

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 (Regulations)

Chamber Ref: FTS/HPC/PR/22/4124

Re: Property at 106/1 Polwarth Gardens, Edinburgh, EH11 1LH (“the Property”)

Parties:

Miss Leah Setrice, 114/9 Willowbrae Road, Edinburgh, EH8 7HW (“the Applicant”)

Mr Mohammed Ashiq, 32a Redburn Road, Prestonpans, EH32 9NG (“the Respondent”)

Tribunal Members:

Alan Strain (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent pay the sum of £1,760 to the Applicant.

Background

This is an application under Regulation 9 of the Regulations and Rule 103 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (Rules)* in respect of an alleged failure to protect a tenancy deposit.

The Tribunal had regard to the following documents:

1. Application received 14 November 2022;
2. Tenancy Agreement (TA) commencing 1 September 2021 and ending 11 September 2022;
3. Deposit Protection Schemes correspondence confirming deposit not protected;
4. Respondent’s Written Representations dated 21 February 2023;
5. Tribunal CMD Note and Direction dated 8 March 2023;
6. Applicant’s Written Representations by email of 30 March 2022.

Hearing

The Hearing proceeded by conference call on 23 May 2023.

The Applicant participated and represented herself. The Respondent did not participate but was represented by his Letting Agent.

The Tribunal heard from the Applicant. The Applicant's position was that the deposit of £880 was not protected for the entire duration of the tenancy and to the date of the Hearing had still not been repaid. The other tenants had their deposits repaid under deduction of cleaning costs. The Applicant maintained that she had no rent arrears and had vouched this to the Letting Agents.

The Respondent's position was that he let this Property and one other. He has been letting properties since 2001. Being a landlord is not his main business. It is the Respondent's position that the tenancy deposit was not protected due to "human error" on the part of his Letting Agents. It was correct that the other tenants' deposits had been repaid under deduction of cleaning costs but this was done in error. It was only after repayment had been authorised that the Letting Agent noticed there were rent arrears. By then it was too late to prevent release of their deposits.

The Respondent accepted that the Applicant did not have any rent arrears but that this was a joint tenancy so she shared liability for this. It was for that reason the deposit had not yet been repaid.

After discussion with the Tribunal the Respondent's Letting Agent undertook to repay the deposit in full to the Applicant.

The Tribunal asked both Parties to confirm repayment of the deposit to the Applicant within 7 days failing which the Tribunal would issue its Decision on the basis that the deposit remained in the hands of the landlord.

The Tribunal subsequently received confirmation from both Parties to the effect that the deposit had been repaid after the Hearing concluded on 23 May 2023.

Decision and Reasons

The Tribunal considered the evidence before it and made the following findings in fact:

1. The Parties entered into the TA commencing 1 September 2021;
2. The Applicant paid a deposit of £880 on commencement which was not protected for the duration of the tenancy which ended on 11 September 2022;
3. The deposit has not yet been repaid and remains unprotected at the date of the Hearing;
4. The deposit has been unprotected for a period of 1 year 8 months;
5. The joint tenants deposits had been protected and repaid to them under deduction of cleaning costs;

6. The Applicant's deposit had not been repaid to her due to rent arrears on the part of one of the joint tenants and the Letting Agents proceeding on the basis of joint and several liability for this;
7. By holding onto the unprotected deposit of the Applicant in such circumstances the Respondent had used the failure to protect the deposit to his advantage and to the Applicant's prejudice;
8. The Respondent is an experienced landlord who let 1 other Property in addition to this Property and the Applicant was not his first tenant.
9. The Respondent's Letting Agent has taken remedial action by updating their practice and procedure;
10. The Respondent's failure to protect the deposit and the continued retention of the deposit was due to error on the part of his Letting Agent;
11. The deposit was repaid in full on 23 May 2023.

It was clear that the tenancy deposit had not been protected in breach of the regulations. Having made those findings it then fell to the Tribunal to determine what sanction should be made in respect of the breaches. In so doing the Tribunal considered, referred to and adopted the approach of the court in ***Russell-Smith and others v Uchegbu [2016] SC EDIN 64***. The Tribunal considered what was a fair, proportionate and just sanction in the circumstances of the case always having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend upon its own facts and in the end of the day the exercise by the Tribunal of its discretion is a balancing exercise.

The Tribunal weighed all the factors and found it be of significance that the deposit was unprotected for 1 year 8 months; the Respondent was an experienced landlord who should have had knowledge of the requirement to protect the deposit; the deposit had not been repaid prior to the date of the Hearing and the other tenants had received repayment of their deposits under deduction of cleaning costs; due to the fact the deposit had not been protected the Respondent was in a preferential position to hold the Applicant's deposit without having to go through an adjudication under the tenancy deposit protection scheme; the Respondent's Letting Agents have taken remedial action by updating their practice and procedure and the deposit has now been repaid. The Tribunal accepted that the failure to protect the deposit and the decision to hold the deposit was attributable (in the main) to the Letting Agents and took that into account in assessing the level of sanction.

In the circumstances the Tribunal considered the breach to be towards the higher end of the scale. The Tribunal considered the sum of £1,760 to be a fair, proportionate and just sanction in the circumstances of the case.

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.

A Strain

13 June 2023

Legal Member/Chair

Date