



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”)

Chamber Ref: FTS/HPC/PR/21/0912

Re: Property at 2 Stopford Street, Newcastleton, TD9 0QW (“the Property”)

Parties:

Ms Mary Wilson, 23 Moss Place, Newcastleton, TD9 0RX (“the Applicant”)

Mrs Janet Nixon, Blinkbonny, Newcastleton, Scottish Border, TD9 0TN (“the Respondent”)

Tribunal Members:

Yvonne McKenna (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 £380 should be made in favour of the Applicant

Background

1. This is an application to the Tribunal in terms of Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 and Regulations 9 and 10 of the 2011 Regulations.

2. The Applicant lodged her application with the Tribunal on 12th April 2021. Along with the application she lodged the following: -

- Copy Private Residential Tenancy Agreement for the Property with a start date of 1st October 2020
- Copy Rent Deposit Certificate with Safe Deposit Scotland
- Copy of exchange of message with the Respondent confirming the end date of the tenancy
- Paper Apart entitled “Additional notes and Information”.

3. A copy of the application and supporting documents was served on the Respondent by Sheriff Officers on 5th May 2021. Both parties were advised that a Case Management Discussion (CMD) would take place by telephone conference on 2nd June 2021 at 2pm and that they were required to participate. Prior to the CMD the Respondent lodged written representation with the tribunal consisting of; -

- 3 e-mails to the Tribunal dated 23rd May 2021 attaching copy of receipt of deposit, four-page written representations being response to the application, text messages between the Applicant and the Respondent, text messages between the Applicant's son Gary Wilson and the Respondent, Tenancy Agreement and House Instruction(undated).
- E-mail from Safe Deposit Scotland to the Applicant regarding the deposit registration and further procedure
- Email to the Respondent from Scottish Borders Council
- Email exchange between the Applicant and the Respondent dated 5th April 2021-21st April 2021
- Invoice re works at the Property from James Hibbert-Hingston dated 23rd May 2021

Case Management Discussion (CMD) 2 June 2021

4. The application called for a CMD on 2 June 2021 at 2pm by teleconference. Both parties participated. The Applicant was present and was represented by her son Mr Gary Wilson. The Respondent was supported by her husband.

The Applicant's Position at the CMD 2 June 2021

5. The Applicant's Representative Mr Wilson said that he was inviting the Tribunal to find that the Respondent had acted unlawfully in not using the deposit scheme correctly. He said that the deposit had only been paid into a deposit scheme after there was a "hint of a problem with the tenancy". In relation to the suggestion that the Respondent believed that her solicitors would be responsible for paying the money into an approved scheme, he said that when the Tenancy Agreement was received by the Applicant, that accompanying this was an e-mail from the solicitors making it quite clear that they would not be involved in the safety certificate checks nor with dealing with the deposit scheme. He said that this was a fabrication. He said that the e-mail from the solicitors was available, and this could be provided to the Tribunal. He also pointed out that the Property has been owned by the Respondent for a decade or so and asked whether the Applicant had previously paid any deposit into an approved scheme for earlier tenants.

The Respondent's Position at the CMD 2 June 2021

6. The Respondent said that she intended to make an application for damages to the Tribunal regarding the state the tenancy was left in by the Applicant. She said that she intended to pursue a claim for damages of £549.88 and that her application was being lodged with the Tribunal today. The Respondent said that she fully believed that the solicitors would be responsible for the payment of the deposit into an approved

scheme even though the deposit stayed in her bank account until 9th March 2021. She said that when she was sent an invoice by her solicitors, she had expected this would be included. (She was not invoiced by them until March 2021). She said that she was led to believe this by her solicitors and wished the opportunity to be able to provide some verification from them to the tribunal to mitigate her position. She said in response to the question regarding previous tenants that her last tenant had paid the deposit into an approved scheme directly with the administrators, so she had not required to attend to this herself before. She has let the Property for a period of 8 years. It is the only property she rents out.

7. Directions were issued by the Tribunal and the case continued to a further CMD on 16 July 2021 at 2pm by teleconference.

8. Prior to the CMD on 16 July 2021 the parties lodged the following: -

- Email from the Respondent dated 6 July 2021 enclosing letter from Haddon and Turnbull solicitors dated 24 March 2017
- Letter to the Tribunal dated 16 June 2021 from Cullen Kilshaw
- Email from the Respondent dated 12 July 2021 to the Tribunal
- Email from the Applicant dated 2 July 2021 enclosing e-mail from the Respondents solicitors dated 30 September 2020 with draft copy lease and terms and conditions

Case Management Discussion 16 July 2021

9. The case called by teleconference at 2pm on 16 July 2021. Both parties again participated. The Applicant was not present and was represented by her son Mr Gary Wilson. The Respondent was present supported by her husband.

10. The Legal Member discussed the purpose of the CMD and invited representations from parties regarding whether they were each of the view that the Tribunal now had before it all the required information to be able to reach an informed decision. Parties were in agreement. Neither party sought that the case be continued to a Hearing for further witness evidence to be led.

11. Both parties agreed that the ongoing dispute relating to the deposit was still under consideration with Safe Deposit Scotland and no decision had been made in that regard. The Respondent confirmed that she had now made a separate claim for a payment order to the Tribunal regarding damages and no date had yet been allocated regarding that separate application.

12. The Legal Member invited parties to make submissions on the understanding that a final decision would be made today without a full Hearing being necessary.

13. Mr Wilson invited the Tribunal to impose a sanction on the Respondent for not protecting the deposit under law. He did not invite the Tribunal to make any specific amount and left this to the Tribunal's discretion. He drew attention to the fact the Respondent had not lodged the deposit with an approved scheme and had attempted as he saw it to disguise the fact, claiming ignorance. He disputed that tenants would

be able to lodge sums themselves with the deposit scheme directly. He referred to the fact that the Respondent had at least 3 previous tenants at the Property since 2008 apart from the Applicant.

14. The Respondent accepted that the deposit had been unprotected and maintained her previously stated position.

Findings in Fact

15. The Applicant entered into a Tenancy Agreement for the Property which had a start date of 1st October 2020.

16. The Applicant gave written notice to terminate the tenancy on 29th March 2021.

17. The tenancy terminated on 12th April 2021.

18. The Applicant paid a deposit of £380 to the Respondent on 30th September 2020.

19. The deposit was paid into an approved tenancy deposit scheme with Safe Deposits Scotland on 9th March 2021. The payment was received on 12th March 2021.

20. The deposit was protected in terms of the scheme from 12th March 2021 onwards and was unprotected between 30th September 2020 to 12th March 2021.

21. Parties are still involved in negotiating the return of the deposit and counterclaim for repairs at the Property at the current time with the scheme administrators. No final decision has been made in that regard at the date of the CMD.

Reasons for Decision

22. Regulation 3 of the 2011 Regulations states-

1.1.1 Duties in relation to tenancy deposits

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.

23. The Legal Member is satisfied that the Applicant’s tenancy is a relevant tenancy for the purposes of Regulation 3

24. The Applicant made an application to the Tribunal timeously in terms of Regulation 9, having lodged the application not later than 3 months after the end of the tenancy.

25. Under Regulation 10 of the 2011 Regulations this stipulates that if the Tribunal is satisfied that the landlord did not comply with a duty in terms of Regulation 3, it “**(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.**” The Legal Member therefore determines that an order must be made in favour of the Applicant.

26. Parties have left the amount of the award to the Tribunal’s discretion.

27. The Tribunal has an “unfettered discretion” as to the level of penalty to be paid under Regulation 10 (a) (see *Fraser and Pease V Meehan* (2013 SLT (Sh Ct))119 per Sheriff Mackie at p 121). The Tribunal is also mindful of the need to proceed in a manner that is fair, proportionate and just having regard to the circumstances of the case including the seriousness of the breach and the purpose of the Regulations (see *Tenzen V Russell* 2014 GWD 4-90; *Kirk v Singh* 2015 SLT (Sh Ct) 111; *Jenson V Fappiano* 2015 SC Edin 6).

28. The Tribunal has also considered the decision of the Upper Tribunal (UTS/AP/19/0020) which states; “*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*”

29. The Tribunal has taken into account that the purpose of the regulations was to protect the tenancy deposit throughout the duration of the tenancy and for parties to have access to the dispute resolution procedure should any issues arise on termination of the lease. The Applicant had a reasonable expectation that her deposit would be paid into an approved scheme timeously.

30. In this case the deposit was paid timeously by the Applicant to the Respondent directly. She was unaware that her deposit was unprotected until issues arose between the parties when she enquired regarding the scheme being used by the Respondents.

31. The Respondent has indicated that she was unaware that it was her obligation to pay the deposit into an approved scheme. She suggested that her solicitors would be dealing with this on her behalf. The letter lodged by her solicitors makes it clear that they did not state that they would do so. Indeed, the communication from the Respondent's solicitor Cullen Kilshaw states that they had been asked to compile a draft PRT which they had done and sent out to the Respondent on 29 September 2020. They stated that they had no further contact with the Respondent regarding the draft PRT and presumed that the tenancy had not gone ahead.

32. The solicitors go on to state

"On the 9th of March 2021, Cullen Kilshaw received a call from Janet Margaret Nixon in regards to an issue she had with the property due to flooding asking for advice. I confirmed that the Agreement which was sent to the client on the 29th of September 2021, was a DRAFT lease, which was to be looked over and sent back to us. The client confirmed that she had used the draft lease and asked if this was legal. I confirmed that the document was a legal document, and all details were in the DRAFT copy.

After speaking with the client at length regarding her issues and damages, I explained that this would need to be completed through a deposit claim and asked at this time which scheme she had used when the deposit was received from her tenant. The client confirmed that the deposit was indeed still in her possession and that she had not lodged this with a deposit scheme. I explained the seriousness of a failed deposit lodge and advised the client to pay the deposit to one of the schemes immediately. I can confirm on 9th March 202, the client confirmed that the deposit had been lodged."

33. The Respondent offered an explanation in mitigation as to why the deposit was not paid timeously into an approved scheme suggesting she thought her solicitors would do so on her behalf. This is not borne out from the letter from her solicitors. She has lodged a letter from her previous solicitors dated 24th March 2017 confirming that they had lodged the deposit with Safe deposit Scotland Limited in relation to an earlier tenancy of the Property. However, it is clear that in relation to the PRT with the Applicant, that she received the deposit directly, and had not engaged her solicitors to proceed with the PRT on her behalf. She chose instead, to use a Draft Lease and to deal with the Applicant herself, presumably to reduce fees incurred.

34. The Respondent did not express any regret/ apology that she had not complied with the Regulations

35. The Tribunal takes into account that the Respondent paid the deposit into an approved scheme as soon as she was advised she required to do so by her solicitors. The Tribunal also takes into account that the Respondent is not a commercial landlord, and the Property is the only one which she rents out. However, the deposit was unprotected for the period 30 September 2020 to 12 March 2021.

36. As matters have transpired it has become necessary for the deposit scheme administrators to deal with the respective parties' claims relating to the deposit.

37. The Tribunal considers that in the circumstances of this case and taking account of the submissions made by the parties that the breach of the regulations is towards the lower end of the scale of seriousness. The Tribunal considers it to be proportionate to make an award equal to the value of the deposit.

Decision

38. The Tribunal determines that an order for payment in the sum of £380 should be made in favour of the Applicant being an amount equal to the value of the tenancy deposit. The Tribunal considers that sum, to be fair, proportionate, and just in all the circumstances of the case.

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; Yvonne McKenna

Date 16 July 2021

Y McKenna
