



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/20/1558

Re: Property at 2/5 King's Stable Road, Edinburgh, Midlothian, Scotland, UK, EH1 2JY (“the Property”)

Parties:

Mr Jonathan Turpin, 167 Cold Bath Road, Harrogate, North Yorkshire, England, UK, HG2 0HN (“the Applicant”)

Mrs Susan MacAllister-Hall, briskworld ltd, Touchwood House, 29 Island Bank Road, Inverness, Scotland UK, IV2 4QS (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent be ordered to pay the sum of FIFTY POUNDS (£50.00) STERLING to the Applicant

FINDINGS IN FACT

- a. The Applicant was the tenant, and the Respondent the landlord, of the Property under and in terms of a Private Residential tenancy which commenced on 28 February 2020.
- b. On or around 21 February, the Applicant paid a tenancy deposit to the Respondent’s letting agent in the sum of £975 (“the Deposit”).
- c. The Respondent had given a standing instruction to her letting agent to pay any tenancy deposit received to Safe Deposits Scotland.

- d. The Respondent was aware of her duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 when the Deposit was paid, and relied upon her letting agent to comply with those duties.
- e. On or around 28 February 2020, the letting agent erroneously paid the Deposit to a bank account in the name of Briskworld Ltd instead of to Safe Deposits Scotland.
- f. On or around 28 April 2020, the letting agent realised its error and informed the Respondent. The Respondent immediately arranged for the Deposit to be returned to the letting agent.
- g. On or around 29 April 2020, the Deposit was lodged at Safe Deposits Scotland.
- h. The tenancy terminated on 28 May 2020.

FINDINGS IN FACT AND LAW

- 1. The Respondent was under a duty to lodge the Deposit with an approved Tenancy Deposit Scheme on or before 14 April 2020.
- 2. By failing to lodge the Deposit with an approved Tenancy Deposit Scheme on or before 14 April 2020, the Respondent is in breach of her duty under Regulation 3(1)(a).
- 3. In all of the circumstances, an appropriate sanction under Regulation 10 is the sum of £50.

STATEMENT OF REASONS

- 1. This application called for its Case Management Discussion on 30 September 2020. The parties both took part in the Case Management Discussion personally.
- 2. This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) for sanction pursuant to a breach by the Respondent of his duties under Regulation 3. The relevant parts of the Regulations are 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.

(1A) Paragraph (1) does not apply—

- (a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
- (b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(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.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

- (a) the references to deposit were to each instalment of the deposit, and
- (b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.

(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 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 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.”
3. Regulation 10 imposes strict liability. Where a landlord has breached its duties under Regulation 3, the Tribunal must make an order for payment. The only discretion afforded to the Tribunal relates to the imposition of a sanction. Determining sanction is an exercise of judicial discretion.

Agreed Facts

- 4. I am grateful to both parties for the concise but detailed written representations that were submitted in advance of the Case Management Discussion, as well as their targeted submissions during the call.
- 5. From the representations submitted, and the submissions made, I consider that the following facts were agreed by the parties:-
 - a. The Applicant was the tenant, and the Respondent the landlord, of the Property under and in terms of a Private Residential tenancy which commenced on 28 February 2020.
 - b. On or around 21 February, the Applicant paid a tenancy deposit to the Respondent’s letting agent in the sum of £975 (“the Deposit”).
 - c. The Respondent had given a standing instruction to her letting agent to pay any tenancy deposit received to Safe Deposits Scotland.
 - d. The Respondent was aware of her duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 when the Deposit was paid, and relied upon her letting agent to comply with those duties.
 - e. On or around 28 February 2020, the letting agent erroneously paid the Deposit to a bank account in the name of Briskworld Ltd instead of to Safe Deposits Scotland.

- f. On or around 28 April 2020, the letting agent realised its error and informed the Respondent. The Respondent immediately arranged for the Deposit to be returned to the letting agent.
- g. On or around 29 April 2020, the Deposit was lodged at Safe Deposits Scotland.
- h. The tenancy terminated on 28 May 2020.

Further Procedure

- 6. In terms of Rule 17 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Procedure Rules, the Tribunal may do anything at a Case Management Discussion that it may do at a Hearing, including make a decision.
- 7. The parties were in agreement as to the salient facts in this case, and neither wished to add to anything that was not provided for in their written cases or as discussed at the Case Management Discussion.
- 8. Regulation 3(1)(a) of the Regulations requires that a Deposit is lodged within 30 working days of the commencement of the tenancy. In terms of Regulation 2 of the Regulations, “working day” means any day which is not a Saturday or Sunday, nor any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom. In terms of section 1 and paragraphs 1, 2 and 3 of Schedule 1 of the 1971 Act, Good Friday and Easter Monday are both bank holidays. Taking all of that into account, it is my view that the Deposit required to be lodged with an approved Tenancy Deposit Scheme no later than 14 April 2020.
- 9. The Respondent accepted that the Deposit was not lodged with an approved scheme until 29 April 2020, which was 15 days after the last day for lodging the Deposit. Accordingly, she was in breach of Regulation 3 and sanction must follow. The only question that remained to be answered was what level of sanction ought to be applied in the circumstances. That being so, I decided to exercise my discretion under Rule 17 and make a decision on this application at the Case Management Discussion.

Applicant's Submissions

- 10. The Applicant submitted that there had been a breach of Regulation 3. He submitted that he had paid his Deposit to the letting agent on 21 February 2020, and thus his Deposit had remained unprotected for a period of over two months. He accepted that the issue here was with the letting agent, and went on to list various other issues that he had experienced with the letting agent during his tenancy.

Respondent's Submissions

11. The Respondent submitted that there had obviously been an error by the letting agent in this case. She submitted that this was an isolated incident which had never happened before. She spoke of an 18 year relationship with the letting agent, during which time the letting agent had never let her down in this sort of way. She submitted that the letting agent had informed her that the individual employee responsible for the error was no longer employed by them. She also submitted that, in order to ensure compliance with her duties under the Regulations, she had given a standing instruction to the letting agent that all tenancy deposits were to be paid directly to Safe Deposits Scotland. That instruction was in place when the Deposit was paid, and she had no explanation for why the letting agent had failed to implement that instruction other than clerical error.

Decision

1. I consider that the correct approach to matters of this nature is that set out by Sheriff Welsh in *Jenson v Fappiano*, 2015 EDIN 6 at paragraphs 11 and 12, where he says:-

“11. Non-compliance is admitted in this case, therefore the regulation is engaged. I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is ‘unfettered’. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

1. 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 judgment.
2. 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 of the case and a value attached thereto which sounds in sanction.
3. A decision based on judicial discretion must be fair and just (‘*The Discretion of the Judge*’ , Lord Justice Bingham, 5 Denning L.J. 27 1990).

12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf *Tenzin v Russell 2014 Hous. L.R. 17*). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case.”

12. Whilst on the face of it the Deposit was unprotected for a period in excess of two months from the date of payment (21 February 2020), the truth is that the duty required by Regulation 3 was to lodge the Deposit with an approved scheme by 14 April 2020. That being so, it was only unprotected for a period of 15 days.
13. Separately, I must have regard to the purpose of the Regulations, which was to afford protection to tenants against a background of historical difficulties in private sector tenants recovering their deposits from rogue landlords. The strict liability offence, and level of sanction permitted by Regulation 10 of up to three times the tenancy deposit, was intended to both punish rogue landlords who put tenancy deposits out of reach and act as a deterrent to prevent such behaviour.
14. None of those matters appear to be a factor in this case. The Respondent was aware of her obligations, and had instructed a professional letting agent to ensure her compliance. She has evidently been let down on this occasion, but it is an isolated incident in respect of lodging tenancy deposits. The error was noticed by the letting agent in what I consider to be a very short space of time, and steps immediately taken to remedy that. I accept that it was an error by the letting agent, and that there is no real need to award sanction as a deterrent from future wrongdoing.
15. That being said, the Regulations are directed at landlords and not letting agents. This action serves as a cautionary tale to landlords that it is not a complete defence to say that the letting agent was responsible. That is, however, a significant mitigating factor to take into consideration.
16. Taking all of that into consideration, I consider that an appropriate sanction lies very much at the low end of the scale, such that I would tend to describe it as “nominal”. The breach was accidental, quickly realised and remedied, and did not inhibit the Respondent’s ultimate ability to make use of the Scheme to recover the Deposit. The Respondent had taken reasonable steps to comply with her duties under Regulation 3, and was not at fault for the breach. In all of the circumstances, I consider that the sum of £50 is adequate sanction.

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.

Andrew Upton

30/09/2020

Legal Member/Chair

Date