



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

**Chamber Ref: FTS/HPC/PR/20/0016**

**Re: Property at 73 Millgate Loan, Arbroath, DD11 1PG (“the Property”)**

**Parties:**

**Mr Callum Watt, 20 Pitkerro Road, Dundee, DD4 7DG (“the Applicant”)**

**Mr Mark Blyth and Wendy Blyth, 6B Reres Road, Broughty Ferry, DD5 2QA (“the Respondent”)**

**Tribunal Members:**

**Petra Hennig-McFatrige (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £750 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) should be made and that the Respondents should be ordered to pay the tenancy deposit of £500 to the Scheme administrator of an approved scheme in terms of Regulation 10 (b) (i) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 within 14 days of receipt of the order.**

**BACKGROUND:**

1. On 6 January 2020 the Applicant applied under Rule 103 of the First tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure (the Rules) for payment under Regulation 10 (a) of the Regulations.
2. The Applicant submitted to the Tribunal tenancy agreement for the tenancy commencing on 23 August 2019, email correspondence between the Applicant and his joint tenant Rachel Creaney and the landlords Mark and Wendy Blyth dated 31 October 2019, email messages between the parties dated 2 and 3 December 2019, email confirmations that the deposit was not registered from MyDepositScotland dated 10 December 2019, from Letting

Protection Scotland on 4 December 2019 and from Safe Deposits Scotland on 6 January 2020.

3. The Respondents lodged a copy of the tenancy agreement and written representations which were received by the Tribunal on 10 February 2020,
4. A Case Management Discussion (CMD) was fixed for 21 February 2020 and the Applicant attended in person together with his legal representative Sarah Wilson from Shelter. The Respondents attended in person.
5. Both parties had been advised in the notification for the Case Management Discussion that the Tribunal may make a decision at that stage. The legal member explained the provisions under rules 17 and 18 of the Rules and both parties were aware that a decision could be made at the CMD.
6. The legal member explained at the start of the CMD that the only issue before the Tribunal at this stage is the issue of whether or not the requirements in the Regulations regarding the tenancy deposit had been complied with. This would not include the issue of repayment of the deposit.
7. The Applicant asked to amend the application to include the joint landlord Mrs Wendy Blyth as a Respondent at the CMD in terms of rule 13 of the Rules at the CMD. The Respondents were offered an adjournment to consider this request. It was clear from the representations sent on 7 February 2020 by both Mr and Mrs Blyth that both were aware of the proceedings and that the Respondents considered themselves to be joint owners, landlords and jointly responding to the application made and that Mrs Blyth, who was personally present at the CMD, considered herself to be involved in the case. The Respondents agreed that the joint landlords were Mr and Mrs Blyth and had no objection to this being correctly reflected in the application by being named joint Respondents. The amendment was allowed.

#### **The Case Management Discussion:**

8. The Applicant stated that the tenancy agreement had made no mention of the specific arrangements regarding the deposit and that he had last rented a property before the 2011 Regulations came into force. Once he and the joint tenant wished to terminate the tenancy, they asked for the deposit to be returned.
9. He had made enquiries with all 3 registered deposit schemes and none had the deposit registered.
10. The Respondents do not dispute the deposit had been paid to them by the tenants and admitted that the deposit had not been paid into a registered scheme since the start of the tenancy. Mr Blyth explained that, as stated in their representations, they considered that the parties to the tenancy agreement had agreed in the tenancy agreement to pay a deposit. The tenants had agreed to the lease and in the lease there was no agreement about payment of the deposit into a registered scheme. Had the tenants

wished to include that they could have amended the lease. The tenancy agreement was a loose agreement that suited both parties. The Respondents relied on the content of the agreement.

11. He confirmed that the Respondents have rented out another property for 11 years and not used the deposit scheme for that tenancy either. For other tenants the deposit had always just been returned.
12. They manage their properties themselves and have not taken legal advice on the issue of the tenancy type or deposit requirements. As stated in their representations they consider that the agreement between the parties was what was relevant with regard to the tenancy and the deposit. Mr Blyth stated that they had been aware of the tenancy deposit scheme and the new Private Residential Tenancies but used an old lease for the tenancy agreement with the Applicant and thought that what was agreed was what both parties would then implement.
13. Mr Blyth stated that they now intended to sell both their rental properties. He stated this was a learning experience.
14. He also stated that the funds were held in a separate bank account only used for deposit payments from tenants and not mixed with their own funds.
15. Both parties agreed that it would be appropriate for the Tribunal to order that the original deposit now should be paid into an approved tenancy deposit scheme so that the dispute resolution mechanism would be available for the determination of the repayment of the deposit.
16. Ms Winter on behalf of the Applicant set out her submissions. She asked for the maximum amount to be imposed by the Tribunal. She stated the parties had entered into a Private Residential Tenancy as the tenancy agreement commenced on 23 August 2019 and thus after the Private Housing (Tenancies) (Scotland) Act 2016 came into force. The type of tenancy and the landlord's obligations were set out in legislation. The deposit had still not been returned.
17. Mr Blyth on behalf of the Respondents stated again that the parties had entered into an agreement which was followed by the Respondents and it had been open to the Applicant to change the terms of the agreement. The Respondents had felt bound by the mutual agreement. The funds were still in a separate account.
18. The Respondents had been offered the option of a second CMD to obtain legal advice. Neither party considered that a hearing was required as the material facts of the case were undisputed and both parties were content for a decision to be made at the CMD.

### **The legal test:**

19. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
20. In terms of Regulation 10 "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. In terms of Regulation 3 "(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

### **Findings in fact:**

- I. The Applicant and the Respondent entered into a Private Residential Tenancy Agreement for the property on 23 August 2019.
- II. The Respondents are the landlords stated in the Tenancy Agreement
- III. The Applicant paid a deposit of £500 to the landlord
- IV. The tenancy started on 23 August 2019.
- V. The deposit was not lodged with an approved scheme at any point.
- VI. The Respondent have more than one rental property and have been renting out property for at least 11 years.
- VII. The clause in the tenancy agreement dealing with the deposit does not specify payment into a registered scheme.
- VIII. The Respondents were aware of the Tenancy Deposit Regulations and the Private Housing (Tenancies) (Scotland) Act 2016.
- IX. The information stated in Regulation 42 of the Regulations was not provided by the Respondents within the statutory period.
- X. The deposit was not paid into a registered scheme within the statutory period.

### **Reasons for Decision:**

22. The tribunal considers that the Respondents did not comply with the requirements of Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
23. The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement on 23 August 2019.
24. As of 21 February 2020 the deposit has not been lodged with a registered scheme.

25. The tribunal also finds that the Respondents did not provide the information required by Regulation 42 to the Applicant.
26. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the rules. The non-compliance with the Regulations is not disputed by the landlord.
27. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
28. Whilst the Tribunal notes the request in the written submissions of the Applicant for payment of the maximum of three times the deposit amount, the Tribunal does not agree that the case warrants the maximum remedy.
29. The Tribunal considers that the discretion of the Tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015) by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.
30. This is a clear breach of the Regulations. The Tribunal took into account the length of time the deposit was unprotected, which is approximately 7 months and thus a sustained period of time, the fact that the Respondents stated they were aware of the Tenancy Deposit Scheme and had not used it for the tenancy, the fact that the Respondents had been letting property for a considerable time and were aware of the mechanism of lodging the deposit, and that ultimately the action of the Respondent meant that the Applicant would not have had access to the dispute resolution process envisaged to be used under the Regulations had the application not been made.
31. It must be made clear to the Respondents that if they chose to let out property on the private rental market, they have an obligation to inform themselves about the legal framework in which they operate. It is not enough to be vaguely aware of the existence of Tenancy Deposit Scheme, the Private Housing (Tenancies) (Scotland) Act 2016 and the previous provisions of the Housing (Scotland) Act 1988. There are legally binding obligations on landlords which cannot be contracted out. The Tenancy Deposit Schemes (Scotland) Regulations 2011 include such obligations and have been in force for 9 years. It is deeply concerning for the Tribunal that the Respondents frankly admit to not having used the scheme whilst having been active as landlords over the entire period since the Regulations came into force and clearly did not take appropriate steps to make themselves familiar with the ongoing changes in landlords' obligations. It is their responsibility to know what obligations they have and to ensure that these are adhered to.
32. On the other hand the Tribunal also took into account that the Respondent credibly stated that the funds were kept in a separate bank account and not mixed with their own funds and available, that they had thought that the

tenancy agreement was the document setting out the obligations regarding the deposit and had not deliberately or maliciously tried to deprive the Applicant of the benefits of the deposit scheme because they thought it would be sufficient to deal with the deposit through a separate bank account, that they had admitted the non compliance with the obligations as soon as they became aware of the case and that they had credibly stated they had learned through the process and would not repeat this mistake.

33. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £750, which constitutes a meaningful sanction for non-compliance of the Regulations at the level of 1 1/2 times the deposit sum of £500.
34. In order to ensure that the dispute resolution process can be made available to the Applicant the Tribunal also considers it appropriate to order the deposit to now be lodged with an approved scheme.

**Decision:**

- 35. The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £750 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 and orders the Respondents to pay the tenancy deposit of £500 to the Scheme administrator of an approved scheme in terms of Regulation 10 (b) (i) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 within 14 days of receipt of the order.**

**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.

Petra Hennig-McFatrige

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**Legal Member/Chair**

21.2.2020  
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**Date**