



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 2011

Chamber Ref: FTS/HPC/PR/23/2919

Re: 108B Bellevue Road, Edinburgh EH7 4DE (“the Property”)

Parties:

Hetong Wang, Apartment 6, 154 McDonald Road, Edinburgh EH7 4NN (“Applicant”)

Complete Clarity Solicitors, 34 Woodlands Road, Glasgow G3 6UR (“Applicant’s Representative”)

Douglas James Hardwick Graeme Scott, 108B Bellevue Road, Edinburgh EH7 4DE and 2F2, 72 Broughton Street, Edinburgh EH1 3SA (“Respondent”)

Graeme Scott, 108B Bellevue Road, Edinburgh EH7 4DE and 2F2, 72 Broughton Street, Edinburgh EH1 3SA (“Respondent Representative”)

Tribunal Members:

Joan Devine (Legal Member) and Leslie Forrest (Ordinary Member)

Decision :

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent should pay to the Applicant the sum of £10,000 together with interest thereon at the rate of 5% per annum from 21 May 2024 until payment..

Background and Documents Lodged

1. The Applicant made an application in Form G ("Application") dated and lodged on 26 August 2023 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("Rules") stating that the Respondent had failed to timeously lodge a tenancy deposit in an appropriate scheme in breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations"). The documents produced to the Tribunal by the Applicant were:

- A private residential tenancy agreement (“PRT”) between the Applicant, the Respondent dated 20 September 2022 and which commenced on 27 September 2022.
 - Copy email from the Respondent’s Representative to the Applicant dated 27 September 2022 confirming receipt of the deposit and rent for the period 1 October 2022 to 31 March 2023.
 - Copy email from the Applicant to the Respondent’s Representative dated 14 June 2023 asking for details of the deposit scheme.
2. A Case Management Discussion (“CMD”) took place on 22 November 2023 and 4 March 2024. Reference is made to the Notes of the CMDs. Following the first CMD the Tribunal issued a Direction dated 22 November 2023 in terms of which the Respondent was asked to lodge a written submission explaining why the factual circumstances surrounding the commencement of the tenancy in this case exempts the Respondent from compliance with the provisions of the Tenancy Deposit Scheme (Scotland) Regulations 2011 regarding the deposit received by the Respondent from the Applicant in respect of his occupation of the Property. The Respondent did not lodge a written submission in response to the Direction. At the second CMD the Tribunal determined to fix a Hearing. Following the second CMD the Tribunal issued a Direction dated 4 March 2024 in terms of which the Parties were asked to lodge documents on which they intended to rely at the Hearing and a list of authorities on which they intended to rely at the Hearing. Parties were asked to lodge their response to the Direction 14 days before the Hearing to be fixed. On 7 May 2024 the Applicant’s Representative lodged productions consisting of pages 1 to 37 and a list of authorities. On 14 May 2024 the Applicant’s Representative lodged productions consisting of pages 38 to 47 and an updated list of authorities. On 20 May 2024 the Respondent’s Representative lodged copy messages between the Parties and photographs of the Property. The documents were not paginated.

Hearing

3. A Hearing took place on 21 May 2024 by webex. The Applicant was in attendance and was represented by Scott Stevenson of the Applicant’s Representative. The Respondent’s Representative was in attendance.
4. The Tribunal noted that certain matters had been noted as agreed at the CMD on 22 November 2023 and asked if that remained the case. Mr Stevenson and Mr Scott confirmed that it did. Those matters were :

- The Applicant and the Respondent entered into a tenancy agreement which commenced on 27 September 2022 and ended on 26 May 2023.
 - A deposit of £3900 had been paid at the start of the tenancy.
 - The deposit was not lodged in an approved scheme.
5. In response to questions from the Tribunal Mr Scott said that he had no real experience of being a landlord. He said that the Property was owned by the Respondent and himself. They had renovated it to a high standard then decided to rent it out. They had one tenant in the Property for approximately one year before the Applicant took up the tenancy of the Property. The Tribunal noted that title to the Property was in the name of the Respondent alone and that he was the registered landlord for the Property. Mr Scott said that he was responsible for managing the letting of the Property.
 6. The Tribunal asked Mr Scott if he was aware of the 2011 Regulations at the time of letting the Property. He said he was not aware of the 2011 Regulations. The Tribunal asked Mr Scott if he accepted that the 2011 Regulations applied to the tenancy between the Parties. Mr Scott said that references were never received from the Mr Wang. He allowed Mr Wang to take entry to the Property as he had met him and thought everything would be alright. He said that he did not think the 2011 Regulations applied to the tenancy as references were not received. He said he understood that in terms of Scots law, if a landlord was misled then the tenancy agreement was invalid.
 7. Mr Wang said that he tried to provide references before the date of entry. He said he contacted his previous property manager for references but no response was received. He said that Mr Scott told him that he trusted him.
 8. The Tribunal noted that the tenancy agreement did not make any reference to the provision of satisfactory references being required. Mr Scott said he thought the point was covered in correspondence. He said it was a fundamental issue. The Tribunal noted there are handwritten annotations on the tenancy agreement. Mr Scott confirmed the annotations were his handwriting. The Tribunal noted that clause 11 of the tenancy agreement referred to the deposit being lodged with Safe Deposits Scotland. Mr Scott said that he was aware that Safe Deposits Scotland were an approved scheme. He said that he thought he would lodge the deposit once references were received. However some major events occurred in his personal life which meant he was not making sound decisions. He said it was his error that the deposit was not lodged in an approved scheme. The Tribunal asked if the previous tenant paid a deposit. Mr Scott confirmed that they did. He said he held the deposit and returned it in its

entirety at the end of the tenancy. He said the deposit was not lodged in an approved scheme.

9. The Tribunal explained the terms of regulation 10 of the 2011 Regulations and asked Mr Scott if there were any mitigating factors he wished the Tribunal to take into account. The Tribunal asked Mr Scott to explain any relevant factors which related to the Respondent. Mr Scott said that he managed the Property and it was down to him that the deposit was not lodged in an approved scheme. He said he held the deposit in his bank account. The Tribunal asked Mr Scott if he accepted that failing to lodge the deposit in a scheme meant that Mr Wang was deprived of the opportunity to approach the scheme administrator regarding return of the deposit and instead had to apply to the Tribunal. Mr Scott said that Mr Wang had accepted there should be some deductions from the deposit. He said that he did not respond to the settlement proposal from Mr Wang until August 2023 as other things were going on in his life. He said that the matters referred to in the letter which he had lodged from his GP related to the entire period of the tenancy agreement with Mr Wang.
10. Mr Stevenson said that it was his position that the 2011 Regulations applied to the tenancy agreement between the Parties even if no references were provided. He asked Mr Wang why he had taken legal advice. Mr Wang said he did so as he is an international student and his English is not perfect. He said he needed someone to speak on his behalf. He said he rented the Property in September 2023 as he was starting university. He said it was difficult to find accommodation for a student with a dog. He said other two bedroom properties were available to rent at around £1500 / month with a deposit required of £500. He noted that Mr Scott requested the maximum deposit.
11. Mr Stevenson asked Mr Scott if it was fair to say that he had been reckless in disregarding his responsibilities. Mr Scott said he did not agree with that statement. He said that when he met Mr Wang he had assured him that he would look after the Property. He said he felt comfortable that would be the case until he visited the Property in April 2023.
12. Mr Stevenson asked Mr Scott if he had been ignorant of the rules regarding deposit schemes. Mr Scott said that he had. Mr Stevenson noted that the monthly rent for the Property was £1950 whilst other two bedroom properties were £1400 / £1500 per month. He asked Mr Scott if the rent was deliberately higher because of Mr Wang's circumstances. Mr Scott said that it was difficult to find a property comparable to the Property which he said was exceptional particularly due to its outdoor space. Mr Stevenson suggested that a deposit of £3900 was very high and asked if Mr Scott had benefited from Mr Wang having limited choice. Mr Scott disagreed and said that the Property was in a good

location and finished to a very high standard. Mr Stevenson noted that at the CMDs the Tribunal had urged Mr Scott to take legal advice and asked if he had done so. He said he had not due to financial constraints.

13. Mr Stevenson asked Mr Scott if he accepted that failing to lodge the deposit in a scheme meant that Mr Wang was deprived of the opportunity to resolve the dispute regarding the deposit through the scheme administrator free of charge. Mr Scott said that Mr Wang had agreed that certain amounts should be retained from the deposit. Mr Stevenson asked Mr Scott if he accepted that Mr Wang had to incur legal expenses in order to resolve the dispute. Mr Scott said he did not accept that as damage was caused to the Property by two dogs in the Property. He said Mr Wang tried to conceal the damage and misled him. Mr Stevenson said that Mr Wang made two attempts to resolve the dispute but was ignored and had to incur legal fees. Mr Scott said that was not correct.

Submissions

14. Mr Stevenson submitted that the Respondent accepted he had failed to lodge the deposit in an approved scheme despite the tenancy agreement referring to Safe Deposits Scotland. He said that the Applicant tried to reach out to the Respondent by email but his question about the identity of the deposit scheme where his deposit was lodged was ignored. He submitted that ignorance of the 2011 Regulations was not an acceptable excuse.
15. Mr Stevenson submitted that the lack of references was irrelevant. There was nothing in the tenancy agreement regarding references. He noted that the Respondent continued to accept rent each month which indicated he accepted the tenancy agreement was binding on the Parties.
16. Mr Stevenson referred the Tribunal to the case of *Rollet v Mackie* 2019 UT 45 and directed the Tribunal to paragraphs 13 and 14. He submitted that when assessing the penalty to be made in this case the Tribunal should consider the case to be at the more serious end of the scale. He submitted that aggravating factors were that the tenancy with Mr Wang was not the first tenancy where the Respondent had failed to lodge the deposit in an approved scheme. He submitted that the Respondent had fraudulent intent or deliberate or reckless failure to observe his responsibilities. Mr Stevenson submitted that a very high financial sum was involved as the maximum deposit had been sought. He submitted that the Respondent took advantage of the Applicant's circumstances and made a conscious decision to seek the maximum deposit.

17. Mr Stevenson submitted that the Applicant had suffered actual loss in the form of significant legal fees which exceeded £7000. He said the Applicant had attempted to resolve the dispute without success.
18. Mr Stevenson referred the Tribunal to *Bell v Rawley* FTS/HPC/PR/23/0780 where the penalty was three times the deposit. He submitted that the circumstances of the current case were worse than the factual background in *Bell v Rawley*. Mr Stevenson referred the Tribunal to *Numeron v Gowans* FTS/HPC/PR/23/2842 where the penalty was three times the deposit. He noted the penalty seemed to relate to the length of time for which the deposit was unprotected. He noted that the tenancy in the current case was not as long but submitted that the financial sum involved was much higher.
19. Mr Stevenson concluded by asking the Tribunal to make an award at the maximum level of three times the deposit being £11700 plus interest at 8%.
20. Mr Scott said that the level of deposit sought related to the lack of a guarantor where the tenant was a student with a pet. He said he had previously explained the mitigating circumstances.

Findings in Fact

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent had entered into a tenancy agreement which commenced on 27 September 2022.
2. The tenancy came to an end on 26 May 2023.
3. The Applicant paid to the Respondent a deposit of £3900 on or about 27 September 2022.
4. The deposit was not paid to the administrator of an approved scheme in compliance with the 2011 Regulations.
5. The Respondent had let the Property on one occasion before entering into the tenancy agreement with the Applicant. The tenant under the previous tenancy had paid a deposit which the Respondent did not lodge in an approved scheme.
6. As a result of being unable to utilise the dispute resolution procedure offered by approved tenancy deposit schemes, the Applicant has incurred legal costs.

Findings in Fact and Law

7. The Respondent breached Regulation 3 of the 2011 Regulations.

Relevant Legislation

21. Regulation 3 of the 2011 Regulations provides *inter alia* :

"(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.....

22. Regulation 9 of the 2011 Regulations provides:

"(i) 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.

(ii) An Application under paragraph 1 must be made no later than three months after the tenancy has ended."

23. Regulation 10 of the 2011 Regulations provides *inter alia* :

"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"

Reasons for the Decision

24. Mr Scott submitted that the 2011 Regulations did not apply to the tenancy agreement between the Applicant and the Respondent as the Applicant did not provide references at the start of the tenancy. Mr Scott was unable to point the Tribunal to any authority in support of that submission. He submitted that without references the tenancy agreement was "invalid". Despite this, rent was paid and accepted. The Tribunal could identify nothing in the tenancy agreement or the 2011 Regulations to support Mr Scott's position. The Tribunal considered that the 2011 Regulations did apply to the tenancy agreement between the Parties. It was clear that the Respondent is a landlord for the purposes of the 2011 Regulations and the tenancy was a relevant tenancy for the purposes of the 2011 Regulations.

25. Regulation 10 of the 2011 Regulations states that if satisfied that the landlord did not comply with the duty in Regulation 3 to pay a deposit to the scheme administrator of an approved scheme within 30 working days of the beginning of the tenancy, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. It was a matter of admission that the Respondent did not lodge the deposit with an approved scheme.

26. The amount to be awarded is a matter for the discretion of the Tribunal having regard the factual matrix of the case before it. The Tribunal considered the comments of Sheriff Ross in *Rollett v Mackie* UTS/AP/19/0020. At para 13 and 14 he considered the assessment of the level of penalty and said:

"[13] In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer also tends to lessen culpability, as it affects intention. the finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.

[14] Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals. None of these aggravating factors is present."

27. The Respondent's Representative took responsibility for failure to lodge the deposit. He said that his name was on the tenancy agreement but he does not hold title to the Property. The Tribunal noted that neither the Respondent or the Respondent's Representative was an experienced landlord. Although the Property had been let on one previous occasion where the deposit was not lodged in an approved scheme, there was no evidence of multiple lettings and multiple breaches of the 2011 Regulations. The Tribunal was of the view that there was no evidence of fraudulent intent on the part of the Respondent.

28. The explanation given for the failure to comply with the 2011 Regulations was lack of awareness of the Regulations and difficult personal circumstances. Ignorance of the law is not an excuse for non-compliance. Whilst the Tribunal accepted that the Respondent's Representative suffered a period of difficult

personal circumstances, the Tribunal was not offered any information regarding the Respondent's circumstances.

29. The Tribunal considered that there were aggravating factors in this case. Firstly the lack of admission of fault. Secondly the high financial sums involved. Thirdly, as the deposit was not lodged in an approved scheme the Applicant was deprived of the opportunity to approach the scheme administrator regarding return of the deposit. In these circumstances the purpose of the 2011 Regulations was defeated. This also meant that the Applicant required to apply to the Tribunal to seek recovery of the deposit and in so doing incurred legal fees. The Applicant therefore suffered actual loss as a result of the Respondent's failure to comply with the 2011 Regulations. In light of these aggravating factors the Tribunal considered that it would be appropriate to make an award of compensation at the higher end of the scale.
30. Having regard to factors put forward by both parties the Tribunal determined that the sanction should be £10,000 in the particular facts and circumstances of this case. The Tribunal also determined to award interest in terms of Rule 41A. The Applicant sought interest at 8%. The Tribunal considered that level of interest to be excessive and that 5% was more appropriate.

Decision

The Tribunal granted an Order for payment of £10,000 in terms of Regulation 10(a) of the 2011 Regulations plus interest thereon at the rate of 5% per annum from 21 May 2024 until payment.

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.

**Joan Devine
Legal Member**

Date: 21 May 2024