfied a breach of the regulations had occurred the FTT had to make an order in terms of Regulation 10.
9. 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.
10. When considering the Order and level of sanction the FTT must have regard to the severity of the breach and any mitigating factors.
11. The deposit was unsecured throughout the tenancy. The period of unsecurity was the duration of the tenancy. The Applicant did not receive the deposit until January 2022. He asked directly for it. The Respondents said it could not be returned until joint bills had been settled between the tenants.
12. 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.
13. 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.
14. 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.

15. The FTT was therefore of the view that an Award should be made in the middle to high end of the scale as the deposit had been unsecured throughout the tenancy. The Tribunal also considered that the Respondents when they became aware of the error did not lodge the deposit. The Respondent's were genuine and clearly remorseful but had also sought that joint bills between tenants be resolved before the deposit was returned. The Applicant had been significantly inconvenienced and prejudiced given this as rather than dispute issues with the deposit scheme who would independently determine matters they had to rely upon the Respondent doing so. This did not occur to January 2022. It was not relevant that utility liabilities the tenants had with each other was a reason not to in addition make payment of the deposit. Accordingly in balancing the circumstances of both parties it found the Applicant entitled to an award of 2 times the deposit to the sum of £800.

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.

K Kirk

Legal Member/Chair

11 May 2022

Date