



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/21/0320

Re: Property at 35 Llynallan Road, Shotts, ML7 5TW (“the Property”)

Parties:

Mr Gabor Toth, Mrs Karolina Toth, 35 Llynallan Road, Shotts, ML7 5TW (“the Applicant”)

Ms Helen Brady, 3 Blackburnhall Holdings, Blackburn, Bathgate, EH47 7AB (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision :

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 £800 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. The application was lodged by the Applicants and received by the Tribunal on 12 February 2021 in terms of Rule 103 of the Procedural Rules.
2. The Applicants had lodged with the application an extract from the Private Residential Tenancy commencing 14 July 2020, emails from all 3 registered deposit schemes dated 10 and 11 February 2021 respectively confirming that the deposit was not registered and screenshots of bank transfers confirming that the deposit of £1200 was paid to the Respondent prior to the commencement of the tenancy.
3. A case management discussion (CMD) was scheduled for 6 April 2021 at 11:30 am and the Respondent was notified by the Tribunal of the date and

time and the content of the application by service through Sheriff Officers on 2 March 2021

4. The Respondent contacted the Tribunal with a letter dated 13 March 2021 stating that the breach of the Regulations was admitted, that the deposit had been paid to Me Deposit Scotland on 3 March 2021 as soon as the matter had been brought to her attention.

B: EVIDENCE

1. At the CMD both parties attended via telephone conference call. The Applicants had asked their daughter Boglarke Toth to speak on their behalf but were both also on the call.
2. At the start of the next CMD the legal member set out the purpose of the CMD and both parties confirmed they did not consider that a hearing would be necessary as the factual background of the case was not in dispute.
3. The Respondent admitted that she had not paid the deposit into a deposit scheme at the relevant time. She stated that she rents out a total of 13 properties and has been a landlord for 10 years. She has tenants under Short Assured Tenancies and Private Residential Tenancies and these are her main source of income. She does not use a letting agent or solicitor to assist her in managing her properties. She was familiar with the Regulations and her duties as a landlord. She registered the property and lodged the deposit on 3 March 2021 through her existing account with My Deposit Scotland, which she used for other properties. She accepted that although she had completed the part under clause 11 of the tenancy agreement which states the amount of the deposit, she had not completed the part which provides the details of the deposit scheme in which the funds will be lodged. She kept the funds in her account for the income and expenditure for the rental properties, not in her private account. Her explanation was that although she had been renting out several other properties for which she had been a registered landlord, she had built this house and had only rented it out a few weekends as holiday accommodation and had not rented out the property as a residential tenancy before. The time in question was a hard time for her with many personal problems. Her sister suffered from cancer and in the summer of 2020 her treatment stopped and she died shortly thereafter and she also lost her brother in law later that year. She simply overlooked the matter at the time as everything was so difficult at the time, she had her personal problems and the pandemic with everything being closed made things more difficult. The Respondent stated that she did not have to leave the house to lodge the deposit. She repeatedly stated she should have lodged the deposit and was aware of the duty to do so and had no excuse not to lodge it. As soon as this was brought to her attention when the Council contacted her regarding the landlord registration and at the same time the Tribunal served the papers on her she immediately lodged the deposit, added the property to her already existing landlord registration and informed the Applicants of all the relevant details in terms of Regulation 42. The Council have now closed the case.

4. The Applicants stated that the deposit had been unprotected from July 2020 until March 2021 and the Respondent should have lodged it when the tenancy started. She has other properties and knew about the duty to register the deposit. She was not a registered landlord for that property either. Failure to follow the law should have consequences. This had never happened to them in any other tenancy before. They are looking to move out and the Respondent is aware of this. They did not know what the Respondent had done with their money and she should have to pay £2,400 for not lodging the deposit in time. They agree that it is now lodged and that the information regarding the deposit has now been provided by the Respondent.
5. The following documents were lodged in respect of this case:
 - a) Relevant extract of Scottish Private Residential Tenancy Agreement for tenancy commencing 14 July 2020
 - b) email from MeDeposit Scotland 11 February 2021
 - c) email from Safedeposits Scotland 10 February 2021
 - d) email from Letting Protection Scotland 11 February 2021
 - e) Transaction screenshots payment from Applicants to Respondent of £200 on 15 June 2020, £1,000 on 12 June 2020, £1,000 on 14 July 2020
 - f) letter from Respondent to Tribunal 13 March 2021,

C THE LEGAL TEST:

1. In terms of Rule 17 (4) of the Procedural Rules the Tribunal can do anything at a CMD it can do at a hearing.
2. 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;
3. 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.
4. 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.”
5. 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;

D: FINDINGS IN FACT

Based on the documents lodged and the discussion at the CMD the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The deposit of £1,200 was paid by the Applicants to the Respondent on or around 12 and 15 June 2020.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 14 July 2020
3. The tenancy is ongoing
4. For the tenancy period from 14 July 2020 to 3 March 2021 the deposit had not been lodged with a registered scheme.
5. The deposit should have been lodged by 25 August 2020.
6. The funds had been held in the account of the Respondent which held rent payments from her rental properties.
7. The Respondent was contacted by the Council and the Tribunal on or around 2 March 2021.
8. The Respondent lodged the deposit on 3 March 2021 with My Deposits Scotland through her existing account.
9. The property was let out as a residential tenancy to the Applicants for the first time
10. The Respondent was a registered landlord but had not added the property to her landlord registration until around 3 March 2021
11. The tenancy agreement in clause 11 provides that the deposit will be £1,200 but gives no details of the scheme to be used.
12. In the summer of 2020 the Respondent suffered a family bereavement.
13. Because of the pandemic various restrictions on public life were in place in the summer of 2020.

E: REASONS FOR DECISION:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the CMD and without a full hearing on the basis of the information provided by both parties.
2. It was admitted by the Respondent and also clear from the documents lodged, that in this case a deposit of £1,200 was paid to the Respondent prior to the start of the tenancy and that the full deposit was not lodged as required until 3 March 2021.
3. 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.

4. 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.
5. In the case *Tenzin v Russell*, of 20 December 2013, Sheriffdom of Lothian and Borders, Sheriff Principal Stephen stated at para 19 *"There are no rules as to the approach that the court should take in assessing the amount of the order. The court must make an order and it is therefore reasonable to read into the regulations that Parliament intended to leave it entirely to the court to determine the level of penalty to impose. The regulations do not enumerate any matters or criteria which the court must have regard to. Accordingly, the sheriff has complete discretion as to the level of the order and is constrained only by the amount of the deposit and a triple multiplier. The sheriff, of course, will have regard to any evidence offered by way of mitigation. In dealing with non-compliance no distinction has been drawn by the legislators between the careless or devious; the experienced or inexperienced, the culpable or inadvertent. Likewise the strict liability consequences of non-compliance allow the court to promote rigorous application of the regulations pour encourager les autres. In other words deterrence."*
6. The Tribunal considers that the discretion of the Tribunal is correctly 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. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of *"repeated and flagrant non participation in, or non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale"*. It was held that *"Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances..."*
7. For the period from 14 July 2020 to 3 March 2021 the deposit was not protected. It should have been lodged by 25 August 2020 at the latest. The deposit was thus not lodged within 30 working days as required by Regulation 3 and this was a clear breach of the Regulations. The Tribunal is satisfied that the deposit had been essentially unprotected for 233 days of so far 267 days of the tenancy period, 190 days of which constituted an actual delay.
8. As an aggravating factor to be taken into account, the Tribunal further considered that the Respondent was clearly aware of the Regulations and had 10 years experience with letting property. This is her main source of income. She has elected not to seek professional help for this activity. She had previously used the deposit scheme and already had an account. Restrictions in place due to the pandemic would not have prevented the

Respondent to lodge the deposit in time. As an individual engaging regularly and over a long period in the business of renting out property the Respondent should have put in place mechanisms to ensure that she does comply with all landlord duties, such as paying deposits into a registered scheme. There should be safeguards in place in case an oversight happens. Although the Respondent may have been going through a difficult time in her life in 2020 as she stated, this does not mean as a landlord she does not have to adhere to the duties set out in the Regulations.

9. On the other hand, the Tribunal also recognises the Respondent admitted the breach as soon as this was brought to her attention and immediately then rectified her mistake. The Respondent did not try to argue that there were any specific good reasons why the deposit was not lodged but rather explained that during the time in question she was going through a family bereavement and generally through a difficult time with the pandemic and overlooked the matter although she was familiar with the process and aware of her duties. The Tribunal believed that this was a genuine oversight and that it was in no way a deliberate non compliance with the regulations. The Tribunal also noted that as soon as the matter was raised with her, the Respondent then dealt with adding the property to her existing landlord registration and paid the funds into a registered scheme through her existing account. The Tribunal formed the view that the Respondent overall seems to be a diligent landlord but that on this occasion, with a new property and with personal problems, she lost sight of the obligations she had as a landlord.
10. The Tribunal further considers it relevant that at the end of the tenancy, which is the time when decisions about the return of the funds are made, the deposit will now be protected and the Applicants will have access to the dispute resolution scheme of scheme. Ultimately the main goal of the Regulations, that both parties have access to the dispute resolution mechanism when the tenancy ends, is thus achieved in this case prior to the end of the tenancy.
11. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £1,200 would thus be £3,600. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal does not consider that the failure to comply with the Regulations in this case warrants a penalty at the high end of the scale. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £800, which reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

12. **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 £800 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**

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/Chair**

**6 April 2021
Date**

