



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

Chamber Ref: FTS/HPC/PR/23/2733

Re: Property at 13 Holmhead Crescent, Flat 1/1, Glasgow, G44 4HG (“the Property”)

Parties:

Miss Michelle Flynn, 13 Holmhead Crescent, Flat 1/1, Glasgow, G44 4HG (“the Applicant”)

Mr Graham Fisher, Suite 1, 81 Broom Road East, Glasgow, G77 5LL (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that to grant an order against the Respondent for payment to the Applicant of the sum of £500 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. This is an application under Rule 103 of the Procedural Rules and Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations). The application was made by the Applicant on 10.08.2023
2. The following documents were lodged in support of the application:
 - a) Tenancy agreement
 - b) explanation letter
 - c) Deposit scheme replies
 - d) Email from My Deposits Scotland 20.07.2023 at 16:53 confirming deposit protected from 09:30 that morning.
 - e) Notice to Leave dated 14.09.2023 from the Respondent's Letting Agent (LA) to Applicant

3. The application was accepted on 21.08.2023 A Case Management Discussion (CMD) was scheduled for 13.10.2023 by teleconference. The application and CMD notification was served on the Respondent by Sheriff Officers to the address for the Respondent provided to the Applicant by the LA . The Tribunal was satisfied that the Respondents had the required notice of the CMD as set out in Rules 17 (2) and 24 (2) of the Procedural Rules.
4. No formal representations were received from the Respondent.

B: THE CMD

1. Only the Applicant took part in the CMD.
2. The legal member explained the purpose and process of the CMD.
3. Miss Flynn explained that she only ever had contact with the LA and not with the landlord. However, she understood that the landlord was an experienced landlord with more than this property. She had paid the deposit of £595 as per clause 11 of the tenancy agreement to the LA on 16.5.2022 which was prior to the tenancy start date on 25.05.2022. For the whole period until 20.07.2023 the deposit was not protected. She had been in contact with a person called Caron Hume at the LA about the tenancy and that was also the person who ultimately gave her the deposit reference number on 20.07.2023. Miss Flynn stated that if there had been a human error in not lodging the deposit then she should have been told but she thinks the LA covered this up deliberately. Her point was that the LA acted on behalf of the landlord and thus the landlord was ultimately liable for that. She had been told by a male staff member that all the deposits are protected when she enquired about this and then the next day she got the reference number. She also got confirmation from the deposit scheme that on 20.07.2023 in the morning the deposit became protected. She described the behaviour of the LA in general as unprofessional. At present the tenancy is still ongoing although she had received a notice to leave from the same LA for the landlord.

C: THE LEGAL TEST

1. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
2. In terms of Regulation 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."

3. In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme; (b) provide the tenant with the information required under regulation 42.

4. Relevant procedural legislation:

In terms of Rule 17 of the Rules of Procedure:

Case management discussion

17.—(1) The First-tier Tribunal may order a case management discussion to be held—

(a) in any place where a hearing may be held;

(b) by videoconference; or

(c) by conference call.

(2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.

(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties’ dispute may be efficiently resolved, including by—

(a) identifying the issues to be resolved;

(b) identifying what facts are agreed between the parties;

(c) raising with parties any issues it requires to be addressed;

(d) discussing what witnesses, documents and other evidence will be required;

(e) discussing whether or not a hearing is required; and

(f) discussing an application to recall a decision.

(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.

Power to determine the proceedings without a hearing

However, in terms of Rule 18 of the Rules of Procedure:

18.—(1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and

(b) must make a decision without a hearing where the decision relates to—

(i) correcting; or

(ii) reviewing on a point of law,

a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties

D: FINDINGS IN FACT

Based on the documents and the discussion at the CMD the Tribunal makes the following findings in facts:

1. The deposit of £595 was paid by the Applicant to the Respondent's Letting Agent on 16.05.2022..
2. The parties entered into a Private Residential Tenancy over the property which commenced on 25.05.2022.

3. In terms of Clause 11 the landlord is obliged to lodge the deposit with a registered scheme.
4. The deposit is £595.
5. Clause 11 specifies the use of My Deposits Scotland in the tenancy agreement.
6. The tenancy is ongoing.
7. After general discussions with the LA about the tenancy the Applicant had contacted all 3 deposit schemes and received answers that the deposit had not been lodged.
8. The Applicant then asked the LA on 18.07.2023 specifically about this in an email, to which she received no reply.
9. She contacted the LA again on 20.07.2023 early and spoke with a male member of staff, who told her Karen was dealing with this and all the deposits they held were protected.
10. On 20.07.2023 in the afternoon she had a WhatsApp conversation with Karen about a rent increase and at that stage she received the DPC number from My Deposits Scotland.
11. My Deposits Scotland confirmed to her that the deposit had been protected since 09:30 hours on 20.07.2023.
12. The deposit was not lodged with a tenancy deposit scheme at the start of the tenancy and remained unprotected until 20.07.2023, which is more than 13 months of the tenancy duration..
13. None of the information required in terms of Regulation 42 was provided to the Applicants by the Respondent.
14. The dispute resolution service of a deposit scheme will be available to the Applicant at the end of the tenancy.
15. The Applicant was given a notice to leave by the LA on behalf of the Respondent in September 2023.
16. The address of the Respondent was provided to the Applicant by the LA.
17. All contact regarding the tenancy was between the LA and the Applicant.

E: REASONS FOR DECISION:

1. The Tribunal did not consider that there was any need for a hearing as there had been no representations from the Respondent and thus the facts of the case are not in dispute.
2. The Tribunal makes the decision on the basis of the documents lodged by the Applicant and the information provided by the Applicant at the CMD.
3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.
4. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £595 would thus be £1,785.

5. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
6. The Tribunal considers that the discretion of the tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015) by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "repeated and flagrant non participation in , on non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale"..It was held that "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 judgement. 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..."
7. The approach the Tribunal has to take in making a decision was further clarified in the decision UTS/AP/0006 by Sheriff Jamieson, which set out that the Tribunal first has to identify the relevant matters to be taken into account and then in a second step apply weight to these individual relevant factors.
8. In the case before the Tribunal there is a clear breach of the Regulations. The deposit was not lodged within 30 working days as required by Regulation 3 and the information in terms of Regulation 42 had not been provided to the Applicant, despite the Applicants querying this with the Respondent during the tenancy. The Tribunal is satisfied that the deposit had been unprotected for more than 13 months of the tenancy.
9. The Applicant had queried the lodging of the deposit during the tenancy with the Respondent's LA and the deposit was then lodged very quickly thereafter by the LA. However, the LA did not advise the Applicant of any mistakes made in not lodging the deposit, which may well have been an oversight on their part. The LA advised her that all deposits were protected and 2 days later in a WhatsApp conversation provided the reference number for the deposit.
10. Matters identified by the Tribunal as relevant aggravating factors were the duration of the period of the deposit not being protected, the fact that the landlord was clearly aware of the requirement to lodge the deposit as this was specified in the tenancy agreement and the fact that the deposit was only protected once the Applicant had raised the matter explicitly. Matters identified as relevant mitigating factors were that the deposit was lodged very quickly after the issue had been identified by the Applicant, that the deposit is protected for the tenancy duration from 20.07.2023, that the Applicant will have access to the dispute resolution service of the deposit scheme when the tenancy comes to an end and that clause 11 of the tenancy agreement indicates that there has

been a deposit scheme specifically identified by the landlord indicating that this was the scheme normally used. With regard to the fault of lodging likely arising out of conduct of the LA rather than the Respondent it should be noted that employing an letting agent whilst showing that the landlord sought professional help in managing the tenancy, does not take all obligations off the shoulders of the landlord, who ultimately remains liable for ensuring compliance with the obligations under the Regulations.

11. The Respondent has not engaged at all in the Tribunal process and has provided no information which would explain his conduct.
12. Weighing these matters, the Tribunal considers that the failure to comply with the Regulations in this case appears to be a matter of oversight rather than deliberate flouting of the landlord's obligations and a deliberate deprivation of the tenant of the benefits of the deposit protection mechanism. The landlord had engaged a letting agent and the tenancy agreement made specific provision as to which scheme was to be used. The deposit is now protected and thus the Applicant is ultimately not deprived of the opportunity to make use of the dispute resolution service of the deposit scheme. The problem the Regulations seek to prevent have been prevented in this case. However, the risk to the Applicant arising from the lack of protection of the deposit had a duration of about 13 month, which is a significant duration of a failure to comply with the obligations of the landlord to lodge the deposit and it was only remedied after active intervention from the Applicant. At the very least any mechanisms of the landlord to ensure that the obligation was complied with either by him or his agents were insufficient to ensure compliance with these obligations.
13. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 500. This is at the lower end of the scale of penalties as the Applicant was ultimately not deprived of the deposit scheme protection but does reflect the length of time the deposit was unprotected. It reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

F: DECISION:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondents for payment to the Applicant of the sum of £500 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011

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.



**Petra Hennig McFatriidge
Legal Member/Chair**

Date 13 October 2023