



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/23/2790

Re: Property at 5 Robbins Court, Tradespark, Nairn, IV12 5PL (“the Property”)

Parties:

Miss Rhyanna Logan, Brackley Farm Cottage, Gollanfield, Inverness, IV2 7QT (“the Applicant”)

Mr William Downie, Ellands Farm, Ellands of Brodie, Forres, IV36 2TE (“the Respondent”)

Tribunal Members:

Petra Hennig McFatridge (Legal Member)

Decision

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 £850 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's representative on 16.08.2023
- 2.** The following documents were lodged in support of the application:
 - a)** Tenancy agreement (commencing 19.11.2019) in the name of Applicant as sole tenant.
 - b)** Tenancy agreement (commencing 19.1.2019) in the name of the Applicant and Alex Taylor as joint tenants with handwritten receipt for deposit of £500 received on 10.1.2019
 - c)** Deposit scheme replies
 - d)** Notice issued by Applicant dated 4.7.2023

- e) Letter to Tribunal from Applicant's representative 30.8.2023,
3. The application was accepted on 12.9..2023 A Case Management Discussion (CMD) was scheduled for 16.11.2023 by teleconference. The application and CMD notification was served on the Respondent by Sheriff Officers on 16.10.2023 . 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.

B: THE CMD

1. The Applicant took part in the CMD but wished her representative Ms Logan to speak on her behalf.
2. The Respondent took part in the CMD.
3. The legal member explained the purpose and process of the CMD. The legal member explained carefully to both parties the specific issues relevant to an application under rule 103, the obligations for landlords contained in the Regulations and the process of a CMD and potential outcomes contained in rules 17 and 18 of the Procedure Rules.
4. Mr Downie first stated that he had sent in various photographs by recorded delivery to the Tribunal Office, which he wished considered as relevant to the matter of whether or not the deposit would have been returned. Following the detailed explanations regarding the limitations of what an application under Regulation 10 can deal with he then stated that he was content to proceed in the absence of his written representations as these solely related to the issue of the state of the property when the tenant moved out.
5. The legal member undertook to ensure that the matter of why the documents had not found their way into the file would be further investigated and relevant requests have already been made to the Tribunal administration immediately after the CMD.
6. Mr Downie also stated that although he had transferred ownership of the property to his daughter meantime, he continued to act as landlord for this property with her consent and confirmed that the tenancy agreement had continued unaltered and he had remained as landlord.
7. He further stated that the deposit had been carried over from the original PRT with joint tenants to the second PRT in the sole name of the Applicant. He further advised that the deposit had been paid in cash and he had retained the cash in the envelope it was paid in with the file for the tenancy.
8. He had not returned the deposit due to what he considered was the poor state of the property.
9. He further advised that he owns another property, which is rented out and for which he had paid the deposit into Safe Deposits Scotland. He had taken the reference to the specific deposit scheme from that tenancy agreement into the

tenancy agreements for the property. He had taken the tenancy agreement form from the Internet and did not use an agent for the tenancy management for the property. He has been renting out properties for about 5 years.

10. He confirmed that at the relevant time due to an oversight the deposit for the property was not lodged with a Deposit Scheme.
11. He stated that he no longer takes deposits for properties now at all after this experience.
12. He submitted that because this was an oversight and the deposit would not have been returned anyway the amount of an order should be at the very low end.
13. Ms Logan on behalf of the Applicant stated that the lodging of the deposit had not been discussed when the respective tenancy agreements were signed.
14. The deposit had been paid for the first tenancy and then just carried over.
15. All three scheme administrators had confirmed in emails that the deposit had never been protected for 4 and a half years.
16. The deposit has not been returned and there is a separate application being made for repayment of the deposit.
17. She submitted that the Tribunal should order payment of 3 times the deposit, thus £1,500.
18. Both parties stated they were content for a decision to be made at the CMD.

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 parties entered into a Private Residential Tenancy over the property which commenced on 19.11.2019.
2. The parties are landlord and tenant to a relevant tenancy to which the Regulations apply.
3. The deposit of £500 was paid by the Applicant to the Respondent originally on 10.1.2019 for a joint tenancy and the payment carried over as the deposit for the relevant tenancy in the Applicant's sole name commencing 19.11.2019.

4. In terms of Clause 11 the landlord is obliged to lodge the deposit with a registered scheme.
5. The deposit is £500.
6. Clause 11 of the tenancy agreement specifies the use of Safe Deposits Scotland as the relevant scheme administrator.
7. The tenancy ended on 19.8.2023.
8. The deposit was not lodged with a tenancy deposit scheme at the start of the tenancy and remained unprotected for the entire duration of the tenancy.
9. The deposit has not been returned and there is an ongoing dispute over the return of the deposit between the parties.
10. None of the information required in terms of Regulation 42 was provided to the Applicant by the Respondent.
11. The dispute resolution service of a deposit scheme has not been available to the Applicant at the end of the tenancy.
12. The Respondent has another property and has acted as landlord for at least 5 years. He did lodge the deposit for the other property with Safe Deposit Scotland.
13. He retained the funds of the deposit in cash on the lease file.

E: REASONS FOR DECISION:

1. The Tribunal did not consider that there was any need for a hearing as both parties agreed that the relevant 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, her representative and the Respondent 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 £1,500.
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, or 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.
9. 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 not protected for the duration of the tenancy and thus the Applicant did not have access to the dispute resolution mechanism.
10. Matters identified as relevant mitigating factors were that the landlord had not lodged the deposit due to an oversight at the time and had not mixed the deposit with his own funds but retained them separately on the file. The Respondent was not a professional landlord. He was aware of the Deposit Scheme and had identified and used a relevant scheme for another property.
11. The Tribunal did not consider it relevant whether or not the deposit would have been returned in this case depending on the state of the property. The issue the Tribunal has to consider is the compliance with the obligations of a landlord with the Regulations and the landlord has these duties at the time the deposit is paid and when the state of the property at the time the tenant leaves the property is not known. Determining the issue of the return is precisely why the dispute resolution process in the Regulations was created.
12. 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. However, the Applicant did not have access to the dispute resolution process and the funds were unprotected for the duration of the tenancy. This is exactly the situation the Regulations seek to avoid. Given the terms of clause 11 in the tenancy agreement, at the very least any mechanism of the landlord to ensure that the obligation was complied with was insufficient to ensure compliance with these obligations.

13. The Respondent had not lodged the deposit when it was first paid by the Applicant and her joint tenant. The Respondent then had an additional opportunity to remind himself of his obligations when the second, and relevant, tenancy agreement was drawn up. His failure to lodge the deposit deprived the tenant of the protection of and access to the Deposit Scheme as intended by the Regulations. The situation continued for almost 4 years. This is clearly not a case at the lower end of the available disposal for the Tribunal.
14. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 850. This 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 £850 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 McFatridge
Legal Member/Chair**

Date 16 November 2023

Petra Henning McFatridge