



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

Chamber Ref: FTS/HPC/PR/23/2771

Re: Property at 67 Thornwood Avenue, Glasgow, G11 7PX (“the Property”)

Parties:

Miss Veronica Gonzalez Acevedo, Flat G/01, 47 Glencoe Street, Glasgow, G13 1YW (“the Applicant”)

Mrs Donna Downie, 20c Havelock Street, Glasgow, G11 5JA (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order for payment against the Respondent in the sum of Two thousand pounds (£2,000) Sterling

Background

- 1 The Applicant applied to the Tribunal seeking an order for payment as a result of the Respondent's failure to lodge their deposit in an approved tenancy deposit scheme.
- 2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned and the application paperwork was served upon the Respondent by Sheriff Officers.
- 3 On 28 November 2023 the Tribunal received a response to the application from Mr David Downie, the husband of the Respondent. Mr Downie provided

a letter of authority confirming the Respondent consented to him representing her in the proceedings. The response applied to both the present application and a separate application which involved the same parties under reference CV.23.2772. In relation to the present application Mr Downie acknowledged that the Applicants were unhappy with not receiving their deposit back but stated that they had left the property in an unacceptable condition. The Respondent had suffered financial loss that exceeded the deposit sum. He accepted that the deposit had not been protected, explaining that this had been an administrative oversight on his part. He had forgotten to lodge the deposit with a scheme due to a series of personal matters and the Respondent had been unaware. Mr Downie stated that the Respondent had a series of counterclaims against the Respondents in relation to repair costs following damage to the property at the end of the tenancy.

The Case Management Discussion

- 4 The Applicant was present at the Case Management Discussion. The Respondent was represented by Mr Downie.
- 5 The Legal Member explained the purpose of the Case Management Discussion and the legal test to be applied. She confirmed with the Respondent that it was accepted by her that the deposit had not been lodged with a deposit scheme. The issue for the Tribunal to determine therefore was what level of sanction should be awarded to the Applicants as a result of the Respondent's breach of the 2011 Regulations, which would require consideration of the circumstances surrounding the deposit as well as any mitigating factors on the Respondent's part. She asked the parties to address her on their respective positions on this point. Their submissions are summarised below. For the avoidance of the doubt, this is not a verbatim account of what was discussed at the Case Management Discussion but a summary of those matters relevant to the Tribunal's determination of the matter.
- 6 The Applicant addressed the Tribunal. She explained that she had not received the deposit back at the end of the tenancy. She was a student and had suffered financially as a result. The money would have assisted with meeting costs such as transportation, food, clothing, rent and utilities. The fact that she had not received the deposit back had impacted on her way of living. The entirety of the deposit had been withheld by the Respondent, she had not received anything back.
- 7 Mr Downie confirmed that the deposit had not been lodged with an approved scheme, stating that this was a consequence of an administrative error on his part. The Respondent had not been aware and had believed he had dealt with it. Mr Downie explained that he had experienced a number of personal issues at the time arising from a domestic situation that he did not want to elaborate

on. The requirement to lodge the deposit had fallen through the cracks. It wasn't until later in the process when the property had been repossessed that he realised. At that point the condition of the property had been inspected and there were a number of repairs required. Mr Downie and the Respondent had therefore taken the decision to retain the deposit in order to meet the repair costs. The Respondent had not benefitted from the situation, all they had tried to do was restore the property to its original condition.

- 8 The Tribunal asked Mr Downie whether the property had previously been let, and if so whether deposits taken in relation to previous tenancies had been lodged with an approved scheme. Mr Downie stated that they had let the property previously and had never had any issues with tenancy deposits. Tenants would receive their deposits back when required. This was the first time they had found themselves in this position. They perhaps had not complied with the administration requirements and he apologised that matters had reached this stage. From his perspective the Respondent required to keep the deposit for the purpose of reinstating the property. Mr Downie confirmed that the duties under the 2011 Regulations was something he and the Respondent were notionally aware of in terms of their obligations as a landlord however they did not appreciate that the duty was a mandatory one. They thought it was more a matter of mutual agreement between the parties, and the scheme would be used if required. He and the Respondent would never have approached the process in the way that they had if they knew it was mandatory. Mr Downie confirmed that the funds had been held in the Respondent's account. The domestic situation he had referred to had now resolved itself.
- 9 Mr Downie stressed again that the funds were required to reinstate the property and the decision had been taken by himself and the Respondent to retain the deposit rather than be left out of pocket. That was the reasoning behind it. He apologised for the situation.
- 10 The Applicant advised that they disagreed with the Respondent's position regarding the condition of the property, and the repairs that were allegedly required. The Legal Member noted that these matters were the subject of the application CV.23.2722 in terms of which the Applicant sought the return of the deposit in full. The Legal Member further noted that the Applicant sought an award of up to three times the amount of the deposit.
- 11 The Case Management Discussion concluded and the Legal Member advised parties that the decision would be issued in writing in due course.

Relevant Law

- 12 The relevant law is contained with the Housing (Scotland) Act 2006 and the Tenancy Deposit Scheme (Scotland) Regulations 2011. Section 120 of the 2006 Act provides as follows:-

“120 Tenancy deposits: preliminary

(1) A tenancy deposit is a sum of money held as security for—

(a) the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b) the discharge of any of the occupant's liabilities which so arise.

(2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

- 13 The 2011 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 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.

(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.”

Findings in Fact

- 14 The Applicant entered into a tenancy agreement with the Respondent which commenced on 4 October 2022. The tenancy was a joint tenancy with the Applicant and Saba Rabiee.
- 15 In terms of Clause 1.1 of the said Tenancy Agreement the Applicant and Miss Rabiee agreed to pay a tenancy deposit in the sum of £1,100. The Applicant and Sara Rabiee were jointly and severally liable for payment of this sum.
- 16 The tenancy between the parties terminated on 3 June 2023.
- 17 The Applicant and Miss Rabie paid the tenancy deposit of £1,100 to the Respondent prior to the commencement of the tenancy. The deposit was held in the Respondent's bank account.
- 18 The Respondent did not pay the deposit into an approved deposit scheme within the statutory timescale. The Respondent did not provide the required information regarding the deposit within the statutory timescale.
- 19 The failure to lodge the deposit was an administrative error on the Respondent's husband's part.
- 20 The Respondent and her husband discovered the error at the end of the tenancy. Due to alleged repairs required as a result of the condition of the property the Respondent chose to retain the deposit in its entirety to meet the costs of reinstatement.
- 21 The Applicant disputes that any deductions were required from the deposit as a result of alleged disrepair. The Applicant has lodged an application with the Tribunal seeking the return of the deposit in full.
- 22 The Applicant suffered financial detriment as a result of the Respondent's decision to retain the deposit in full.

Reasons for Decision

- 23 The Tribunal determined the application having regard to the application paperwork, the written representations from the parties and the verbal submissions at the Case Management Discussion. The Tribunal was satisfied that it was able to make a determination of the application at the Case Management Discussion and that to do so would not be prejudicial to the interests of the parties. It was noted that the substantive facts of the matter were agreed and the issue for the Tribunal to determine was the level of sanction to be applied as a result of the landlord's failure to lodge the deposit with an approved deposit scheme. The Tribunal considered that there was no requirement to fix a hearing as there were no issues to be resolved other than that point which is a matter for judicial discretion.
- 24 The 2011 Regulations specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy.
- 25 It was a matter of agreement between the parties that the tenancy had commenced that the Applicant, along with the joint tenant Sara Rabiee, had paid a deposit of £1,100 prior to the commencement of the tenancy and that the Respondent had not paid the deposit into an approved tenancy deposit scheme. The Respondent had also failed to provide the prescribed information to the Applicants regarding the scheme in which their deposit had been placed. The Respondent was therefore in breach of Regulation 3, which was accepted in the verbal submissions by Mr Downie at the Case Management Discussion.
- 26 Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. There is no requirement for the tenant to establish anything other than the landlord's failure to comply with Regulation 3, which they had done in this case.
- 27 Regulation 10 states that in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case. The application of the sanction must seek to act as a penalty to landlords and ensure compliance with their statutory duties in relation to tenancy deposits.
- 28 The Tribunal had regard to the decision of Sheriff Cruickshank in *Ahmed v Russell* (UTS/AP/22/0021) which provides helpful guidance on the

assessment of an appropriate sanction. In doing so the Tribunal must identify the relevant factors, both aggravating and mitigating, and apply weight to same in reaching its decision. The Tribunal is then entitled to assess a fair and proportionate sanction to be anywhere between £1 and three times the sum of the deposit, which in this case is £3,300. As per Sheriff Cruickshank at paragraph 40 of his decision in *Ahmed*:

“The sanction which is imposed is to mark the gravity of the breach which has occurred. The purpose of the sanction is not to compensate the tenant. The level of sanction should reflect the level of overall culpability in each case measured against the nature and extent of the breach of the 2011 Regulations.”

- 29 In this case the deposit had remained unprotected for the entirety of the tenancy. The Respondent had then retained the deposit in full to put towards the costs of repairs to the property. It was not for the Tribunal in this case to make a determination as to whether the Respondent was entitled to retain the deposit. The purpose of the 2011 Regulations is to ensure landlords and tenants are on an equal footing and provide a mechanism for resolving any dispute between the parties at the end of a tenancy. As per Mr Downie's submissions, the Respondent had become aware of the failure to lodge the deposit at the end of the tenancy and a decision had been made to retain the deposit due to put towards repair costs. As a result of the deposit having not been lodged with a scheme the Applicant had been unable to challenge this decision and had therefore required to submit a separate application to the Tribunal seeking the return of the deposit. The Tribunal considered these all to be aggravating factors to which significant weight could be applied.
- 30 The Tribunal also considered the financial detriment suffered by the Respondent to be an aggravating factor, albeit one that attracted a lower weight. This was on the basis that the outcome of the dispute between the parties was not yet known, therefore it could not be said whether she would have received the deposit back in full and have been financially better off had she had access to the deposit resolution mechanism under the 2011 Regulations.
- 31 Mr Downie, on behalf of the Respondent, had submitted that the deposit had not been lodged due to an administrative error on his part. He made reference to personal issues at the time as the reason for this, however declined to elaborate further. The Tribunal therefore only able to give moderate weight to this as a mitigating factor. The Tribunal also found it difficult to equate this with Mr Downie's later submissions that the Respondent had some knowledge of the Regulations but did not fully appreciate the extent of her statutory duties, stating that she had not, as a matter of course, complied with the Regulations in respect of previous tenancies. The explanation for the failure to lodge the deposit appeared to suggest that she was indeed aware, and had simply

failed to comply due to the circumstances outlined by Mr Downie. When the failure had come to light Mr Downie had stated that a decision had been made to retain the deposit due to the cost of repairs and the financial impact on the Respondent as a result. It should be said had it indeed been the case that the Respondent had been ignorant of her obligations, despite having let the property on a number of occasions, the Tribunal would have found this to be an aggravating factor which would have attracted significant weight.

- 32 The Tribunal did accept that it had been Mr Downie's responsibility to lodge the deposit and there had been an expectation on the Respondent's part that he would do so on her behalf. The Tribunal applied moderate weight to this as a mitigating factor. Whilst the Respondent was entitled to delegate her duties, ultimately she had the responsibility as landlord to ensure compliance with the 2011 Regulations.
- 33 Mr Downie had cited financial loss suffered by the Respondent, in terms of the costs of repairs to the property that he stated were required. The Respondent's personal circumstances would be relevant insofar as the failure to lodge the deposit, however any loss the Respondent may have suffered due to the Applicant's alleged breach of the terms of the tenancy agreement was not a relevant factor in the opinion of the Tribunal. It would however be open to the Respondent to pursue a separate claim against the Applicant and the joint tenant if they wished to seek recovery of those costs.
- 34 Accordingly balancing the aggravating and mitigating factors here, and the requirement to proceed in a manner that was fair, proportionate and just having regard to the seriousness of the breach, the Tribunal considered that the level of culpability was serious. The Tribunal therefore made an award in the sum of £2000 which, in the Tribunal's opinion represented a fair and proportionate sanction.

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.



19 December 2023

Legal Member/Chair

Date