

Housing and Property Chamber

First-tier Tribunal for Scotland



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Chamber Ref: FTS/HPC/PR/17/0527

Re: Property at Flat 2/1, 37 Henderson Street, Glasgow, G20 6HP ("the Property")

Parties:

Miss Anita Rozentale, Mr Luke Joseph Welch, First Floor Flat, 22 Silverdale Road, Southampton, SO15 2NG ("the Applicant")

Mr Michael Caldwell, 46 Findhorn Place, Troon, Ayrshire, KA10 7DJ ("the Respondent")

Tribunal Members:

Virgil Crawford (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent shall make payment to the Applicant in the sum of ONE THOUSAND SIX HUNDRED AND FIFTY POUNDS (£1,650.00) STERLING

BACKGROUND

1. The Applicant entered into a Lease Agreement in relation to the property. The Applicant was the tenant, the Respondent was the Landlord. The Lease commenced on 1st December 2016. The Lease terminated on 18th September 2017.
2. The Applicant paid the sum of £550 to the Respondent as a deposit in relation to the Lease.

3. The Respondent was obliged, in accordance with Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the TDS regulations") to pay the deposit to an approved tenancy deposit scheme within a period of 30 days. Further, the Respondent was obliged, in terms of Regulation 42 of the TDS regulations to provide information to the tenant in relation to the amount of the deposit and the tenancy deposit scheme into which it had been placed. The Respondent failed to do so.
4. Following the termination of the tenancy, the Applicant requested repayment of the deposit. A lengthy exchange of email correspondence ensued in the course of which the Respondent advised that the deposit funds had been placed into an approved scheme by his accountant, that he was awaiting information from his accountant in relation to the repayment of the deposit, that the deposit was to be repaid from the scheme in four separate instalments and that the payments would be forwarded to the applicant. One single payment of £100 was paid by the Respondent to the Applicant in repayment of the deposit. The balance of the deposit outstanding was, and remains, as £450.
5. The Applicant presented a timeous application to the Tribunal seeking an Order in terms of Regulation 10 of the TDS Regulations.
6. The Tribunal issued a direction to the Respondent ordering that he provide information in relation to the tenancy deposit scheme into which the deposit was placed. The Tribunal issued a request for evidence to each of the approved tenancy deposit schemes requiring information as to whether or not deposit funds in relation to the property had been lodged with them. The Respondent replied confirming that he had not placed the funds within a tenancy deposit scheme and accepted responsibility for that. Each of the tenancy deposit schemes provided a response to the request for evidence, each confirming that it had no record of funds being deposited in relation to the property.

SUBMISSIONS AT HEARING

7. Neither party attended the Case Management discussion. Each had separately corresponded with the Tribunal advising of her/his inability to attend, each also confirming that all relevant information had been provided.
8. The Tribunal, being satisfied that the requirement of Rule 24 (1) of the Regulations had been met, determined that a decision could be made in the absence of the parties in accordance with Rule 29 of the Regulations.

DECISION

9. The Tribunal ordered, in accordance with Regulation 10 of the TDS Regulations, that the Respondent make payment to the applicant in the sum of £1,650 Sterling that being an amount equivalent to three times the amount of the deposit.

REASONS FOR DECISION

10. The TDS 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 sheriff 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.

References to “the sheriff” should now be read as referring to the First Tier Tribunal for Scotland.

11. The TDS regulations were introduced to address a perceived mischief whereby some Landlords secured payments of deposits from tenants, which deposits were due to be repaid at the end of the tenancy but, often, were not repaid for a variety of reasons. Previously, any dispute in relation to repayment of a deposit, in the absence of agreement between the parties, required to be referred to Court which gave rise to costs for tenants in making the necessary application. The TDS regulations are designed to ensure that the deposits paid are secured and available for repayment at the end of any tenancy and, in addition, that, in the event of any dispute, a cost free dispute resolution process is available.
12. In the present case, it appeared to the Tribunal that it was a classic example of the very mischief the TDS regulations were introduced to protect against. The deposit had been paid by the applicant. The deposit had not been lodged with an approved tenancy deposit scheme. The deposit had not otherwise been protected or secured to ensure that it was available for repayment at the end of the tenancy. The deposit was not repaid at the end of the tenancy. Indeed, as at the date of the Case Management Discussion, the deposit had still not been repaid to the applicant. The Respondent had made repayment only of an amount of £100. The balance of £450 remains outstanding.
13. In terms of Regulation 10 of the TDS Regulations, in the event of a failure by a Landlord to make payment of a deposit to an approved Tenancy Deposit Scheme within a period of 30 days of receipt of the same, the Tribunal must order the Landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. The Tribunal has a discretion in relation to exact amount it may order to be paid, the regulations providing only for an upper limit having regard to the amount of any particular deposit. The Tribunal, therefore, required to consider the amount it ought to order in this particular case.
14. While it may be argued that the award of the maximum amount ought to be reserved for cases in which the Tribunal is dealing with experienced Landlords who may be responsible for serial non compliance with the regulations (Jensen .v. Fappiano 2015 SCEDIN 6 @ para 13) it may also be argued that non compliant Landlords can expect no mercy from the courts if they conduct their business in flagrant disregard to statutory controls (Jensen v Fappiano 2015 SCEDIN 6 @ para 14).
15. Leaving aside the issue of how the Tribunal may, in any particular case, be made aware as to whether or not any Landlord was (a) experienced or (b) guilty of serial non compliance with the regulations, in this particular case the Landlord's breach of the regulations was flagrant, continuing and, indeed, still continuing as at the date of the Case Management Discussion. Further, following the termination of the tenancy, the Landlord repeatedly misrepresented the true position to the Applicant. No mitigation was provided by the Respondent in relation to any aspect of his failure to comply with the Regulations. No information was provided as to when the balance of the deposit will be repaid to the Applicant.

16. In the particular circumstances, it appeared to the Tribunal that this was a case in which, there being a flagrant and continuing disregard of the statutory regulations, there being no mitigation provided for that, and a significant proportion of the deposit remaining unpaid to the applicant, the breach of the regulations in this particular case was at the top end of any scale of such matters. In the circumstances, the Tribunal could see no reason to mitigate the maximum penalty available to it. Accordingly, the Tribunal made an award of a sum equivalent to three times the original deposit.

OBSERVATIONS

17. As indicated at Paragraph 14 above, while it has been suggested that serial non compliance with regulations may be a relevant factor to be taken into account in determining the award to be made in any case of this type, it appears to the Tribunal that there may be a difficulty in ascertaining whether or not any Landlord has been guilty of any previous breach of the TDS regulations. As such, it may be that it would be appropriate for a system to be introduced whereby breaches of this type may be recorded with a view to any previous such breaches being made known to the Tribunal when dealing with any subsequent case, effectively introducing a system similar to the production of "previous convictions" in criminal court proceedings.
18. The Applicant in this case sought an Order for repayment of the balance of the deposit due, that being an amount of £450. It appears curious to the Tribunal that the TDS regulations do not, in fact, permit such an order to be made by the Tribunal. Regulation 10 of the TDS Regulations enable an order to be made for payment by the Landlord to the tenant of a sum not exceeding three times of the amount of the tenancy deposit, that by way of a penalty for non compliance with the Regulations. Thereafter, the Regulations provide that the Tribunal may order the Landlord to pay the tenancy deposit to an approved scheme. No provision is made for an order for payment of the deposit, or any balance thereof, to the tenant. In a case such as this, in which the deposit has never been paid into an approved scheme, the tenancy is now at an end and has been for a number of months and it is unclear whether the deposit funds are still available to be paid into an approved scheme, there appeared little point in making an Order for payment of the deposit into an approved scheme at this stage. There may be some merit in consideration being given to the TDS regulations being amended to include a power enabling the Tribunal to make, in addition to an order in terms of Regulation 10 (1), an order for repayment of the deposit, or any part thereof outstanding, to the tenant.
19. The Tenant requested that the Tribunal order that interest be applied to an order for repayment of the balance of the deposit. For the reasons stated, the Tribunal was not able to make such an order for repayment of the balance of the deposit in the first place. The Tribunal did consider whether or not to make an order for interest to be applied to the payment ordered in terms of

20. Regulation 10 (1) but refrained from doing so. No request was made by the Applicant for interest on any such amount. It may be argued that, in the absence of a request by the applicant for interest to be applied, it ought not to be applied by the Tribunal. The Tribunal is aware that, in certain court proceedings, for example Sheriff Court simple procedure, the pro forma application forms provided to applicants for completion contain a provision within them inviting the Applicant to request interest on any sum awarded. There may be merit in consideration being given to whether or not application forms made available to applicants in relation to the first tier tribunal may be amended to include such a request.
21. The Applicant requested payment for "stress, continuous chasing and worries" arising from the actions of the Respondent. The TDS regulations, however, do not allow for any award in relation to such matters. The Applicant did not attribute any value to such matters. In any event, the Tribunal would not have considered it appropriate to make an award for such matters, particularly when an award of the maximum amount had already been made in terms of the TDS regulations.
22. The Applicant also, in a letter dated 9th February 2018, requested an award of expenses in relation to "all the legal costs accrued during First Tier Tribunal process". In terms of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 , expenses ought only be awarded in cases where a

"party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense."
(Regulation 40 (1)).

In this particular case, while the conduct of the Respondent in failing to lodge the Applicant's deposit with an approved scheme and his subsequent misleading of the Applicant in relation to return of the deposit thereafter may well be categorised as being unreasonable, that, of course, was conduct of the Respondent prior to the proceedings being raised. In relation to the proceedings themselves, the Respondent cannot be said to have acted unreasonably. He responded to a direction issued to him by the Tribunal. He provided written correspondence in which he admitted his fault. He communicated further with the Tribunal explaining his inability to attend the Case Management Discussion. In relation to the case, therefor, his conduct has been entirely reasonable. Separately, however, it is unclear to the Tribunal exactly what expenses the Applicant was seeking. The Tribunal system does not require payment of any expenses by an applicant to enable a case to be presented or progressed. Accordingly, despite a request by the Applicant, no award of expenses could be made.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

V Crawford

Legal Member/Chair

Date

16 February 2018