



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/20/0422

Re: Property at 9 West Pilton Road, Edinburgh, EH4 4GX (“the Property”)

Parties:

Mrs Karin Paterson, 9 West Pilton Road, Edinburgh, EH4 4GX (“the Applicant”)

Mr Robert Pearson, 731 - 733 Ferry Road, Edinburgh, EH4 2UA (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined to grant an order against the Respondent for payment to the Applicants of the sum of £2,400 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011, orders the Respondent to lodge the deposit of £1,200 with a registered scheme forthwith and orders the Respondent to provide the information required in regulation 42 (2) of the Regulations to the Appellant forthwith.

BACKGROUND:

1. On 6 February 2020 the tribunal received the Applicant's application under Rule 103 of the First tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure (the Procedure Rules) for payment under regulation 10 (a) of the Regulations.
2. The Applicant submitted to the tribunal a tenancy agreement for the property commencing on 1 December 2018 headed "Short Assured Tenancy Agreement", a Letter from Respondent to Applicant dated 6 May 2019 confirming receipt of the deposit, correspondence from LPS, MyDeposit

Scotland and SafeDeposit Scotland showing no protected deposit lodged for the property and Respondent, CHAI instruction by Applicant dated 13 January 2020,

3. Further submissions for the Applicant with case references were lodged on 15 June 2020. These included a copy of the letter sent to the Respondent by CHAI, the Applicant's representatives on 15 January 2020 and copies of the cases Jensen v Fappiano 28 January 2015 Edinburgh Sheriff Court, Fraser v Meehan 29 August 2014 Edinburgh Sheriff Court and Russell v Tenzin 20 December 2013 confirmed by the Inner House in [2015] CSIH 8A.
4. There were no written representations from the Respondent.
5. All documents are referred to for their terms and held to be incorporated herein.
1. A Case Management Discussion (CMD) was fixed for 1 April 2020. Unfortunately due to the restrictions under the Covid-19 lockdown the CMD had to be postponed. The new date of 17 July 2020 at 14:00 hours was intimated to the parties on 15 June 2020. The recorded delivery notification to the Respondent was signed for on 17 June 2020. The intimation to the Respondents was done by recorded delivery post in terms of Rules 6 (1) (a) (ii) and 17 (2) of the Procedural Rules. In terms of Rule 17 (1) (a) of the Procedural Rules a CMD may be held by conference call.
2. The Tribunal thus considers that the appropriate notice period has been given to the Respondent. The Tribunal was satisfied that he had been appropriately notified of the application and the CMD.
6. Both parties had been advised in the notification for the Case Management Discussion that the tribunal may make a decision at that stage under rules 17 and 18 of the Procedure Rules.
7. No representations were received from the Respondent.

The Case Management Discussion:

8. The only participant in the telephone conference call as Mr Wilson from Community Help & Advice Initiative (CHAI) acting on behalf of the Applicant. Neither the Applicant nor the Respondent participated.
9. Mr Wilson confirmed that the Respondent had sent the Applicant a new Notice to Leave dated 8 July 2020, which still gave the same address for the Respondent as stated in the application. He also confirmed that the Respondent has dealt with the Applicant personally and not through a letting agent or other agents. He emphasised that the Respondent had been advised to seek legal advice in the letter of 15 January 2020. This arose out of a Notice to Quit given to the Applicant which CHAI advised was not a valid notice and out of the description of the tenancy agreement as a Short Assured Tenancy, which clearly was not the correct tenancy agreement for a tenancy starting on

or after 1 December 2018. The Applicant had not received any correspondence from either the Respondent or from one of the registered deposit schemes to indicate that the deposit had been lodged with a registered scheme. Whilst initially the Respondent had allowed the deposit to be paid in instalments and thus had agreed to a payment method he did not have to agree to, the correspondence and actions after the first notice was issued to the Applicant had been less cordial. There has to date been no further communication about the deposit. However, the Respondent appears to have now lodged a correct Notice to Leave and this may mean he has now had some legal advice.

10. The Applicant's representative referred to the written submissions of 15 June 2020 and moved the tribunal to grant an order for the maximum amount.

The legal test:

11. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—(a) may make a decision without a hearing if the First-tier Tribunal considers that—
(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and (ii) to do so will not be contrary to the interests of the parties;
12. 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.
13. 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.”
14. 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 1 December 2018.
- II. The Respondent is the landlord stated in the Tenancy Agreement
- III. The Applicant paid a deposit of £1,200 to the Respondent on or before 6 May 2019 in cash instalments.
- IV. The deposit was not lodged with an approved scheme at any point.
- V. The tenancy is ongoing.

- VI. The tenancy agreement stated in clause 6.4 "The deposit or part of the deposit, if any, will be refunded to the tenant within the timescales as laid out in the Tenancy Deposit Schemes (Scotland) Regulations 2011".
- VII. The Respondent was aware of the Tenancy Deposit Regulations
- VIII. The Respondent is a private landlord who is dealing with the tenancy himself.
- IX. No discussions regarding the return of the deposit have taken place between the parties.
- X. The Respondent had sought to end the tenancy first on 3 February 2020 and has now served a fresh Notice to Leave on 8 July 2020.
- XI. The Respondent did not provide the Applicant with confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord; the date on which the tenancy deposit was paid to the scheme administrator; the address of the property to which the tenancy deposit relates; the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

Reasons for Decision:

1. The facts of the case are not in dispute. There is no need for a hearing. The Respondent had ample opportunity to make representations to the tribunal and has not done so. The tribunal was accordingly able to make a decision at the CMD.
2. The Respondent has known about the application since 2 March 2020 when Sheriff Officers served the case papers and the notification of the original CMD date of 1 April 2020 personally on the Respondent. He has made no representations, has not disputed the facts stated in the application and has not provided any explanation or mitigation of his failure to comply with the Regulations.
3. The Respondent did not provide any of the information required in Regulation 42 (2) a, b, c, e and f of the Regulations. The tribunal is thus satisfied that the Respondent did not comply with the requirements of Regulation 3 (1) (b) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
4. The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement on 1 December 2018 or of the date when the final instalment of the deposit had been received, which the tribunal considers to be 6 May 2019. The tribunal is thus satisfied that the Respondent did not comply with the requirements of Regulation 3 (1) (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
5. The deposit of £1,200 remained unprotected for the entire duration of the tenancy and is still unprotected.
6. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the

regulations. The non-compliance with the Regulations is not disputed by the landlord.

7. 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.
8. 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. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately.
9. This is a clear breach of the Regulations. It was not denied. The tenancy is ongoing. The Respondent had sought to end the tenancy in February 2020 and has now served a fresh Notice to Leave on the Applicant. Had the tenancy been ended successfully without the deposit having been paid into a registered scheme, the Applicant would not have had access to the dispute resolution mechanism provided by the registered schemes and would have depended on the Respondent returning any funds due to her. This is exactly the situation the Regulations sought to avoid.
10. The Tribunal is satisfied that the deposit had been unprotected for the duration of the tenancy to date and allocates one times the deposit as the starting point of calculation of the sanction to be imposed due to the fact that the tenancy deposit was unprotected for the entire time.
11. As aggravating factors to be taken into account in awarding a higher amount the tribunal further considered that the Respondent must have been aware of the Regulations as there is a specific reference to The Tenancy Deposit Regulations 2011 in clause 6.4 of the tenancy agreement. He is also a registered landlord and thus clearly was aware that there is a regulatory framework of duties of landlords.
12. Despite the application having been intimated to him in March 2020, the Respondent has taken no steps to lodge the deposit. He has been explicitly made aware of his duties in this regard due to the application having been raised and served on him and appears to have not acted on that information.
13. It must be made clear to the Respondent that if he chooses to let out property on the private rental market, he has an obligation to inform himself about the legal framework in which he operates. It is not enough to be vaguely aware of the existence of Tenancy Deposit Scheme and to collect deposit funds from tenants and then not follow through with the obligations set out in the Regulations referred to in the tenancy agreement. The Tenancy Deposit Schemes (Scotland) Regulations 2011 are legally binding and have been in force for 9 years. It is landlord's responsibility to know what obligations they have and to ensure that these are adhered to even if they deal with the rental properties themselves.

14. Whilst the Applicant's representative moved for the maximum of 3 x the deposit value to be awarded, the tribunal takes some guidance in that regard from the decision by Sheriff Ross in the decision[2019] UT 45 *Darren Rollett and Julia Mackie* which sets out: " **Cases at the most serious end of the scale might involve:** repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals." None of these factors were present in this case.
15. The Tribunal also took into account that the failure to lodge the deposit has not been shown to be a case of deliberate defiance of the Regulations. The Respondent appears to be an amateur landlord.
16. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £2,400, which is 2x the amount of the deposit and reflects the seriousness of the breach, the lack of mitigation and constitutes a meaningful sanction for non-compliance of the Regulations.
17. The Tribunal also orders payment of the deposit amount of £1,200 into a registered scheme forthwith in terms of Regulation 10 (b) (i) of the Regulations to ensure that by the time the tenancy comes to an end the deposit is protected as intended by the Regulations.
18. The Tribunal also orders the Respondent to provide the tenant with the information required under regulation 42 in terms of Regulation 10 (2) (b) of the Regulations to ensure the Applicant is in possession of the necessary information to allow them to deal appropriately with the mechanisms for return of the deposit when the tenancy comes to an end..

Decision:

19. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £2,400 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**
20. **The First-tier Tribunal for Scotland (Housing and Property Chamber) orders the Respondent to lodge the deposit of £1,200 with a registered scheme forthwith**
21. **The First-tier Tribunal for Scotland (Housing and Property Chamber) orders the Respondent to provide the information required in regulation 42 (2) of the Regulations to the Appellant forthwith.**

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 McFatridge
Legal Member

17 July 2020
Date