



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

Chamber Ref: FTS/HPC/PR/23/0966

Re: Property at Ground Floor Left 59 Erskine Street, Aberdeen, AB24 3NR (“the Property”)

Parties:

Blessing Mbah, 164 Morrison Drive, Aberdeen, AB10 7HD (“the Applicant”)

GK Property Management, 605 King Street, Aberdeen, AB24 1SA (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member) and Mike Scott (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order in the sum of Eight hundred and fifty pounds (£850) Sterling

Background

- 1 The Applicant applied to the Tribunal seeking an order for payment as a result of the Respondent's failure to lodge their deposit in an approved tenancy deposit scheme.
- 2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application and referred the matter to a Case Management Discussion. A copy of the application paperwork was served upon the Respondent by Sheriff Officers on 4 May 2023.
- 3 The Tribunal subsequently received written representations from the Respondent on 23 May 2023 and 26 May 2023. In summary the Respondent

submitted that no tenancy deposit had been paid by the Respondent, however she had been asked under the terms of the tenancy agreement to pay two months rent upfront. A rent increase notice had been served on the Applicant in September 2022 however she had not taken any heed of this and had been looking for another property. The Applicant had been informed that she would be liable for any legal bills as a result of her casual attitude. The Applicant had failed to pay the increased rent and the Respondent had ceased communication with her due to her erratic behaviour. It was clearly mentioned in the tenancy agreement that the flat would be professionally cleaned at the start of the tenancy and it would have to be returned in the same state. The Respondent gave a summary of the issues they had experienced with the Applicant during the term of the tenancy and stated that she was a habitual liar who did not understand the terms of the lease, despite the Respondent's efforts to explain it to her. In support of their representations the Respondent provided a copy letter from their lender regarding mortgage rates, a copy letter from the Respondent to the Applicant dated 24 October 2022 intimating a rent increase and a copy letter from Anderson Bain solicitors to the Respondent dated 27 January 2023 regarding the rent increase.

- 4 The Applicant submitted further written representations on 31 May 2023, providing copies of bank transactions that purported to show payments being made to the Respondent.

The Case Management Discussions

- 5 The first Case Management Discussion was adjourned due to concerns from the Tribunal about conducting same via teleconference. The second Case Management Discussion therefore took place in person in Aberdeen at the Tribunals Centre. The Applicant was in attendance. The Respondent was represented by its sole Director, Gautam Kumar.
- 6 The Tribunal explained the purpose of the Case Management Discussion and asked parties to address them on their respective positions regarding the application. For the avoidance of doubt the following is a summary of the relevant matters that were discussed, and not a verbatim account of what was said by the parties.
- 7 The Applicant explained that she had paid £850 at the start of the tenancy, being the first months rent of £425 and deposit of £425. At the end of the tenancy she should have received the sum of £535 back from the Respondent however they had withheld costs for cleaning, legal fees and a rent increase. She referred to the statement the Respondent had provided her with by Whatsapp which she had submitted to the Tribunal. She had received the sum of £325 back from the Respondent. She understood from Mr Kumar that she would receive the entirety of her deposit back, however following an intervention from his father the deductions had been made. She did not think the deductions were justified, the property had been cleaned at the end of the

tenancy and she didn't understand the legal fees that the Respondent was attempting to recover.

- 8 Mr Kumar confirmed that the sum of £850 was received from the Applicant at the start of the tenancy, however this equated to the first and last months rent. It was not a deposit, it was advanced rent. He confirmed that the legal fees and cleaning costs had been deducted from the outstanding balance, together with the rent increase. The Applicant had been advised in October 2022 that the rent would increase in January 2023, however she had not paid the increased amount. She seemed to be under the presumption that the rent would stay the same until she moved out. Mr Kumar confirmed that mortgage rents had risen which necessitated the increase to cover the Respondent's costs. Mr Kumar confirmed that he was a professional landlord and his other tenants were all happy in their properties.
- 9 In response to questions from the Tribunal Mr Kumar confirmed that he owned around 23 properties in Aberdeen which he let, and managed 10 to 12 more on behalf of others. He made use of the advanced rent provision across his tenancies. It meant that tenants would get their money back quicker as they would not have to wait for the deposit scheme to release it. It was a mutual agreement between the landlord and tenant. Mr Kumar confirmed that the Applicant had paid the last months rent in this case. It was written in the tenancy agreement that the flat had to be professional cleaned and, if not, the costs would be deducted from the payment held. Mr Kumar confirmed that this was the general approach he would take across all of his properties if a tenant did not leave a property in a suitable condition.

Relevant Law

- 10 The relevant law is contained with the Housing (Scotland) Act 2006 and the Tenancy Deposit Scheme (Scotland) Regulations 2011. Section 120 of the 2006 Act provides as follows:-
- "120 Tenancy deposits: preliminary*
- (1) A tenancy deposit is a sum of money held as security for—*
- (a) the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or*
- (b) the discharge of any of the occupant's liabilities which so arise.*
- (2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.*
- 11 The 2011 Regulations provide as follows:-
- "3.—(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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person, unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “relevant person” and “unconnected person” have the meanings conferred by section 83(8) of the 2004 Act.”

“9.—(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended.”

“10. If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff—

(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 sheriff 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.”

Findings in Fact

12 The Applicant entered into a tenancy agreement with the Respondent which commenced on 20 June 2022.

13 In terms of Clause 10 of the said tenancy agreement the Applicant was required to pay an advanced rent of £425 for the sixth month of the tenancy. The tenancy agreement does not make provision for payment of a tenancy deposit.

14 The Applicant paid the sum of £850 at the start of the tenancy to the Respondent.

- 15 The Applicant paid the rent of £425 in the sixth month of the tenancy.
- 16 The tenancy between the parties terminated on 14th February 2023.
- 17 The Respondent was holding the sum of £535 on behalf of the Applicant, being the £425 paid as advanced rent and £110 in overpaid rent.
- 18 The Respondent deducted the sum of £60 for cleaning costs, £100 for legal fees and £50 in rent from the £535 held. The Applicant received the sum of £325 from the Respondent following said deductions.
- 19 The £425 paid as advanced rent by the Applicant at the start of the tenancy was held by the Respondent as security for the performance of the Applicant's obligations under the said tenancy agreement.
- 20 The £425 paid as advanced rent by the Applicant was therefore a tenancy deposit.
- 21 The Respondent is a professional landlord. The Respondent uses the "advanced rent" model across the tenancies they manage.

Reasons for Decision

- 22 The Tribunal determined the application having regard to the application paperwork, the written representations from the parties and the verbal submissions at the Case Management Discussion. The Tribunal was satisfied that it was able to make a determination of the application at the Case Management Discussion and that to do so would not be prejudicial to the interests of the parties. It was noted that the substantive facts of the matter were agreed.
- 23 The 2011 Regulations specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy.
- 24 The Respondent's position in this case is that the payment of £425 made by the Applicant at the commencement of the tenancy was not a tenancy deposit, but was in fact a payment of advanced rent. Whilst it is entirely acceptable for a landlord to take payments of advanced rent from a tenant, in this case it was

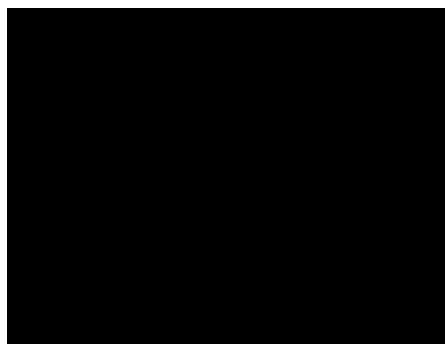
clear from the Respondent's treatment of the £425 that it fell within the definition of a tenancy deposit.

- 25 Mr Kumar had been frank in his reasons for using the "advanced rent" model. He had stated that tenants generally preferred this as they would get their money back sooner than if it was held in a tenancy deposit scheme. He had conceded that he would make deductions from the payment held at the end of a tenancy for cleaning or other costs if required, but insisted it was not a deposit under the terms of the tenancy agreement. However the Tribunal was clear that calling the payment "advanced rent" did not circumvent the fact that the Respondents were treating it as a deposit. If it was genuinely advanced rent it would have been applied to the last months rent as stated in the tenancy agreement. Instead the Respondents, in the Applicant's case, had sought to make deductions to recover costs that they claimed were due to her failure to adhere to her obligations under the tenancy agreement, including a cleaning fee and legal costs. The Tribunal therefore concluded that the payment of £425 was in fact a tenancy deposit as defined by section 120 of the Housing (Scotland) Act 2006 and the Respondent was therefore in breach of Regulation 3 in terms of the requirement to place said deposit in an approved tenancy deposit scheme.
- 26 Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. Further, under Regulation 10 in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case.
- 27 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. Whilst the Respondent had stated that he applied the "advanced rent" model across his properties, the Tribunal believed that this was a result of a genuine misunderstanding regarding the applicable legislation and not due to any malicious conduct on their part. However by failing to adhere to the requirements of the Regulations the Respondent had denied the Applicant access to the dispute resolution scheme which would have been available to her had the deposit been placed with an approved tenancy deposit scheme. Instead the Respondent had unilaterally decided what sums to withhold from the deposit and this had resulted in the Applicant having to raise separate proceedings before the Tribunal to recover what she considered to be unjustified deductions. The aim of the 2011 Regulations was to avoid situations such as these.

- 28 The Tribunal further noted the purpose of Regulation 10, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The Respondent had conceded that they applied the “advanced rent” model across the properties they owned and managed. Whilst Mr Kumar had stated that other tenants were happy with this practice, there was an ongoing risk to tenants, who would not have the proper recourse to challenge decisions on deductions and would face their deposits remaining unprotected during the term of a lease. The provisions of Regulation 10 leave no discretion where a landlord is found to have failed to comply and permit an award of up to three times the deposit where a finding of breach is made. The Respondent is clearly an experienced landlord and any penalty should seek to ensure that moving forward they are meeting their obligations in relation to tenancy deposits.
- 29 Accordingly balancing the competing factors, the Tribunal considered that a sanction in the sum of £850 would be appropriate. The mitigating circumstances identified by the Tribunal were not an excuse, albeit they did give some indication as to why the Respondent had acted as they did. The Tribunal did not therefore consider that a sum at the highest end of the scale was warranted, but in view of the wider practice employed by the Respondent in applying the “advanced rent” model and the need to ensure they were compliant in future, the Tribunal concluded that the sum of £850 was reasonable and proportionate in the particular circumstances of this case.
- 30 The decision of the Tribunal was unanimous.

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.



Legal Member/Chair

21 November 2023

Date

