



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

Chamber Ref: FTS/HPC/PR/21/1717

Re: Property at 21A Orchard street, Falkirk, FK1 1RF ("the Property")

Parties:

Miss Susanne Heaney, 21A Orchard street, Falkirk, FK1 1RF ("the Applicant")

Mrs Diane Fraser, 5 Callendar Park Drive, Falkirk ("the Respondent")

Tribunal Members:

Lesley-Anne Mulholland (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided to allow the applicant's application.

1. The Applicant is the former tenant of the property at 21A Orchard Street, Falkirk, FK1 1RF ("the Property"). The Respondent is the owner and Landlady of the property. It is common ground that the Parties negotiated between them an oral contract whereby the Respondent and her daughter rented the property for the sum of £675 per calendar month, with 2 months' rent being paid upfront and that the parties failed to enter into a Private Residential Tenancy Agreement as required by law.
2. A Case Management Discussion took place remotely on the 8 November 2021.

The Case Management Discussion Note provides a record of that discussion and is referred to for its terms.

3. An evidential hearing took place remotely by teleconference on 17 December 2021. The Applicant and Respondent attended the hearing. The Applicant called one witness, her son, Richard Burns and the Respondent called her husband, Mr Ross Fraser. The Parties were not represented. The Respondent's call disconnected at one point but she re-joined quickly. We ensured that the Respondent had not missed anything and we went over the last evidence heard before her call terminated. Otherwise, the hearing proceeded without difficulty. We were satisfied that those taking part in the hearing had a reasonable opportunity to put their points across and that the discussion was fair. No complaint about the lack of effective participation caused by the remote hearing was brought to our attention.
4. It was a matter of agreement at the Case Management Discussion that the Applicant paid a deposit of £675 into the Respondent's bank account on 9 October 2020 as shown on the bank statement and that this deposit was not lodged into a Tenancy Deposit Scheme (see appellant's bundle, production 2, page 4.) The Applicant seeks the return of her deposit and compensation for the duress she has suffered as a consequence.
5. At the hearing, the Respondent changed her position by claiming that the sum of £675 sent to the Applicant on 9 October 2020 was not a deposit but was instead a loan from the Applicant to allow her to continue to refurbish the property, which would in turn allow the Applicant to take up occupancy sooner as she required to relocate from England to Scotland to look after a sick relative.
6. We do not accept that. We rely upon the Applicant's bank statement entry of 9 October 2020 which shows that the sum of £675 was transferred to the Respondent. The reference to this payment is described as "house deposit". We also rely on the text message from the Applicant dated 9 October 2020 at 12:43 which clearly states that she would pay the deposit that day plus a further two month's rent which would be paid by next week.
7. We are not satisfied with the Respondent's explanation that this money was in fact a loan to allow her to finish refurbishing the property. If that were the case, we would have expected to see repayment of this amount sooner. The Respondent failed to take any steps to refund this payment to the Applicant

before the lease was terminated. The timing of the payment on the 9th of October 2020, shortly before the tenancy was due to commence, the bank statement showing that £675 was remitted for the deposit and the fact that in the ordinary course of things, it would be usual for a tenant to pay a landlord a deposit and not a loan, leads us to find that a deposit of £675 was paid.

8. Having found that a deposit of £675 was paid, the next question we have to determine is whether that deposit was repaid to the Applicant. The Applicant claims that despite asking for the return of the deposit that she had to lodge an application to pursue the issue.
9. In support of the Applicant's position, she relies upon the oral evidence of her son, Mr Richard Burns. He is a fireman by occupation. Mr Burns stated that he had been at the property to assist his mother leave as there was heavy furniture to move. He did not see any deposit in cash being returned to his mother and he did not hear anything said by the Respondent to indicate that she had returned the deposit in cash to the Applicant.
10. The Respondent's position is diametrically opposed to this. The Respondent claims that she returned the £675 deposit less the amount for the additional days the Applicant remained in the property, in cash in an envelope directly to the Applicant on the night she inspected the property and the keys were handed back.
11. The Respondent claims that her husband provided her with the cash. The money was placed in an envelope with the amount and workings written clearly on it. She travelled by car to the property, inspected the property and handed over the cash in the envelope to the Applicant. She did not get a receipt as she just wanted the Applicant to leave the property as she had found her difficult to deal with. The Respondent claims that a tenant named Joanna, who lives in the Respondent's property which is located next to the Applicant's, overheard the conversation between them and heard the Respondent say to the Applicant to take the deposit and go.
12. The Respondent also relies upon a text message from her tenant, Joanna. Despite Directions requiring the Respondent to lodge productions in a paginated and indexed bundle, she referred to earlier correspondence sent to HPC admin. We decided to look for this text message and allow it to be referred to, given its importance. It is helpful to set out the text exchange between the Respondent and Joanna.

13. Respondent to Joanna

“Hi Joanna, thanks for sending the information about your lease etc. Unfortunately because Suzanne has blatantly lied to the tribunal. Saying I did not return her money. Can you please confirm that in your coming and going on Friday, while I was standing at the door of the bottom flat which is right next to yours, that you heard me say to Suzanne about her deposit? I said here’s your deposit, just go. I am sorry for involving you on Friday but you were aware of Suzanne bringing you into it by saying that you didn’t even have a lease. I know I put you on the spot but I’m glad you were there to confirm that you did have a lease and that you heard some of our conversation.”

From Joanne to the Respondent:

“Hi Diane, I can confirm I heard you say you have your deposit now, just go. I didn’t expect to get involved on Friday but I do have a lease and I did hear you all talking loudly when I arrived.”

14. We asked the Respondent to explain why she had not just asked Joanna what her recollection was, but instead put forward her own account for confirmation. The Respondent replied that this is what happened and she was just putting that to Joanna to ask her to confirm it. She had arranged with Joanna to attend the hearing to support her position however the Applicant visited Joanna to speak to her about this after which Joanna no longer wished to be involved.
15. Having considered the text exchange between Joanna and the Respondent, we are satisfied that Joanna supports the Respondent’s account that she overheard the conversation. We have taken into account that the Applicant did not seek to challenge the text message from Joanna nor did she challenge the Respondent’s account that the Applicant had gone to speak to Joanna. She failed to explain why she had gone to speak to Joanna at a time when she would have known that she was a potential witness. This interference with a potential witness counts against her.
16. The Respondent’s account is supported by her husband Mr Ross Fraser who attended the hearing and gave evidence. He said that he works as an undertaker and had cash to take to the bank. The bank is not in the local area and therefore the cash had been placed in a safe. He knew that his wife needed to return the deposit to the Applicant and therefore he took cash from the safe

and gave it to his wife in an envelope with the workings written upon it. He was busy and therefore did not accompany his wife to the property.

17. Having considered this part of the application individually and in the round, we find that the Respondent did in fact repay the deposit less the additional amount for the extra days the Applicant stayed. We prefer the Respondent and her husband's evidence as this is supported by the text message from Joanna and the weight of evidence is therefore in their favour.

18. Having been satisfied that a deposit was paid and repaid, the only issue left is the level of compensation to award to the Applicant because of the Respondent's failure to secure the deposit in a Tenancy Deposit Scheme.

19. Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 provides:

(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.

20. Regulation 10 of the Tenancy Deposit Regulations provides:

If satisfied that the landlord did not comply with any duty in regulation 3, the
First-tier Tribunal:

(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and

(b) may, as the First-tier Tribunal considers appropriate in the circumstances of the application, order the landlord to

(i) pay the tenancy deposit to an approved scheme; or

(ii) provide the tenant with the information required under regulation 42.

21. The Tribunal noted that there was a deterioration in the relationship between the Parties, and that this deterioration has resulted in a number of claims and counter claims relating to the state of the property. We reminded the Parties

that the issue to be determined relates only to whether there has been a breach of the Tenancy Deposit Regulations and if so, what level of compensation should be awarded.

22. We accept the Respondent's position that she is not good at administrative functions and that she has a lot on. Accordingly, we find that the Respondent's failure to lodge the deposit into a Tenancy Deposit Scheme was an innocent oversight.
23. Regulation 10 of the 2011 Regulations provides that where there has been a breach of Regulation 3 and Regulation 9 has been satisfied, the Tribunal must impose a sanction of up to three times the deposit paid by the Tenant.
24. Any award under Regulation 10 is required to reflect a sanction which is fair, proportionate and just given the circumstances (Jensen v Fappiano 2015 GWD 4-89). In Tenzin v Russell 2015 House. L.R. 11 it was held that any payment in terms of Regulation 10 is the subject of judicial discretion after careful consideration of all the circumstances.
25. We have taken into account that the Applicant's deposit remained unprotected since 9 October 2020. This is a serious breach. We accept that the failure to pay the deposit into a Tenancy Deposit Scheme was an innocent oversight. Taking everything into account, we determine the appropriate sanction to be the equivalent of one times the deposit. Accordingly, the Respondent is sanctioned to make payment of compensation to the Applicant in the sum of £675.00.

DECISION

An Order for Payment is granted in the amount of £675.00.

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.

Lesley-Anne Mulholland

17 December 2021

Legal Member/Chair

Date