



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

Chamber Ref: FTS/HPC/PR/19/4109

Re: Property at 16 Spey Drive, Coatbridge, North Lanarkshire, ML5 5LZ (“the Property”)

Parties:

Mr David Pollock, 24 Fendoch Street, Glasgow, G32 7TH (“the Applicant”)

Mrs Myra Mitchell, 11 Meagy Road, Castlederg, Northern Ireland, BT81 7NX (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member) and Angus Lamont (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent failed to comply with her duty under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and should make payment to the Applicant in the sum of THREE HUNDRED AND FIFTY POUNDS (£350.00) STERLING

FINDINGS IN FACT

1. The Applicant was the tenant of the Respondent of the Property.
2. The Respondent instructed Location Lettings as her letting agents.
3. The Applicant paid a tenancy deposit of £550 to Location Lettings.
4. The Applicant’s tenancy deposit was not paid into an approved tenancy deposit scheme at any time prior to the commencement of the tenancy, during the tenancy, or after the termination of the tenancy.

5. The Respondent relied upon Location Lettings to provide a professional service, which included compliance with all legislative requirements, including the Tenancy Deposit Schemes (Scotland) Regulations 2011.
6. Since this application was raised, the Respondent has taken steps to ensure that she has complied with her duty under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in respect of other tenancies in which she is a landlord and in respect of which her tenants have paid a tenancy deposit.

FINDINGS IN FACT AND LAW

1. By failing to lodge the Applicant's tenancy deposit within an approved tenancy deposit scheme, the Respondent breached her duty in terms of Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
2. In all of the circumstances, the sum of £350.00 is an appropriate sanction for the purposes of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

STATEMENT OF REASONS

1. This application called for a Hearing by teleconference on 30 July 2020 at 10am, together with the related application CV/20/0726. Both parties were present for the Hearing by teleconference. The Respondent was assisted by Mrs Judith Stewart, a friend and lay representative.
2. In this application, the applicant seeks an order under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"), on the basis that the Respondent had failed to pay the deposit into an approved tenancy deposit scheme.
3. In terms of the 2011 Regulations:-

"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.”
4. At the start of the hearing, it was determined that the following facts were agreed:-
- a. In November 2017, the Applicant made payment of the sum of £550 to Location Lettings, the agents of the Respondent, as a tenancy deposit; and
 - b. The tenancy deposit was not paid into an approved tenancy deposit scheme.
5. In light of those agreed facts, it was clear that the Respondent had breached her duty under Regulation 3 of the 2011 Regulations. That being so, in terms of Regulation 10, the Tribunal must grant an order for payment by the Respondent to the Applicant in a sum not exceeding three times the tenancy deposit. Regulation 10 creates strict liability for matters of this nature. The only discretion afforded to the Tribunal relates to the question of sanction. The evidence led and submissions made in relation to this application focused on what level of sanction was appropriate.

Evidence

David Pollock

6. The Applicant's evidence under this application was short. He had paid a deposit of £550 to Location Lettings, and that deposit had not been paid into an approved scheme. The Applicant said that he had highlighted to the Respondent in an email in 2018 that his deposit was not held in an approved scheme, but he did not produce that email to the Tribunal.

Myra Mitchell

7. The Respondent adopted her written statement, submitted with a bundle of productions provided to the Tribunal. She accepted that the deposit had been paid to Location Lettings. Her position was that she had relied on Location Lettings, as professional letting agents, to properly manage her let properties and to ensure compliance with all legislation, including the 2011 Regulations. That the deposit had not been lodged in an approved scheme was due to the breach by Location Lettings of their obligations to her. She was unaware of

the requirement to lodge tenancy deposits with an approved scheme, and assumed that the deposit continued to be held by Location Lettings together with other sums owed by them to her. She did not accept that she had been advised of the need to lodge the deposit in an approved scheme. Her position was that she had behaved reasonably to the tenant throughout the tenancy by affording him additional time to make payment of rent when he was persistently in arrears, and had confirmed to the Applicant that she would pay whatever part of the deposit was properly due to him, notwithstanding it having been retained by Location. Since the raising of this application, she has taken steps to ensure that deposits paid by her other tenants had been placed into approved tenancy deposit schemes, notwithstanding Location Lettings having also retained those deposits. The Respondent produced copies of the relevant certificates showing that.

Submissions

8. The Applicant submitted that his tenancy deposit had been unprotected throughout his tenancy. He had told the Respondent in 2018 that his deposit was not in an approved scheme, and that it required to be lodged in one. He submitted that the appropriate sanction would be the maximum: three times the tenancy deposit.
9. The Respondent accepted liability for her breach of duty. Her position was simply that she had been very badly let down by the professional agents that she had instructed to avoid this very situation. She had been very accommodating to the tenant throughout the tenancy.

Discussion

10. When considering what order to make under the 2011 Regulations, the Tribunal is required to exercise judicial discretion. In *Jenson v Fappiano*, unreported, Sheriff Welsh set out his views on the requirements of Regulation 10:-
 - “11. 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)."
11. The Tribunal accepts Sheriff Welsh's analysis. This is the basis upon which the Tribunal has approached the question of sanction.
 12. In this case, the Applicant's deposit was unprotected for the duration of his tenancy. However, we do not accept that this was due to the deliberate disregard by the Respondent of her obligations. In fact, the Respondent had engaged a professional letting agent for the purposes of ensuring compliance with all legal requirements. It is regrettable that the Respondent's letting agent failed to lodge the Applicant's deposit in an approved scheme and ensure the Respondent's compliance with the Regulations, but it is our view that there was nothing that ought to have suggested to her that Location Lettings had failed to lodge the Applicant's deposit in an approved scheme.
 13. In respect of the Applicant's evidence that he informed the Respondent of her requirement to lodge the tenancy deposit in an approved scheme sometime in 2018, the Tribunal rejects that evidence for two reasons: firstly, the Applicant's vague reference to an email sometime in 2018 was unsupported by a copy of that asserted email; and secondly, the Respondent produced a copy of an email from the Applicant to the Respondent dated 17 December 2019 in which the Applicant states the following:-

"I have spoken with Shelter Scotland and they have advised me of the following.

At point from where my deposit is paid by law the landlord or their agent must deposit that within a registered safe deposits scheme within 30 days."

The Applicant then goes on to set out his understanding of the legislation. All of that is prefaced by the caveat that he had obtained that advice from Shelter Scotland. It seems clear that the advice had been taken recently. It also appears that this was the first occasion that this was raised with the Respondent. That is inconsistent with the Applicant's evidence that he had previously told the Respondent of her obligations. The Tribunal finds the Applicant's evidence to be unreliable.

14. The Respondent has invited the Tribunal to take into consideration her treatment of the Applicant during the tenancy. That evidence is irrelevant to the current application. The sanction in this case ought to relate to the Respondent's actions to comply with her duty, and it would be inappropriate to

accept that her breach of that duty could be mitigated by her leniency towards the Applicant in respect of his accepted persistent late payment of rent. That being so, the Tribunal has disregarded that evidence and related submission.

15. That being said, the Tribunal has considerable sympathy with the situation that the Respondent has found herself in as a consequence of her agent's actions. We do not consider this case to be an example of serial non-compliance, or of deliberate disregard for the Regulations. We certainly do not consider that this case is at the extreme end of the spectrum of non-compliance. Insofar as sanction in this case ought to act as a deterrent, it seems clear that the Respondent is not only aware of her obligations but has embraced the duties incumbent upon her in respect of her other tenancies. As such, the deterrent factor is not of considerable importance, in our view.
16. Therefore, having regard to all of the circumstances, the Tribunal considers that the sum of £350, being slightly more than half of the tenancy deposit, is a reasonable sanction in this case. It reflects the fact that the Respondent breached her duty, but only as a consequence of her professional agent's failure. She had instructed a professional agent specifically to avoid this sort of situation. Accordingly, the Tribunal will grant an order that the Respondent makes payment to the Applicant in that sum.

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 July 2020

Legal Member/Chair

Date