



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/20/1210

Re: Property at Room 1, 36 Berkeley Street, Glasgow, G3 7DW (“the Property”)

Parties:

Mr Cameron McLean, 53 Gamekeepers Road, Edinburgh, EH4 6LR (“the Applicant”)

McMillan & Co Residential Ltd, 15 Hillhead Street, Glasgow, G12 8PU (“the Respondent”)

Tribunal Members:

Melanie Barbour (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”) seeking an order for payment due to the landlord’s failure to timeously lodge the tenancy deposit with an approved scheme.
2. The application contained,
 - (a) email confirming receipt of deposit from Respondent to Applicant dated 18 February 2019
 - (b) a copy of the Tenancy Agreement showing commencement of tenancy 22 February 2019
 - (c) My Deposits Scotland Tenancy Protection Certificate showing deposit received on 23 December 2019

- (d) email confirming end of tenancy to be 17 April 2020
 - (e) Email from My Deposits Scotland advising deposit to be returned dated 16 April 2020
3. The Applicant attended today's case management discussion. Mr Maciver from Messrs Brunton Miller appeared on behalf of the Respondent.
 4. There was a preliminary matter regarding the submission of written answers. Mr Maciver advised that they had been submitted by email of 17 July 2020. The tribunal member and Mr McLean had not had sight of them. Mr Maciver was content to proceed without regard to these and to make a verbal submission for the Respondent.

Hearing

5. The Applicant confirmed that he was seeking an order against the Respondent. He advised that he had paid a deposit on 18 February 2019. He had taken entry on 22 February. He received an email from My Deposits Scotland on 23 December 2019 advising that his deposit had been secured. He was concerned to find this out, as he had assumed that the deposit would have been secured earlier and in accordance with the provisions of the tenancy agreement between the parties. The tenancy agreement had said that it would be secured in a tenancy deposit scheme. From the terms of the email received from My Deposit Scotland he became aware that the deposit had not been secured until 23 December 2019, 10 months after the tenancy had started.
6. The Applicant understood that a deposit had to be secured within 30 days of being received. It had not been registered with a scheme in time. The Applicant was disappointed by this failure and he was seeking an order of 3 times the value of his deposit.
7. He confirmed that he had not chased up the lodging of the deposit with the landlord before 23 December 2019. He advised that he did not think that he had to, and what would happen to the deposit was set out in the tenancy agreement. He confirmed that the deposit had been returned to him, in full, at the end of the tenancy, there had been no delay and there had been no difficulty getting the deposit returned.
8. He considered that the order should be 3 times the value of the deposit, as the Respondent was an established property company; they had been in business for 20 years; they had multiple properties; the failure to lodge the deposit for 10 months was more than just a "slip up"; and he was very dissatisfied to find out that the deposit had been unsecured for 10 months.
9. The Applicant while appreciating the response by the Respondent's representative submitted that it did not seem reasonable to suggest that the responsibility for the lodging the deposit lay only with one person in the organisation. There had been no check or notice of it until the audit was completed. He thought this was a rather concerning statement.

10. The Respondent's representative advised that there was no dispute by the Respondent that the deposit had not been lodged with an approved scheme within the correct timescale. He advised that in terms of the regulations the best case scenario for the landlord was that the deposit had been lodged 9 months late. This failure was accepted by the Respondent.
11. The Respondent's representative submitted that there had been no issues regarding the release of the deposit.
12. The Respondent's representative acknowledged that the Respondent had been in the property industry for a number of years; and further that they had 38 properties in their portfolio. They were a long established business.
13. The Respondent's representative advised in relation to the failure to lodge the deposit, this matter had come to light when an audit had been carried out by the Respondent's accountants. During the audit, a discrepancy had been identified and the Respondent realised that some deposits had not been lodged. As soon as this matter was identified, all deposits were lodged with an approved scheme. He advised that there had been a member of staff, who had responsibility for lodging the deposits; the failure had led to disciplinary action being taken against that member of staff. She no longer worker for the Respondent. The Respondent accepted that the failure was nonetheless his responsibility; and he had to ensure that deposits are lodged and the buck stops with him. The Respondent is now taking personal responsibility in ensuring that future deposits are lodged in accordance with the regulations, in order to that such a failure does not happen again.
14. The Respondent accepts that the deposit was not lodged, however the Respondent's company had a healthy credit balance in their account and the deposit was not at risk.
15. As the matter was dealt with as soon as the Respondent had become aware of it; and as there had been no re-occurrence, he submitted that any sanction that the tribunal decided to impose should be the lower end of the scale. The Respondent accepted that the breach of the regulations was not acceptable; however the Applicant had not suffered any loss. He submitted that it is not compensation that is payable to an Applicant, but it is a sum imposed as a sanction upon the Respondent.

Findings in Fact and Law

16. The tribunal found the following facts to be established :-
 - (a) That a tenancy had commenced on 22 February 2019.
 - (b) The Respondent was the landlord and the Applicant was the tenant.

- (c) That the Applicant had paid the Respondent a tenancy deposit of £495 on 18 February 2019.
- (d) That the deposit was lodged with an approved scheme on 23 December 2019.
- (e) That the tenancy had ended on 17 April 2020.
- (f) That arrangements had been made to repay the deposit in full to the Applicant on 16 April 2020.
- (g) That the tenancy deposit had not been lodged with an approved scheme within 30 working days of the tenancy beginning.

Reasons for Decision

17. The Tenancy Deposit Schemes (Scotland) Regulations 2011 set out a number of legal requirements in relation to the holding of deposits, and relevant to this case are the following 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; ...
- ...

18. Regulation 9 provides that 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.

19. Regulation 10 provides that if satisfied that the landlord did not comply with any duty in regulation 3 then the first tier tribunal — must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and may, as it 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.

20. The Respondent accepted that the deposit had not been paid into an approved scheme in accordance with the terms of the regulations. Therefore, the terms of regulation 10 are engaged and I must order that the Respondent pay the Applicant an amount not exceeding three times the amount of the tenancy deposit. The amount to be paid requires to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty.

21. In this case, I consider that a sum of £400 would be appropriate. While there has been a breach, I do not consider that it has been a serious breach; and any

penalty should be at the lower end of the scale, albeit, not the lowest end of the scale.

22. In considering what penalty to impose, I have regard to the submission of both parties and the Applicant's application.
23. I consider that it is a serious matter to fail to lodge a tenancy deposit in accordance with the regulations. A period of 10 months is a not insubstantial period of time for a deposit to be unsecured. The Respondent was a long established and experienced property company. The Respondent was well aware of his duties under the regulations and these duties were breached. The system that the Respondent had in place to ensure that a deposit was lodged was evidently not sufficient or adequate. The deposit had sat in a company account for 10 months, and this matter only came to light when the Respondent's accountants were undertaking an audit. There appeared to be only one person in the Respondent's company responsible for lodging deposits. There appears therefore to have been no adequate supervision/or checking in place to ensure that employees were carrying out their duties.
24. In mitigation however the Respondent accepted the breach in full and has not sought to dispute liability. He has provided a reasonable explanation for what happened; that it only came to light when the audit took place and this appears to me to be a credible explanation of what did happen. In addition the deposit was lodged as soon as the matter came to light. There was no issue or delay with the return of the deposit at the end of the tenancy. The Respondent appears to have also taken action to ensure that the matter does not reoccur; he has dismissed the employee and now takes personal responsibility for the lodging of tenancy deposits.
25. While it was in no way the responsibility of the Applicant, I do note that the deposit was not lodged as a result of the Applicant having to press the Respondent to lodge the deposit.
26. It appears to me to have been more of a simple failure in the administration of the Respondent's company; as opposed to any reckless disregard or, refusal to comply with the tenancy deposit regulations. While such a failure led to the deposit being unsecured, I consider that is relevant that it was rectified as soon as it became known to the Respondent and no loss has been suffered by the Applicant.
27. For all of the reasons set out above, I consider that the matter is sufficiently serious that a penalty needs to be imposed that is more than minimal, however the penalty should be at the lower end of the scale, as I do not consider that there has been a blatant disregard for the regulations; I consider that it has been an administrative error on the part of the Respondent; and one which was rectified as soon as the matter was noticed.

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.

M. Barbour

Legal Member/Chair

05/08/20

Date