



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

Chamber Ref: FTS/HPC/PR/24/1331

Re: Property at 48 Brown Street, Carlisle, ML8 5DT (“the Property”)

Parties:

Miss Michelle Clark, 48 Brown Street, Carlisle, ML8 5DT (“the Applicant”)

Noon Investment Homes LTD, Noon Investments Homes LTD, 32 Douglas Street, Carlisle, ML8 5BJ (“the Respondent”)

Tribunal Members:

Mary-Claire Kelly (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to grant an order for payment in the sum of SIX HUNDRED POUNDS (£600)

Background

1. By application dated 26 March 2024 the applicant sought an award under the Tenancy Deposit Schemes (Scotland) Regulations. The applicant lodged with the application various documents including:
 - Copy Private Residential Tenancy Agreement
 - Text messages between parties
 - Copy letter from the applicant’s GP dated 5 March 2024
 - Copy bank statements
2. The application was heard alongside conjoined application FTS/HPC/PR/24/1437 seeking an award for compensation in respect of harassment, attempted unlawful eviction, dampness and disrepair and alleged

personal injury due to dampness as well as loss of earnings and return of the deposit.

3. Written representations were submitted by the respondents together with the various documents including:
 - Text messages between parties
 - Text messages between Steven Noon and the applicant's mother, Roseanna Clark
 - Correspondence between the respondents and other tenants
4. Following an initial adjournment due to the respondents' availability a teleconference case management discussion ("cmd") was scheduled for 29 July 2024.
5. Prior to the cmd a large volume of emails and material was received from parties, much of it focussed on arrangements for repairs to be carried out in the property and conflict that had arisen as a result.

Case Management Discussion- teleconference – 29 July 2024

6. The applicant attended with her mother, Roseanna Clark. Steven Noon and Caroline Noon, spouses, both Directors of Noon Investment Homes Ltd attended.
7. The Tribunal noted that the applicant had highlighted in her submissions that she suffered from mental health issues. The applicant explained that her mother was attending in a supporting role but also might give evidence if required. The applicant explained that she had complex Post Traumatic Stress Disorder and Bipolar disorder. The applicant stated that she received a disability payment as part of her Universal Credit. The applicant explained that she had come to reside in the tenancy as a result of fleeing domestic violence. She had initially been placed in a South Lanarkshire Council property. An explosion at that property had placed her and her pets in danger. The applicant stated that she was traumatised by her housing history and this made the issues which she had stated had arisen in her current tenancy very difficult to cope with.
8. It was clear from the correspondence which had been lodged and the oral representations at the hearing that relations between the parties had broken

down. In addition to the applications before the Tribunal two further applications had been submitted to the First-tier Tribunal. Throughout the cmd the applicant's behaviour was volatile and she sought to make personal criticisms of Mr and Mrs Noon. Ms Noon explained that the process had taken a toll on her personal wellbeing due to the stress of the process and the difficult relations between parties.

9. The Tribunal made clear to parties at the outset that they could request a break at any time if necessary. Numerous breaks were taken during the cmd. Enquiries were made as to whether parties required any additional reasonable adjustments to be made. Neither party requested any further adjustment to the usual process.

Evidence from the applicant

10. The applicant stated that she had been in private tenancies for over 20 years and had never had any issues with previous landlords. The applicant had a poor relationship with the respondents and at times struggled to contain her emotions which led to a number of pauses in the cmd.
11. The applicant explained that she had been looking for a tenancy in the Carlisle area in July 2018 and had noticed the tenancy whilst driving around with her mother. The applicant stated that she and her mother had made contact with Mr Noon straightaway as she was keen to secure the property. She stated that she was particularly keen to secure the property as pets were accepted. In her experience it had been difficult to find a property which would accept pets. She stated that £200 was paid to Mr Noon in cash to secure the property on 31 July 2018 and a further £300 was paid on 3 August 2018. The applicant's evidence on the amount of the second payment was unclear. The applicant did not have a receipt for payment of the sums and stated that she was sure that she had paid them as she could see from her mother's bank statement that those sums had been transferred to her on those dates. She advised that she was in a psychologically fragile state at the time, was keen to secure the property and was not thinking about asking for a receipt.
12. The applicant stated that she had received money from a charity called the Retail Trust to help her pay for a deposit.

13. The applicant stated that she had offered to pay the amount of £200 to the respondents to cover any additional costs associated with her having pets. She stated that this was something that she had done in her previous tenancies. She stated that it was her understanding that this £200 was to be treated as part of the deposit and she expected that amount to be returned in the same way as a deposit.
14. The applicant stated that she had been trying to leave the property and had been asking for her deposit back since 2021. She stated that her sole income was from benefits and if the deposit was not returned to her she would be unable to move to another property. She was very unhappy with her current housing situation which she stated was impacting her mental health.
15. The applicant stated that a previous tenant of the respondents had also brought proceedings to the First-Tier Tribunal and had been successful in obtaining an award under the Tenancy Deposit Regulations.
16. The applicant stated that when she had raised the return of the deposit with Mr Noon he stated that there was no deposit and the money had been used to purchase the white goods in the property. The applicant stated that this was untrue and she had not agreed to purchase white goods with the deposit.
17. The applicant advised that she is currently on the waiting list for housing with the local authority and has been given priority. She advised that she wishes to move out of the property as soon as possible. She explained that she has not given formal notice as she requires to know whether she will have a deposit before being able to find somewhere else.

Evidence of Roseanna Clark

18. Roseanna Clark is a retired library supervisor from Carlisle. She had helped her daughter to secure the tenancy. She stated that her daughter, the applicant, has been impacted by trauma. The applicant had previously worked as a supermarket manager but her working life had been impacted by domestic abuse. Mrs Clark confirmed that her daughter had been trying to move to another property. She advised that her daughter has some issues with expressing herself in concise terms and can become frustrated.

19. Mrs Clark stated that an initial payment of £200 in cash was made to Mr Noon after they had first seen the property. A further payment of £365 which she understood to be part of the deposit was paid on 2 August 2018. She confirmed that her daughter had been particularly keen to secure the property as pets were accepted.
20. When Mrs Clark was asked to comment on the text she sent to Mr Noon where she stated: "I thought Michelle got to keep them as she didn't pay a deposit." she stated that the text had been taken out of context and was ironic as the discussion was regarding white goods.

Evidence of Steven and Caroline Noon

21. Mr Noon disputed that a deposit had been accepted. He stated that he accepted a sum of £200 prior to the tenancy commencing however this was a "pet fee". The sum was paid in order to cover the cost of a pet coming into the property. He submitted that it was a one off non refundable payment and as such was distinct from the deposit. Mr Noon stated that the respondents owned over 60 properties and that it was standard practice for a pet fee to be charged.
22. Mr Noon stated that a further payment of £365 was received on 3 August 2018. This payment was for a months' rent in advance and was not a deposit payment.
23. Mr Noon stated that many landlords would not accept tenants with pets and he did so on the basis that an extra fee was applied.
24. Mr Noon stated that the reason the respondents do not take a deposits in their rental properties is that they do not wish to come under the Tenancy Deposit Regulations. As an alternative, Mr Noon advised that guarantors were now required for all leases to cover costs that would previously have been met from the deposit.
25. Mr Noon referred to the lease which had been lodged. The paragraph in the lease headed "Deposit" stated that no deposit was paid.
26. Mr Noon confirmed that there was no reference to a pet fee in the lease.
27. In relation to the previous case at the First-tier Tribunal by another tenant in relation to the Tenancy Deposit Regulations, Mr Noon stated that he had been found in breach of the regulations.

28. Mr Noon stated that he had previously operated a system whereby he took money for white goods rather than a deposit. He offered tenants the option to purchase them when they moved in, otherwise they would have to provide their own white goods. Mr Noon explained that the respondents did not wish to take on responsibility for testing electrical appliances such as fridge/freezers.
29. Caroline Noon highlighted a copy of a text between Roseanna Clark and Steven Noon dated 7 June 2020. The text exchange showed Mrs Clark asking if Mr Noon was responsible for replacing the fridge freezer in the property. Mr Noon responded that he only fixed ovens, hobs and extractor fans. He also stated that if they break they have to be replaced then left to which Mrs Clark replied "I thought Michelle got to keep them as she didn't pay a deposit.". Ms Noon stated that this was evidence that no deposit had been paid.
30. Mrs Noon also highlighted the emails and references which had been lodged from 6 tenants including 2 former tenants all of whom stated no deposit had been collected for their tenancies as evidence of the general practice of the respondents not to take deposit payments.

Findings in Fact

31. Parties entered into a tenancy agreement with a commencement date of 5 August 2018
32. The monthly rent due was £365 payable in advance.
33. A deposit of £200 was paid to the respondents in advance of the tenancy commencing.
34. The respondent failed to lodge the deposit in a tenancy deposit scheme as required in terms of regulation 3 of the [Tenancy Deposit Schemes \(Scotland\) Regulations 2011/176](#)

Reasons for the decision

35. The Tribunal took into account the parties written and oral submissions and the various documents lodged by parties.
36. It was not disputed that parties entered into a tenancy agreement with a commencement date of 5 August 2018.

37. It was not disputed that £200 had been paid in cash prior to the commencement of the tenancy. It was also not disputed that £365 was paid in early August.
38. Parties were in agreement that the £200 payment made as the applicant had dogs and was related to damage they may do to the property. The applicant's position was that this payment was a deposit and her expectation was that it should be repaid to her at the end of the tenancy if no deductions were necessary. It was her position that as a deposit the sum required to be placed in a relevant tenancy deposit scheme.
39. The respondents position was that the £200 was a fee charged for allowing an animal into the property. This was different from a deposit and was a one off non refundable payment.
40. Neither party had any written evidence in relation to the payment of £200. The lease which was signed stated that no deposit was payable. The lease also stated that no pets would be allowed in the property. The lease did not make any reference to a "pet fee" of £200 being charged.
41. The Tribunal required to determine whether the £200 cash payment was a deposit or a "pet fee". The applicant had been clear in her evidence that the payment was a deposit made to ensure that any damage caused by her pets would be covered. Mr Noon's evidence was clear that he sought to avoid collecting deposits as he was aware that this would lead to the tenancy deposit regulations applying. He stated that he had in the past taken payments from tenants to cover purchasing the white goods. This had been done to avoid engaging the tenancy deposit regulations. The respondents stated that when they had been found in breach of the regulations for that practice they changed their leases to ensure that guarantors were used in all cases to pay for damage that may arise. The respondents were open that they sought to create their tenancy agreements in a way which would not engage the tenancy deposit regulations.
42. The Tribunal did not believe the respondents evidence that they had taken the payment as a "pet fee". The Tribunal determined that the respondents had called the payment a "pet fee" after the applicant had asked for her deposit back as a way to avoid returning the money and engaging the tenancy deposit

regulations. This was in line with their general approach to the regulations and was similar to the approach taken towards white goods.

43. The Tribunal took into account the evidence from other tenants in the form of emails stating that they had not paid a deposit however the Tribunal did not give these great weight as most were from existing tenants who may not have pets or had more recent tenancy agreements. The respondents did not produce tenancy agreements showing a common practice of charging a “pet fee” and this issue was not covered in the email evidence from other tenants.
44. The Tribunal gave some weight to the text produced from Roseanna Clarke to the respondents where she stated that there was no deposit however, the Tribunal considered that this was not particularly helpful to the respondents as it appeared to suggest that sums may have been paid which were applied to the white goods.
45. The Tribunal gave weight to the fact that the applicant was unable to recall all the details of the tenancy agreement process as she had been experiencing personal and mental health details but she was clear on the payment of £200.
46. The Tribunal determined that the second payment of £365 on 3 August 2018 was not a deposit payment but rent. The Tribunal took into account the fact that the payments had been split which indicated that they were for different purposes and also that the applicant and her mother had been vague on the amount of the second deposit payment. The Tribunal also considered the respondents’ evidence on this part to be clear and in alignment with the rent clause in the lease which stated that rent would be payable monthly in advance and common practice in leases.
47. The Tribunal was satisfied that the £200 cash fell within the definition of a deposit under section 120(1) of the Housing (Scotland) Act 2006. On that basis the deposit should have been paid into an approved tenancy deposit scheme in terms of regulation 3 of the Tenancy Deposit regulations. Accordingly the respondent was in breach of regulation 3 and the Tribunal required to make an order in terms of regulation 10.
48. Regulation 10 states.

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

49. In assessing the appropriate amount of sanction under Regulation 10(a) of the regulations the Tribunal took the following factors in account.
50. In this case the deposit had been unprotected for a period of 6 years. The Tribunal also took into account the applicant's undisputed evidence that another tenant had experienced difficulties with the respondents in relation to their deposit. The Tribunal took into account that the respondents were experienced landlords with a large portfolio of properties who were aware of the tenancy deposit regulations.
51. The Tribunal gave weight to the applicants evidence that uncertainty around return of the deposit had impacted her search for an alternative property.
52. The Tribunal gave weight to the fact the respondents had continued to dispute that a deposit had been paid requiring the applicant to take legal action to recover her deposit.
53. The legal test to be applied in determining the level of sanction is set out in *Jenson v Fappiano* 2015 G.W.D. 04-89 and subsequent case law. Those authorities are reviewed by Sheriff Cruickshank in *Ahmed v 3 Russell* 2023 S.L.T. (Tr) 33 and confirm the Tribunal should seek to assess a sanction that is "fair and proportionate" in all the circumstances, taking into account both aggravating and mitigating circumstances.
54. Having regard to the foregoing factors and the weight attached to each of them, and that the maximum sanction is £600 (three times the deposit of £600) the Tribunal assesses a fair and proportionate sanction in the sum of £600.

Decision

The respondent is ordered to pay the applicant the sum of £600 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.

Mary-Claire Kelly

Legal Member/Chair

29 July 2024

Date