



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 16 of the Housing (Scotland)
Act 2014**

Chamber Ref: FTS/HPC/PR/23/3854

Re: Property at 15 Hall Street, Galashiels, TD1 1PJ (“the Property”)

Parties:

Mr Connor Nelson, 24 Pentland Road, Bonnyrigg, EH19 2LG (“the Applicant”)

**Mr Scott McFarlane, previously of 1 Todburn Way, Clovenfords, Galashiels,
TD1 3AL and whose present whereabouts are unknown (“the Respondent”)**

Tribunal Member:

Shirley Evans (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent failed to comply with his duty as a Landlord in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”) as amended by The Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 by failing to pay the Applicant’s Tenancy Deposit to the scheme administrator of an Approved Tenancy Deposit Scheme, grants an Order against the Respondent for payment to the Applicant of the sum of ONE THOUSAND SIX HUNDRED AND FIFTY POUNDS (£1650) STERLING.

Background

1. This is an application dated 28 October 2023 for an order for payment for where it is alleged the Respondent has not paid a deposit into an approved scheme under the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Application is made under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”).

2. The Application was accompanied by various photographs, various text messages with the Respondent, and a bank statement. After enquiry from the Tribunal the Applicant forwarded an excerpt from Landlord Registration showing the Respondent was not a registered Landlord, an email from Safe Deposits Scotland dated 20 November 2023, an excerpt of an online chat with My Deposits Scotland dated 9 December 2023, an email from My Deposits Scotland dated 5 February 2024 and a screenshot from Letting Protection Scotland.
3. On 21 November 2023, the Tribunal accepted the Application under Rule 9 of the 2017 Regulations.
4. On 10 January 2024 the Tribunal enclosed a copy of the application and advised parties that a Case Management Discussion ("CMD") under Rule 17 of the Regulations would proceed on 26 February 2024. Sheriff Officers reported that they were unable to serve this paperwork on the Respondent. Accordingly, intimation of the CMD on the Respondent proceeded by way of advertisement on the Tribunal website in terms of Rule 6A of the 2017 Regulations. A copy of the Execution of Service was received by the Tribunal.

Case Management Discussion

5. The Tribunal proceeded with the CMD on 24 February 2024 by way of teleconference. Kevin Leightley appeared on behalf of the Applicant. There was no appearance by or on behalf of the Respondent despite the CMD starting 5 minutes late to allow him time to join. The Tribunal was satisfied that the CMD had been intimated on him in terms of Rule 6A of the 2017 Regulations and accordingly proceeded in his absence.
6. The Tribunal had before it a copy of the application with various photographs, various text messages with the Respondent, the bank statement, the excerpt from Landlord Registration showing the Respondent was not a registered Landlord, an email from Safe Deposits Scotland dated 20 November 2023, an excerpt of an on line chat with My Deposits Scotland dated 9 December 2023, an email from My Deposits Scotland dated 5 February 2024 and a screenshot from Letting Protection Scotland. The Tribunal considered these documents.
7. Mr Leightley submitted that the Applicant had never received a written tenancy agreement from the Respondent but that the Applicant had lived in the Property from 1 August 2022 to 28 August 2023. He submitted that the text messages and the bank statement showed that £550 had been paid by the Applicant's mother on 25 July 2022. He advised there was very little by way of paperwork with the Respondent. After the Applicant had left as could be seen from the text messages, the Respondent was not willing to discuss the return of the deposit and made claims that the Property had been left in an unclean and damaged state. The majority of what the Respondent relied on had been documented on entry as could be seen in the photographs. The Respondent point blank refused to discuss the possibility of returning any part

of the deposit. Mr Leightley explained this had been the Applicant's first home and that he had hoped that he would be able to pay the deposit back to his mother after the end of the tenancy. The Applicant had been worried that he would not be able to get another rental property. He had been frustrated by the Respondent's failure to return the deposit and refusal to even consider its return. The Tribunal noted the emails, on line chat, screenshot and excerpt from the three scheme administrators that confirmed none of them had any record of having received the Applicant's deposit for the Property. Further the Tribunal noted the text messages which showed the Respondent had received the deposit, the bank statement which showed £550 had been paid to the Respondent by the Applicant's mother on 25 July 2022, the text message dated 30 August and 1 September 2023 from the Respondent to the Applicant that the deposit would not be refunded due to the state of the Property.

Findings in Fact

8. The Applicant was the tenant of the Property between 1 August 2022 to 28 August 2023. The Respondent did not provide the Applicant with a written tenancy agreement.
9. The Respondent is the owner of the Property. The Respondent is not registered as a Landlord of the Property.
10. The Applicant's mother paid a deposit of £550 to the Respondent on behalf of the Applicant on 25 July 2022.
11. The Respondent did not lodge the deposit with an approved scheme administrator.
12. The tenancy terminated on 28 August 2023.
13. The Respondent refused to pay any of the deposit back to the Applicant.
14. The Applicant has been deprived of an independent dispute resolution for the return of the deposit.

Findings in Fact and in Law

15. The Applicant had an unwritten Private Residential Tenancy Agreement in terms of Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016. It is a relevant tenancy in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

16. The deposit totalling £550 paid on behalf of the Applicant to the Respondent is a deposit as defined by section 120(1) of the Housing (Scotland) Act 2006.
17. The Respondent is a relevant person in terms of Section 83(8) of the Antisocial Behaviour etc (Scotland) Act 2004 and as such had an obligation to comply with the Tenancy Deposit Schemes (Scotland) Regulations 2011.
18. The Respondent failed to pay the deposit into an approved scheme in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations and is in breach of Regulation 3. The tenancy deposit was unprotected throughout the whole of the tenancy.

Reasons for decision

19. For the purpose of Regulation 9(2) of the 2011 Regulations an application where a landlord has not paid a deposit into a scheme administrator must be made within three months of the tenancy ending. The Tribunal found that the application was made in time, the tenancy having terminated on 28 August 2023 and application being made on 28 October 2023.
20. Regulation 3 (1) and (2) of the 2011 Regulations 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.

(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.

The tenancy in this case was a “relevant tenancy” for the purposes of the Regulations. Although no written tenancy was given to the Applicant it is a Private Residential tenancy.

21. A tenancy deposit is defined in section 120 of the Housing (Scotland) Act 2006 as:

“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”.

It is clear to the Tribunal that the sum of £550 paid by the Applicant's mother on his behalf on 25 July 2022 was a deposit which should have been

protected under Regulation 3 of the 2011 Regulations by the Respondent as the landlord and relevant person. It was however never protected throughout the whole of the tenancy.

22. The 2011 Regulations were intended, amongst other things to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit to the landlord or tenant or divided between both, at the termination of a tenancy. They were designed to prevent any perceived “mischief” by giving a landlord control over the return of the deposit at the termination of a tenancy.
23. The amount to be paid to the Applicant where a landlord had failed to lodge a deposit is not said to refer to any loss suffered by the Applicant. Accordingly, any amount awarded by the Tribunal in such an application cannot be said to be compensatory. The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, taking into account both aggravating and mitigating circumstances, having regard to the purpose of the 2011 Regulations and the gravity of the breach. The Regulations do not distinguish between a professional and non-professional landlord. The obligation is absolute on the landlord to pay the deposit into an Approved Scheme.
24. In assessing the amount awarded, the Tribunal has discretion to make an award of up to three times the amount of the deposit, in terms of Regulation 10 of the 2011 Regulations.
25. The Tribunal considered the Respondent had not complied with the basic duties of a landlord. He had not registered as a landlord. He had not provided the Applicant with a written tenancy agreement. He had failed to lodge the deposit with a scheme administrator. It appeared to the Tribunal that the Respondent had acted in a way which demonstrated a flagrant and blatant breach of his obligations. It appeared to the Tribunal that the Respondent had acted in such a way in an attempt to avoid the legislation designed to protect tenants from unscrupulous landlords. The Respondent, by his failure to pay the tenancy deposit had defeated the purpose of the 2011 Regulations by his failure to comply with his duties under Regulation 3. The Applicant had been deprived of having an approved scheme administrator resolve the issue of how the deposit should be distributed at the end of the tenancy. The tenancy deposit was clearly unprotected throughout the whole of the tenancy. The Respondent’s actions amount to a substantial breach.
26. In all the circumstances the Tribunal considered that a fair, proportionate, and just amount to be paid to the Applicant by way of sanction was three times the amount of the unprotected deposit.

Decision

27. The Tribunal accordingly made an Order for Payment by the Respondent to the Applicant of £1650.

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

26 February 2024

Date
