



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

Chamber Ref: FTS/HPC/PR/23/2566

Re: Property at The Fort Cottage, Westfield, Elgin, IV30 8XL (“the Property”)

Parties:

Mr Neil MacDonald, Westview, Longmorn, Elgin, IV30 8RN (“the Applicant”)

Westfield Discretionary Trust, The Fort Cottage, Westfield, Elgin, IV30 8XL (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member)

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1. This Hearing was a Case Management Discussion (hereinafter referred to as a “CMD”) fixed in terms of Rule 17 of the Procedure Rules and concerned an Application dated 29th July 2023 under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (hereinafter referred to as “the Deposit Regulations”). The purpose of the Hearing being to explore how the parties dispute may be efficiently resolved. The purpose of the hearing was explained and it was understood a final decision could be made. The hearing took place by teleconference.

2. Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £ in terms of Regulation 10(a) of the Regulations should be made.

3. Attendance and Representation

The Applicant was present and unrepresented.

The Respondent was present and unrepresented.

4. Preliminary Matters

Preliminary Matters

The Applicant was asked by the Tribunal to expand on his written representations regarding who the landlord is raised by the Tribunal administration and the Respondent. The Applicant said the landlord was as far as he was always concerned Mr Maclean, it had always been him and he was always the figurehead. The letting agency always spoke about him as the landlord

The Respondent was also asked by the Tribunal to expand on his written representations regarding who the landlord is. The Respondent said the landlord was the Westfield Discretionary Trust. The Westfield Trust set up by his parents and the beneficiaries were himself and his 3 sisters. He is one of those trustees. He said the Applicant was probably never aware of this information and the lease will did not specify same of who the trustees are and who the beneficiaries are. The address is correct in the application. He has no issue representing the trust. He had no objection to the amendment being made that he is replaced by the Trust at the same address and he acts as the representative. The Tribunal allowed this amendment and noted thereafter the Respondent should be regarded as the Respondent's representative.

There were no other preliminary matters raised.

Case Management Discussion

For the Applicants

The Applicant's position was that at the beginning of the tenancy he paid a deposit to the Respondent's letting agency at that time, CDK Galbraith. He paid the deposit of £1350. It was his understanding the deposit would be lodged with the Safe Deposit Scotland. The Applicant said that some 12 months after he had lodged the deposit he got an email from the deposit scheme dated 24th July 2018 acknowledging the deposit and thanking him for lodging the money. The Applicant said further he enquired and said he had not lodged the deposit recently. Safe Deposit Scotland confirmed it had only then been a couple of days prior to their communication. This documentation was lodged with the Application.

The Applicant said further that it turned out that the letting agency had not lodged the deposit within the required timescale and they said it was to do with a computer error. The Applicant sought an award of up to three times and he thought it was serious as he only found out from a 3rd party and the money had not been lodged for 12 months. The Applicant confirmed he left the property in July 2023.

For the Respondent

The Respondent's representative said it was admitted that there was a breach of the regulations and the deposit had not been lodged for 12 months due to an error by the letting agents. He said this had been admitted to by Galbraiths, the agency. He went to say the Respondent admits the deposit was not lodged in time and there was a delay of 12 months. He said that the Respondents only became aware by the lettings agents after it had been lodged late. When he had been made aware he made Galbraiths aware. Initially he said the Applicant confirmed he would not raise an application but has since changed his mind. The Respondent's representative said the Trust has 2 properties they rent and that the letting agency deals with all deposits, rent and such.

The Respondent lodged written representations with the Tribunal on the 7th September 2023 and he referred to them in terms of the Tribunal's discretion to make an award. The Tribunal noted the Respondent narrated the nature and progress of the tenancy and relationship between parties. He confirmed the Respondent received the full deposit back at the end of the tenancy. The letting agents for the Respondent accepted fault and responsibility.

5. Findings in Fact and Reasons for Decision

1. Rule 17 of the Procedure Rules provides that a Tribunal can do anything at a CMD which it may do at a Hearing, including making a decision. The Legal Member was satisfied that the Tribunal had everything before it that it would require in order to make a decision having regard to the Overriding Objective. The sufficiency of facts and evidence lodged allowed a decision to be made. No further evidence not already before the Tribunal was referred to by the Applicant. Both parties agreed they did not have any further evidence to provide the Tribunal. The material matter of the alleged breach of the Regulations was not in dispute.
2. The Application was brought timeously in terms of regulations 9(2) of the Deposit Regulations.
3. In terms of Deposit Regulation 10 if the FTT is satisfied that the landlord did not comply with any duty detailed in Regulation 3 then the FTT must order a landlord to pay the tenant or tenants an amount not exceeding three times the amount of the tenancy deposit.
4. The FTT was satisfied that the Respondents did not register the deposit with a deposit protection scheme as required by Regulation 3. The Respondent's position was that this was due to an error admitted by the Trust's letting agency. The deposit was not lodged in an approved deposit scheme for 12 months. The Respondent accepted the breach.
5. If the FTT was satisfied a breach of the regulations had occurred the FTT had to make an order in terms of Regulation 10.

6. In terms of Regulation 10 the FTT is obliged to make an order up to 3 times the deposit of the applicants to the respondent.
7. When considering the Order and level of sanction the FTT must have regard to the severity of the breach and any mitigating factors.
8. The deposit was unsecured for a period of around 12 months of the tenancy.
9. In the case of *Jenson v Fappiano* 2015 G.W.D 4-89 in relation to the amount of such an Award under regulation 10 of the Regulations it was noted that a judicial analysis of the nature of the non-compliance was required and a value attached to reflect a sanction which was fair and proportionate and just given the circumstances.
10. It was further noted that the Sheriff said in said case that the value was not the starting point of three times the deposit minus the mitigating factors it was what was fair and proportionate in the exercise of balanced judicial discretion.
11. The Court of Session in *Tenzin v Russell* 2015 Hous. L.R 11 held that any payment in terms of Regulation 10 of the Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
12. The FTT was therefore of the view that an Award should be made in the lower to middle end of the scale as the deposit had been late for a 12 month period but the responsibility for same did appear to rest with the letting agency from the Respondents point of view. The Trust rented a small amount of properties and employed an agency to manage matters. The Respondents did not seek to deliberately avoid their statutory responsibility to secure the deposit. The Applicant had only become aware of the failure some time later and had not been informed. Whilst at the end of the tenancy he had the benefit of an approved scheme it was a not an insignificant period that his deposit was not secured. Accordingly in balancing the circumstances of both parties having heard submissions and in its discretion the Tribunal found the Applicants entitled to an award of 1.5 times the initial deposit to the sum of £2025.

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

Date 11th October 2023