



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

**Chamber Ref: FTS/HPC/PR/20/0710**

**Re: Property at 149c Dormanside Road, Glasgow, G53 5XP (“the Property”)**

**Parties:**

**Mrs Naseen Akhtar, 8 Tarras Drive, Renfrew, PA4 0YZ (“the Applicant”)**

**Chercor Ltd, 1 Broomieknowe, Lasswade, EH18 1LN (“the Respondent”)**

**Tribunal Members:**

**Ruth O'Hare (Legal Member) and Elaine Munroe (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order for payment against the Respondent in the sum of Two hundred and fifty pounds (£250) Sterling.**

**Background**

- 1 By application dated 28 February 2020 the Applicant sought an order for payment as a result of the Respondent’s failure to lodge her deposit in an approved tenancy deposit scheme. In support of the application the Applicant provided copy Tenancy Agreement between the parties dated 12 June 2018 for a property at 48 Skirva Street, excerpts from text correspondence, copy correspondence from Positive Action in Housing to the Respondent and mandate for Positive Action in Housing to represent the Applicant. The Applicant subsequently provided a copy Tenancy Agreement dated 28 November 2018 for the property at Dormanside Road
- 2 By Notice of Acceptance of Application dated 6 April 2020 the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 18<sup>th</sup>

August 2020. At the same time a Direction was issued seeking clarity on the Respondent's designation.

- 3 The application paperwork together with notification of the date, time and location of the Case Management Discussion was served on the Respondent by Sheriff Officers on 24 July 2020

### **The Case Management Discussion**

- 4 The Case Management Discussion took place on 18 August 2020. The Applicant was not present. Her son, Mr Ahmad Raza, was in attendance together with Mr Timothee Lehuraux, a project lead from Positive Action in Housing. The Applicant had agreed that Mr Lehuraux would represent her in the proceedings going forward. Mr James Anderson attended on behalf of the Respondent as a Director of the company. An interpreter was also present to assist Mr Raza if required.
- 5 The Tribunal noted a dispute between the parties as to whether a payment of £500 made by the Applicant prior to the commencement of the tenancy was a tenancy deposit. The payment had been made in relation to a previous tenancy at Skirving Street in Glasgow, but subsequently transferred to the tenancy at Dormanside Street. The Respondent's position was that the payment had been advanced rent, not a deposit, and did not therefore require to be placed within a scheme. It had been applied to a shortfall in rent during the month of December 2018 for the property at Dormanside Street. The payment of advanced rent had been agreed verbally between the parties, as the Applicant was not in a position to pay a deposit at the commencement of the tenancy. The Tribunal noted that the Respondent had submitted written representations in the form of a rent schedule by email on the day of the Case Management Discussion which had not yet been considered by the Applicant.
- 6 The Tribunal therefore fixed a Hearing in terms of Rule 24 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

### **Issues to be Resolved**

- 7 The Tribunal identified the issues to be resolved as follows:-
  - (a) Was a tenancy deposit (as defined by section 120 of the Housing (Scotland) Act 2006) paid by the Applicant to the Respondent?

- (b) If a tenancy deposit was paid, what sanction should be applied by the Tribunal in terms of Regulation 10 of the 2011 Regulations for the failure to comply with the duty in Regulation 3 of the 2011 Regulations.

## The Hearing

- 8 The hearing took place on 1<sup>st</sup> October 2020 by teleconference. Mr Timothee Lehuraux represented the Applicant who was not in attendance. Mr James Anderson appeared again as a Director of the Respondent. The Tribunal confirmed that neither party intended on leading evidence from any other witnesses.
- 9 As a preliminary matter, the Tribunal noted the following matters as agreed between the parties:-
- (a) The Applicant and Respondent entered into a Tenancy Agreement for the property at 48 Skirving Street, Pollokshaws, Glasgow dated 12 June 2018 which commenced on that date.
  - (b) Clause 10 of the said Tenancy Agreement states *“The Landlord must lodge any deposit they receive within a tenancy deposit scheme within 30 working days of the tenancy. A tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid. At the start date of the tenancy or before, a deposit of £500 will be paid by the Tenant to the Landlord.”*
  - (c) On 6 June 2018 the Applicant arranged a payment of £200 to the Respondent. The reference for that payment was “House Deposit BBP”.
  - (d) On 12<sup>th</sup> June 2018 the Applicant arranged a payment of £800 to the Respondent. The reference for that payment was “House Rent FT”.
  - (e) The Applicant and Respondent entered into a Tenancy Agreement for the property at 149c Dormanside Road, Glasgow dated 28 November 2018 which commenced on 29 November 2018.
  - (f) Clause 10 of the said Tenancy Agreement states *“The Landlord must lodge any deposit they receive within a tenancy deposit scheme within 30 working days of the tenancy. A tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid. At the start date of the tenancy or before, a deposit of £500 will be paid by the Tenant to the Landlord.”*

10 The Tribunal then heard evidence from the parties on the issues to be resolved which can be summarised as follows:-

11 *Was a tenancy deposit (as defined by section 120 of the Housing (Scotland) Act 2006) paid by the Applicant to the Respondent?*

Mr Lehuraux explained the Applicant's position was clear in that the payment of £500 had been made to the Respondent prior to the commencement of the tenancy in line with the requirements of Clause 10 of the tenancy agreement. It had been marked on the bank transfer as a deposit. The deposit had then been transferred to the second tenancy at Dormanside Street. There was no verbal agreement to the effect that the payment was advanced rent. The deposit should therefore have been lodged in a scheme. Mr Lehuraux pointed to the fact that the tenancy agreement used on both occasions was the Scottish Government template, but that Clause 10 had been specifically completed to require a deposit of £500.

12 Mr Anderson explained that the Respondent had been trying to assist the Applicant and her family, by obtaining tenancies suitable to their needs. At the time the payments were made, the Applicant and her son were in need of a larger property as the whole family were sharing one house. The Applicant and her son moved into the property at Skirving Street. At the same time the Applicant's other son moved into another property at Tarris Drive in Renfrew. The Applicant and her sons were having difficulty in obtaining a deposit, therefore it had been agreed in both cases that an advanced payment of rent in the sum of £500 would be paid in addition to the first months rent. This equated to the sums the Applicant had paid to the Respondent in June 2018 for the tenancy at Skirving Street. The Applicant's son Mr Raza had then been chasing the Respondent for a larger property, and the Respondent had done everything to assist the family in transferring to the tenancy at Dormanside Road, including providing a vehicle for them to move their belongings. In relation to the payment of £500 that had been taken as advanced rent, this had been held and had been put towards a shortfall in the rent for December 2018. There was therefore no money to return to the Applicant at the end of the tenancy.

13 In response to questions from the Tribunal, Mr Anderson confirmed that if the rent account had been kept up to date, the payment of £500 would have been returned. It was being held to cover any rent shortfalls that may occur during the tenancy. It was not a deposit. Mr Anderson conceded that the terms of the tenancy agreement required payment of a deposit under Clause 10, but the verbal agreement he made with the Applicant's son superseded that. It was regrettable that the tenancy agreement had not been updated following that discussion to reflect the new arrangements. This had been an error on the Respondent's part and likely a reflection of the temporary nature of the arrangements in relation to the property at Skirving Street. It was the Respondent's practice to take deposits however on this occasion they had

been trying to assist the Applicant. They were also a bit anxious about the circumstances of the tenancy, and Mr Anderson highlighted that all dealings had been with the Applicant's son. The Respondent had not had any direct contact with the Applicant herself.

- 14 In response to Mr Anderson's evidence, Mr Lehuraux queried why the terms of the tenancy agreement had not been updated. The paperwork was the objective evidence that confirmed the nature of the payment made. He highlighted the difference in the treatment of the payment in that the landlord had retained control and had then made deductions in relation to the rent account as he saw fit without the tenant having the benefit of the deposit scheme protection.
- 15 There was discussion in relation to the rent account and whether that was an accurate reflection of the payment history, however the Tribunal was clear in that it was not making a determination on whether the application of the £500 to the rent account was justified. It was solely looking at the question of whether the payment fell within the definition of a deposit. Similarly it was noted that there appeared to be a dispute regarding the end date of the tenancy however this was not considered by the Tribunal to be an issue that required to be resolved in terms of the matter before it, the application having been made timeously in either case.
- 16 *If a tenancy deposit was paid, what sanction should be applied by the Tribunal in terms of Regulation 10 of the 2011 Regulations for the failure to comply with the duty in Regulation 3 of the 2011 Regulations.*

Mr Lehuraux explained that the Applicant sought the maximum amount of three times the deposit in her application. He noted that it was at the discretion of the Tribunal as to what amount they considered appropriate having regard to the circumstances of this case. In response to questions from the Tribunal as to why he considered the circumstances were severe enough to merit the maximum award, Mr Lehuraux explained that he had no additional submission to make as to why the Applicant considered that amount was appropriate. He cited the fact that the law permitted that amount to be awarded. It would also serve as compensation for the delay in the Applicant obtaining her deposit back, which was particularly important as she could at times find it difficult to make ends meet. The deposit had not been registered and no information had been communicated to the Applicant despite repeated requests.

- 17 Mr Anderson advised that he had no comments on the level of award that should be awarded, if such a determination was required. He explained that it was quite clear that the money received was the money that was due in terms of the rent. The rent schedule produced by the Respondent made it clear what rent was due and what was paid. There was no deposit. He accepted there

had been an error in the lease, but the Applicant's son was aware of the position. The Respondent had done everything they could to accommodate the Applicant's situation. They were familiar with their duties as a landlord under the 2011 Regulations. It was the concern around the personal circumstances of the Applicant and her sons that had led to the alternative arrangement.

- 18 Both parties were given the opportunity to make any final submissions but declined to do so.

### **Relevant Law**

- 19 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.*

- 20 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 and Law**

- 21 The Applicant made payments totalling £1,000 to the Respondent on 6<sup>th</sup> June and 12<sup>th</sup> June 2018 in terms of the Tenancy Agreement entered into between the parties dated 12 June 2018 in respect of the property at 48 Skirving Street, Pollokshaws, Glasgow.
- 22 The payments consisted of rent for the first calendar month of the tenancy in the sum of £500 which required to be paid prior to the commencement of the tenancy in accordance with Clause 7 of the said Tenancy Agreement and the deposit in the sum of £500 which required to be paid in accordance with Clause 10 of the said Tenancy Agreement.
- 23 The payment of £500 paid under Clause 10 of the said Tenancy Agreement was a tenancy deposit as defined by section 120 of the Housing (Scotland) Act 2006.
- 24 The Respondent did not pay the deposit into an approved tenancy deposit scheme.
- 25 The deposit was transferred to the tenancy at 149c Dormanside Road, Glasgow in accordance with Clause 10 of the Tenancy Agreement entered into between the parties in respect of that property dated 28 November 2018.
- 26 The deposit was applied by the Respondent to a rent shortfall for the tenancy at 149c Dormanside Road, Glasgow in December 2018.
- 27 The Respondent is in breach of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.

## Reasons for Decision

- 28 The Tribunal determined the application having regard to the application paperwork, the written representations from both parties and the evidence and verbal submissions at the Hearing. The Tribunal was satisfied that it had sufficient information upon which to determine the application.
- 29 The Tribunal did not hear evidence directly from the Applicant, nor her son. Mr Lehuraux had confirmed at the Hearing that neither wished to attend for that purpose. Ultimately it is for a party to determine how they best wish to present their case to the Tribunal and the Tribunal was satisfied on this occasion that the Applicant had been afforded the benefit of advice from Mr Lehuraux in that respect. Accordingly the Tribunal considered it could proceed to determine the application.
- 30 The Tribunal noted the dispute between the parties as to whether a verbal agreement had been reached as to the nature of the payments at the commencement of the tenancy. However the Tribunal considered that in the absence of any formal recording of such an arrangement, the terms of the Tenancy Agreement which made clear and explicit for payment in the sum of £500 by way of a deposit took precedence. The payments that had been made in June 2018 by the Applicant were a clear reflection of the terms of Clauses 7 and 10 of the Tenancy Agreement which required payment of the rent of £500 for the first calendar month of the tenancy and the deposit of £500.
- 31 For the avoidance of doubt the Tribunal did not therefore require to make a finding on whether there had been such a verbal agreement between the parties. However, even if such a discussion had taken place, the Tribunal could envisage that there may still have been some confusion on both sides as to what the nature and purpose of the payments made by the Applicant in June 2018 were. Whilst the Tribunal found Mr Anderson to be generally credible and honest in his evidence, it did find it difficult to follow the Respondent's logic whereby the Applicant could not afford the deposit, but could pay an additional months rent over and above what was required by the tenancy agreement to be held as security for any unpaid rent. It is entirely possible that the Applicant and her son would have had similar difficulties in understanding what exactly was being proposed by the Respondent.
- 32 It should be said that even if the Tribunal had accepted that any verbal arrangement between the parties superseded the terms of the Tenancy Agreement, it would still have reached the conclusion that the said payment was a tenancy deposit. A tenancy deposit, as per the definition in section 120



of the 2006 Act, is a payment held as security for performance of the tenant's obligations under the tenancy agreement, or to discharge any liabilities which so arise. By his own acceptance, Mr Anderson had stated that the money was being held by the Respondent to cover any rent shortfalls, and would have been repaid in the event that the rent account was up to date. It was evident therefore that this was a payment that was being held as security for the Applicant's performance of the obligation to pay rent and fell within the definition of a tenancy deposit. Had the payment been lodged with a tenancy deposit scheme, the parties would have had the benefit of access to the impartial dispute resolution mechanism as the end of the tenancy to resolve any dispute about what deductions were due. Instead, the Respondent had unilaterally made those calculations as per the rent schedule produced and it was clear that these were not entirely accepted by the Applicant. Whilst it was not for the Tribunal to make a determination on that issue it did highlight one of the key reasons why the legislation requires payments of this nature to be lodged with a third party scheme.

- 33 The Tribunal accepts that there will be circumstances where advanced payment of rent will not fall within the definition of a deposit. However clear and unequivocal specification would be required as to which particular obligation will be extinguished by the advanced payment. To give some examples, a payment of six months rent in advance, or a payment of the first and last months rent in advance, would not in the view of the Tribunal fall within the definition of a tenancy deposit. Parties would be clear in such situations what the payments are for.
- 34 The Tribunal therefore made a finding that the Respondent was in breach of the duties under Regulation 3 of the 2011 Regulations. Accordingly under Regulation 10, the Tribunal had to consider what sanction would be appropriate in the circumstances of the case. The Tribunal noted the purpose of Regulation 10, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The provisions of Regulation 10 left no discretion where a landlord is found to have failed to comply and permitted an award of up to three times the deposit where a finding of breach is made.
- 35 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained unprotected for the entire term of the tenancy and that the Applicant had not had the benefit of the independent dispute resolution mechanism that would have been available had the payment been placed within a tenancy deposit scheme.

- 36 However the Tribunal did not consider there to be any deliberate intent on the Respondent's part to evade their duties under the 2011 Regulations. The Tribunal had found Mr Anderson to be credible in his evidence, and accepted that he had been trying to assist the Applicant in her search for suitable family accommodation. The Tribunal considered that there had been some confusion and misunderstanding regarding the purpose of the payment held and the Respondent was under a misapprehension as to what would constitute an advanced payment of rent. It was clear from Mr Anderson's evidence that the Respondent had learned from the situation and was aware of their duties under the 2011 Regulations.
- 37 The Tribunal did not therefore agree with the Applicant that this was a case that would merit an award at the higher end of the scale, as the seriousness of the breach was not sufficiently high enough to justify three times the amount of the deposit. The Tribunal therefore make an order against the Respondent in the sum of £250, being half the deposit.

### **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.**

Ruth O'Hare

1.10.2020

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**Legal Member/Chair**

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**Date**