Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/PR/23/2414

Re: Property at 3F2 13 Roseneath Street, Edinburgh, EH9 1JH ("the Property")

Parties:

Mr Georgios Karanastasis, Ms Ioanna Papadopoulou-Korfiati, 2 Ross Place, Edinburgh, EH9 3BT ("the Applicant")

Mr Peter Gordon Murray, 2F1 7 Shandon Street, Edinburgh, EH11 1QH ("the Respondent")

Tribunal Members:

Melanie Barbour (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and it would make an order for payment of £1200 in favour of the Applicant.

Background Discussion

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 of the First Tier Tribunal for Scotland (Housing and Property

Chamber) (Procedure) Regulations 2017 ("the 2017 Rules") seeking an order against the landlord failure to lodge a tenancy deposit.

2. The application contained:-

    a. Tenancy agreement;
    b. Text messages
    c. Evidence from approved deposit schemes that they held no deposit for the property

3. The case called for a case management discussion (CMD) on 12 September 2023. Both parties appeared. The respondent had submitted written representations for the CMD. The case continued to a hearing. Reference is made to the terms of the CMD Note and Direction.

4. The respondent submitted further written representations for the hearing.

5. The application called as a hearing on 18 December 2023. Both parties appeared at the hearing. The hearing was by telephone conference.

6. The respondent was not sure that he had received the CMD Note and Direction. At the start of the hearing the clerk emailed it to him. The legal member also read the Note to him. He was happy to proceed. Neither party had lodged any further papers, and no witnesses were called.

Hearing

7. The respondent advised that he was still opposing the application, for the reasons set out in his letter, which in summary were that the tenancy was part of an ongoing tenancy for the subjects. There had been various tenants over the years there since the tenancy was created in 2010. The original deposit taken was taken before the tenancy deposit regulations were in place. The tenancy deposit regulations did not therefore apply in this case. The deposit had been returned without any delay and faster than it would have been returned had it been lodged with an approved scheme.

8. The applicant proceeded to explain their position. They advised that their deposit was not put into a scheme and this is contrary to the regulations. They lodged evidence that it was not in a scheme. They lodged evidence it was returned to them from the respondent after a deduction of £45. They submitted a long email discussion between themselves and the respondent and the respondent's partner, in where they had been requesting the deposit be returned: it included some correspondence regarding how the tenancy ended and about unwanted items left in the property. The deposit was returned two months after the tenancy ended, returned from the landlord and not from an approved scheme. Sent from the respondent's bank account to the applicant's account.

9. They `advised that their "last tenancy" for the property started on 1 June 2021 and their deposit should be covered by the current regulations. They had submitted a copy of the tenancy agreement. This was a copy of the tenancy agreement from 1 October 2018. In 2018 there were three tenants, the third tenant left in June 2021 and the agreement was amended. The newest tenancy therefore commenced on the 1st of June 2021. Instead of signing a new agreement, the landlord amended the existing one. The agreement had a handwritten note on it. It was agreed that the deposit for the third tenant was now paid by the applicants. Therefore from June 2021 the applicants had paid the full deposit of £700. Prior to June 2021 they had paid £400 deposit, and the other tenant £300.

10. The applicants advised that they had originally moved into the property in March 2016. There had been different tenants living there then. Since 2016 there have been two or three different tenants living with the applicants. They had paid a deposit in March 2016. The deposit paid was £400. When the other tenants left and new ones came, the applicants and other tenants "sorted the repayment and payment of the deposit out between themselves". They advised that the original £700 was held by the landlord, and when new tenants came and old ones left, the deposits were paid by the new tenant to the old one. The applicant advised that sometimes the respondent's partner was involved in the discussion about the deposit, but the rest of the time it was done by the tenants themselves.

11. The applicant did not think that there was any dispute that the deposit was £700. They said that £655 was repaid to them by the respondent and £45 was retained. The Applicants did not think that the landlord had been entitled to retain £45. They advised that they were afraid they would not get it back, when the landlord said he was retaining the money, they felt they could not argue with the landlord, as he had all the power, he had their deposit. They reluctantly agreed that the landlord could retain £45. There should have been a third party holding the deposit and arbitrating any dispute over it.

12. They advised that they had left the flat because it was supposed to be occupied by the respondent's partner, but eventually, the flat was put up for sale. They said it was not pleasant finding out that the flat was to be sold. They said that the respondent had not been very responsive about returning the deposit and there had been delays in the response.

13. They sought an order of £1400 two times the deposit. They thought this sum was reasonable as it had been returned to them eventually, and some money was withheld, and they were not happy about the reason they had been asked to leave. They thought the landlord would not put other deposits into schemes.

14. The applicant advised that they had never asked if the deposit had been lodged in a scheme. They said that for the first few years, they were not aware of the regulations and after they were aware of them, they did not want to bring anything up as the rent was below the market rate and they were concerned that they did not want to stir things up.

15. They advised that they had been told to leave the keys with the neighbours when they moved out by the respondent's partner. They also noted in the emails lodged that the respondent's partner had been grateful for how the apartment had been left. They had to leave the property in a hurry, as they were going on holiday and it was difficult to organise a meet up with landlords to hand over the keys.

16. The respondent referred to his written submission which set out his position. He noted that the original tenancy contract had been entered into before the regulations had come into force. In 2010 the deposit was £700 and thereafter the individual tenants came and went. His partner met the tenants and vetted them to make sure they were okay. The respondent and his partner made sure that bills were paid, and when people came and went, he made sure deposits were paid either to the landlord or the other tenants. The respondent advised that they were not hard on tenants and we let people come and go and were reasonable with people. He noted that the applicant had implied this.

17. He advised that the applicants had agreed to leave the flat, and he was not happy about what the applicants had said about being asked to leave. He said that the applicants had wanted to leave as they had a young baby, and the flat was not suited for a baby. They decided to leave and the respondent wished them well. He did not know why they had left the keys upstairs. He was not happy that they had left items including a broken tumble drier in the property. He would have tried to talk to them if they had not been away on holiday. He advised that they had had a reasonable relationship before this application. He said that all that was said by the applicants about being worried that the deposit would not be given back, was not true and the applicants knew this.

18. The respondent said his defence was that the tenancy was created before the regulations came into force, no one asked him to put the deposit into a deposit scheme, and it had been difficult as unwanted items had been left in the flat.

19. The respondent said that the applicant had stated that people moved in and moved out and they agreed that the deposit money was dealt with on a nice, informal basis. This had nothing to do with power. He said that had they taken all the stuff out of the flat, he would have sent them all of the deposit.

20. In cross - examination the applicant stated that it was true they had a good relationship with the landlords but that relationship was strained when asked to move

out as soon as possible. They had a young child and we would be happy to stay in the flat longer and they had evidence they were tricked into leaving the flat. Was he aware that we were pressured to leave? The respondent advised that they were not pressured to leave, they had gone around all the properties to see what people wanted to do, the landlords had struggled over COVID-19, and the applicant agreed it was time to move on. He advised that they were not evicted. The applicants could still have been there. He had understood the applicants needed to move to a more suitable property.

21. The tribunal asked the respondent how many rental properties he had. He advised he had 8 rented properties. He had been a landlord for 30 years. He took deposits from other tenants. He had never put any in any approved scheme. He was aware of the Tenancy Deposit regulations. He had known about them when they came into force.

22. When asked why he did not put the deposits into any approved schemes? He said that all the rented properties have tenants who have been there since before the regulations came into force. He said if it had been a new tenancy with new people coming into he would have to put the deposit into an approved scheme. He considered that the moving in and out of tenants had not created new tenancies.

23. He was asked if he had considered if the tenancies became new private residential tenancies when people had moved in and out. He said he had not.

24. He advised that he had not acted for financial gain in not putting them into approved schemes or to make a mockery of the legislation. He did not recall getting anything from the government or the council saying that the deposits had to be put into a scheme.

25. He said that if he was wrong, he was wrong, he was merely working away and trying to be a good landlord and look after his tenants. He advised that this was the first time he had come to the tribunal.

26. He was asked what happened when people left the property, did he check and see if any deposits should be deducted at that time? He said that he made sure that the tenants had paid it to each other or, if there was a gap between tenants then the landlord would pay the deposit back to the leaving tenant. The landlord would try and make sure that things were in order and try and document that. The landlord would write on the tenancy agreement what had happened.

27. He advised that he would never retain the deposit if the property was reasonably looked after, as long as the tenants were happy and the property looked in reasonable order and not trashed, they would agree that the tenants could transfer the money to each other. He said that there had never been any previous deductions.

28. He said that it did not cross his mind that the new tenants after 2016 were new tenancies and therefore the £400 should have been paid into a tenancy deposit scheme. He considered that the tenancy started in 2010 and new tenants came and went, it was not done out of malice, this was what they thought was correct. They had a number of properties and people had been with them for a long time, and the respondent would have crossed the street to speak to their tenants, they tried to be good landlords, and gave them rent breaks during COVID-19.

Findings in Fact

29. The Tribunal made the following findings in fact:-

30. The Respondent was the landlord, and the Applicant was the tenant.

31. The Applicant had paid the Respondent a tenancy deposit on 1 June 2021 totalling £700.

32. A tenancy agreement was in place between the respondent and the applicants. It had been in existence from at least 1 June 2021. The tenancy was a relevant tenancy in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

33. The tenancy ended on 30 April 2023.

34. During the tenancy since 1 June 2021, the tenancy deposit of £700 had not at any time been placed in an approved scheme.

35. The applicants had resided in the property as tenants of the landlord since around March 2016. They had been tenants in a relevant tenancy since March 2016.

36. The applicants had paid the respondent a tenancy deposit of £400 in around March 2016.

37. For the duration of the tenancy or tenancies between March 2016 and June 2021, the deposit had not been placed in an approved deposit scheme.

38. On around 15 May 2023, the applicant asked about for the deposit to be returned.

39. The respondent retained £45 of the deposit to pay for removal costs for unwanted items left in the property by the applicants. The remaining deposit of £655 was repaid to the applicants on 26 June 2023.

40. The respondent was a landlord and let out 8 properties. The respondent had been a landlord for 30 years.

41. The respondent said that he was aware of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

42. The respondent allowed tenants to pay and repay deposit monies between themselves as new tenants moved in and old tenants left rented properties.

43. Clause 6 of the tenancy agreement provides that a deposit of £700 will be paid by the tenant.

44. The application to the first-tier tribunal was made on 20 July 2023.

45. The tenancy deposit paid by the applicants had not been lodged with an approved tenancy deposit scheme within 30 working days of the tenancy commencing.

Discussion

46. The Tenancy Deposit Schemes (Scotland) Regulations 2011 set out a number of legal requirements in relation to the holding of deposits, and relevant to this case are the following regulations:-

> *Duties in relation to tenancy deposits*
> *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.*
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> *Sanctions*
> *9.— (1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal] 1 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 […]2 no later than 3 months after the tenancy has ended.*
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> *10. If satisfied that the landlord did not comply with any duty in regulation 3 the [First-tier Tribunal] 1 — (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] 1 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.*

47. Part 9 of the regulations deals with transitional provisions.

> ***Transitional provisions***
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> ***47.*** *Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force, regulation 3 applies with the modification that the tenancy deposit must be paid, and the information provided, within 30 working days of the date determined under paragraph (a) or (b)—*
>
> *(a)where the tenancy is renewed, by express agreement or by the operation of tacit relocation, on a day that falls three months or more, but less than nine months, after the first day on which an approved scheme becomes operational, the date of that renewal;*
>
> *(b)in any other case, the date which falls nine months after the first day on which an approved scheme becomes operational.*

48. First, the tribunal finds that a relevant tenancy existed. There was a lack of clarity about what had happened when old and new tenants left and joined the property. It appears that the tenancy started as an assured tenancy in 2010. It may be that it continued as an assured tenancy from 2010 and that new and old tenants were assigned in and out of the tenancy. It is also possible that a Private Residential Tenancy was created on 1 June 2021 when the third tenant left. We do not consider that these matters are wholly relevant to determining the case before us, as both circumstances would lead us to find that the tenancy was a relevant tenancy for the purposes of the 2011 deposit regulations. Further, what appears to be a matter of agreement is that the applicants were tenants from March 2016 and paid a deposit from that date, which increased on 1 June 2021. The application can therefore be competently considered by this tribunal.

49. Second, we find that the regulations apply to all relevant tenancies, including those in existence before the regulations were in force. The primary position of the respondent is that the application is not competent because this is an ongoing tenancy created in 2010. Even if that is correct, (we do not make any determination on this point), the respondent's position is misconceived, as the transitional provisions in the 2011 deposit regulations provide that any deposit paid before the regulations came into force still had to be paid into an approved scheme in line with the transitional provisions.

50. It is a matter of admission by the respondent that there was a deposit paid and that it was not paid into an approved scheme. From 1 June 2021, the final deposit amount paid by the applicants was £700. From March 2016 until June 2021 the deposit paid

was £400. The Respondent accepted that no deposit had been paid into an approved scheme in accordance with the terms of the regulations, therefore, the terms of regulation 10 are engaged, and the tribunal must order that the Respondent pay the Applicant an amount not exceeding three times the amount of their tenancy deposit. The amount to be paid is required to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty.

51. In this case, we consider that a sum of £1200 would be appropriate. We find that there has been a breach of the regulations, and although we do not consider that the respondent intended to retain the deposit other than to pay for reasonable costs incurred due to the actions of the tenants, for the following reasons we still find that the breach is serious.

52. In considering what penalty to impose, we have had regard to the verbal and written submissions of both parties.

53. Matters which we consider to be relevant in mitigation for the landlord are : - The fact that the deposit was paid back timeously: we did not find that there was any particular delay in repaying it. We also consider that the £45 does not appear to have been an unreasonable sum to retain to pay for removing unwanted items left in the flat. There appeared to be no evidence of the landlord retaining anyone's deposit and on the whole, it appears that full deposits were always returned except for this case.

54. Matters which we consider exacerbate the breach are:- The fact that the landlord was aware of the deposit not being in a deposit scheme from the date when the deposit was paid, both in March 2016 and then again in June 2021. The deposit had not been secured for the whole duration of the tenancy. The fact that the landlord has a number of properties and is an experienced landlord. That the landlord usually takes deposits but has never paid any deposit into a scheme. That the landlord stated that he was aware of the regulations since they came into force. The fact that he did retain deposit monies and there was no way for the applicants to seek independent arbitration on whether this was a fair and reasonable sum to deduct.

55. We were perplexed about the landlord's reasons for taking a deposit as the evidence appeared to be that the tenants sorted out the deposit monies between themselves, and the landlord did not ever (apart from on this occasion) appear to seek any deduction or in fact check the flat condition when a tenant moved out. He appears to

have left it for the tenants to sort out between themselves. The benefits to the landlord in taking a deposit were not evident, however, the fact that one was taken triggered legal obligations that he was obliged to follow, namely placing the deposit into an approved scheme, and providing his tenants with the protection that the approved schemes provide.

56. The total deposit money was fairly significant as at its highest it totalled £700, although we note that for the first 5 years, it was £400. We consider it significant the length of time that the deposit monies were unsecured, there was a 7-year period when they were not secured in a scheme and this was the duration of the tenancy. When considering what penalty to impose we place weight on these factors and consider that they show the breach to be serious.

57. We did not find the landlord to be incredible in his evidence, however, we were concerned about his failure to properly consider relevant law as it applied to his duties as a landlord. Although he had been a landlord for 30 years and had a number of properties, and although he appears to have had good relationships with his tenants, we found his practice to be very informal. This informality did not serve his tenants or his own interests very well. We found the landlord to pay scant regard to the law, and although we believed that he did not intend to retain the deposit for no good reason, the fact that he failed to secure it, provided his tenants with no protection as required by law. Placing the deposit in a scheme or not, was not a choice that the respondent was entitled to make, Parliament has created regulations which make it a requirement. We place weight on these factors and consider that they show the breach to be more serious.

58. While noting that there are some mitigating factors for the respondent, that the deposit was returned quite quickly, and the sum deducted does not appear unfair, we do not consider however, that these factors provide much mitigation to him when balanced against the factors against him.

59. Given therefore the length of time that this deposit was unsecured, as there were no good reason for failing to put it into a scheme for such a long time, the disregard for the law and as the landlord was an experienced landlord with a number of properties we consider that the penalty has to be relatively high to reflect its seriousness. Accordingly, we impose a penalty of £1200.

Decision

60. The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and it would make an order for payment of £1200.00 in favour of the Applicant.

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

5th January 2024
Date