



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in relation to an application for payment where a landlord has not paid the deposit into an approved scheme in terms of Rule 103 of the Procedure Rules.

Chamber Ref: FTS/HPC/PR/23/2061

Re: 28A High Street, Laurencekirk, AB30 1AB ("the Property")

Parties:

Andrew Paterson residing at Millbreck, Garvock Road, Laurencekirk, AB30 1FJ ("the Applicant")

Pamela Huthwaite residing at 74H Queens Road, Aberdeen, AB15 4YE ("the Respondent")

Tribunal Member: Jacqui Taylor (Legal Member) Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should pay the Applicant the sum of £300 by way of sanction under Regulation 10 1(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011, as amended by the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017.

1. Background

The Applicant submitted an application to the Tribunal for payment where a landlord has not paid the deposit into an approved scheme in terms of Rule 103 of the Procedure Rules, which application was dated 21st June 2023.

2. Documents lodged with the Tribunal with the Application

Documents lodged with the Tribunal by the Applicant were:

2.1 A copy of the Private Residential Tenancy Agreement between the parties dated 30th January 2022.

2.2 A copy of text messages between the parties dated June 2023 which include reference to the deposit.

2.3 A copy of the email from My Deposits dated 20th June 2023 which states that a protection could not be found.

2.4 A copy of the email from Tracy Shapcott of the Letting Protection Service dated 20th June 2023 which states that Letting Protection Scotland do not hold the deposit.

2.5 A copy of the email from a customer operations team leader at Safe Deposits Scotland dated 20th June 2023 which states that they do not hold a deposit.

2.6 A copy of faster payments from the Appellant's bank account showing a deposit payment of £605 headed 'Huthwaite' dated 25th January 2023.

2.7 A letter from Gail Stewart dated 6th July 2023 confirming that she is happy for the Applicant, her co tenant, to deal with the application to the Tribunal.

3. Notice of Acceptance.

By Notice of Acceptance by Helen Forbes, Convener of the Tribunal, dated 18th July 2023, she intimated that she had decided to refer the application (which application paperwork comprised documents received between 22nd June 2023 and 7th July 2023) to a Tribunal.

4. The Case Management Discussion.

This case called for a conference call Case Management Discussion (CMD) Conference call at 14.00 on 10th November 2023.

The Applicant attended.

The Respondent did not attend and was not represented.

The Tribunal had sent a letter dated 6th October 2023 to the Respondent advising her of the CMD. The letter had been served on the Respondent by Roger Ewen, Sheriff Officer on 10th October 2023. The Tribunal were satisfied that the requirements of Tribunal Rule 29 had been satisfied and proceeded with the Continued Case Management Discussion.

4.1 Oral Representations by the Applicant:

4.1.1 He paid the deposit to the landlords on 25th January 2023. He received a reply from Mr Huthwaite advising that he would pay the deposit into a tenancy deposit scheme but this never happened.

4.1.2 He sent an email to the Respondent on 14th June 2023 enquiring about the deposit but she did not reply. He will provide the Tribunal with a full copy of that text message.

4.1.3 The sum of £433 was returned to the Applicant by the Respondent. She had deducted the sum of £172 to meet the cost of grass reseeding and light cleaning. He has copies of the correspondence regarding this and will send it to the Tribunal.

4.1.4 As far as he is aware the Respondent leases out two other properties.

4.2 Outcome of the Case Management Discussion.

4.2.1 The Tribunal issued a separate Direction to the Applicant to produce the following documents to the Tribunal:

- (i) A copy of the text messages/ emails from the late Mr Huthwaite to the Applicant advising that the deposit would be paid into a tenancy deposit scheme.
- (ii) A full copy of the text messages between the parties dated 14th June 2023.
- (iii) A copy of the emails/ text messages between the parties regarding the return of the deposit.

The CMD was adjourned to a hearing allow the Applicant an opportunity to lodge the required documents.

5. Written Representations.

5.1 The Applicant's written representations:

5.1.1 Text message to Jeremy Huthwaite dated 25th January 2023 from Andrew advising that he had made two payments of £605. One for the first months rent and one for the deposit.

5.1.2 Text message from Jeremy Huthwaite in reply confirming that both payments had been received and he would place the deposit in the scheme and he would be advised of the number.

5.1.3 Text message dated 14th June at 17:58 to Pamela asking for clarification of the arrangements at the end of the tenancy and confirmation as to which scheme the tenancy deposit was paid into.

5.1.4 Text message from the Respondent to Gail dated 16th July 2023 with details of the deductions from the deposit (4 days rent, oven cleaning, mould in shower, reseeding of grass, cleaning kitchen cupboards and skirtings and internal window cleaning).

5.2 The Respondent's written representations:

5.2.1 The Respondent sent the Tribunal a certified copy of the death certificate of Lawrence Huthwaite (date of death 11th May 2023).

5.2.2 The Respondent sent the Tribunal a hand written note headed 'This is a clear case of misdirection'. The note stated that Lawrence Huthwaite is the registered Landlord and he has died, by suicide.

6. Hearing

This case called for a Conference call hearing at 10.00 on 9th September 2024.

The Applicant attended. The Respondent did not attend and was not represented.

The Tribunal had sent a letter to the Respondent advising her of the hearing. The letter had been served on the Respondent by Roger Ewen, Sheriff Officer on 12th August 2024. In addition, the Respondent had been advised of the hearing by advertisement on the Tribunal website from 12th August 2024 to 9th September 2024. The Tribunal were satisfied that the requirements of Tribunal Rule 29 had been satisfied and proceeded with the hearing.

6.1 Oral Representations by the Applicant:

6.1.1 Before he moved into the Property he had primarily dealt with Lawrence Huthwaite regarding the tenancy. After he moved in he mostly dealt with the Respondent. He knew her personally as she lived next door to his parents. She contacted him to arrange access on three occasions throughout the tenancy.

6.1.2 He confirmed that he had received the text message from Lawrence Huthwaite confirming that he would lodge the deposit with a tenancy deposit scheme. He also confirmed that neither himself nor his partner had chased up the fact that he had heard nothing further about the deposit. He had a lot going on in his life at the time.

6.1.3 In connection with the deductions from the rent that amounted to £172 he did not think these deductions should have been made. He has asked for permission to install a garden shed which had been erected for a number of weeks. He didn't think it would have been necessary to regrass the area after this short period of time. He did not recall that there was black mould in the bathroom and the Property had been carefully cleaned at the end of the tenancy. However, he agreed that 4 days rent was due and this amounted to £79.56. He will lodge a separate application with the Tribunal regarding return of the deposit.

6.1.4 He could not speculate what the Respondent's position would be. She owns several properties that she leases.

6.1.5 He believes that he should receive payment of three times the deposit due to the lack of contact and engagement by the Respondent which has meant that the process has taken far longer than he expected. He acknowledged that the late Mr Huthwaite died in May but that does not explain why the deposit was not lodged in a tenancy deposit scheme at the start of the tenancy.

6.1.6 He acknowledged that Mr Huthwaite was the registered landlord.

7. The Tribunal made the following findings in fact:

7.1. The Applicant, was Tenant of the Property 28A High Street, Laurencekirk, AB30 1AB along with Gail Stewart.

7.2 The Respondent was the Landlord of the Property together with Jeremy Huthwaite in terms of clause 2 of the lease dated 30th December 2022 and 30th January 2022.

7.3 Jeremy Huthwaite died on 11th May 2023.

7.4 Jeremy Huthwaite was the registered Landlord.

7.5 The date of entry in terms of the lease was 27th January 2023.

7.6 The lease was a Private Residential Tenancy in terms of the Private Housing (Tenancies) (Scotland) Act 2016.

7.7 Clause 10 of the lease stipulates that a deposit of £605 will be paid by the Tenants to the Landlord at the start of the tenancy, or before.

7.8 The Applicant vacated the Property on 1st July 2023. The tenancy between the parties ended on 1st July 2023.

7.9 The Applicant paid the sum of £605 to 'Huthwaite' on 25th January 2023 for the first months rent.

7.10 The Applicant paid the sum £605 to 'Huthwaite' on 25th January 2023 for the deposit.

7.11 Jeremy Huthwaite intended to lodge the deposit with a tenancy deposit scheme but did not do so.

7.12 Neither Jeremy Huthwaite nor the Respondent lodged the deposit with My Deposits Scotland. As confirmed by a copy of the email produced dated 20th June 2023.

7.13 Neither Jeremy Huthwaite nor the Respondent lodged the deposit with Letting Protection Scotland. As confirmed by a copy of the email from Tracy Shapcott of the Letting Protection Service dated 20th June 2023.

7.14 Neither Jeremy Huthwaite nor the Respondent lodged the deposit with Safe Deposits Scotland. As confirmed by a copy of the email from a client adviser at Safe Deposits Scotland dated 20th June 2023.

7.15 The Applicant made the application to the Tribunal on 22nd June 2023 which was within three months of the end of the tenancy between the parties on 1st July 2023.

7.16 The Respondent deducted the sum of £172 from the deposit.

8. The relevant sections of the Tenancy Deposit (Scotland) Regulations 2011 ('2011 Regulations'), as amended, provide:

Regulation 3.

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.

Regulation 10

10(1) 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;

7.3 The Tribunal determined that neither the Respondent nor her late husband Lawrence Huthwaite had not paid the deposit of £605 to the scheme administrator of an approved tenancy deposit scheme within 30 days of the beginning of the tenancy.

9. Decision.

In assessing the level of sanction the Tribunal considered the applicant's representations.

9.1 The Tribunal also considered the following cases:-

9.1.1 Jenson v Fappiano 2015 G.W.D. 04-89

In this case a deposit of £1000 had not been lodged in an approved scheme for the period of more than a year. When a dispute arose the full deposit was paid into an approved scheme and became subject to an independent adjudication which found in favour of the tenant who received the deposit in full. The breach of the 2011 Regulations was admitted. Sheriff Welsh concluded that Regulation 10(a) set an upper limit but did not lead to the automatic triplication of the deposit as a sanction. Such an approach would negate meaningful judicial assessment. Judicial discretion had to be applied as constrained by settled equitable principles. In exercising his discretion by taking account of the relevant factors within the particular circumstances of the case a sanction equivalent to one third of the deposit was imposed.

9.1.2 Kirk v Singh 2015 SLT Sh Ct 111

In this case the Sheriff considered the whole circumstances and decided that whilst the defender's default could be characterised as serious it was not at the most serious end of the scale and it was also necessary to have regard to the mitigating circumstances advanced by the defender. Accordingly, in his opinion, the fair, proportionate and just sanction in that case, having regard to the maximum sanction available, was £500. The deposit in that case was £380.

9.1.3 Cooper v Marriot 2016 SLT (Sh Ct) 99

In this case the deposit had been held unprotected for two years and resulted in depriving the tenant of his right to invoke the dispute resolution service which would have been provided by an approved scheme. Sheriff Welsh found no mitigation. He considered the breach to show flagrant and wilful disregard of the terms and purposes of the Regulations and ordered payment equivalent to twice the deposit.

9.1.4 Rollett v Mackie UTS/AP/19.0020.

In this case Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a 'serious' breach will vary from case to case – it is the factual matrix, not the description, which is relevant." In analysing the "factual matrix" in that case, Sheriff Ross noted that 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.

9.1.5 Ahmed v Russell 2023 S.L.T. (Tr) 33 FTS

In this case Sheriff Cruickshank found that 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. The level of sanction should mark the gravity of the breach which has occurred. The purpose is not to compensate the tenant.

9.1.6 Bavaird v Simpson UTS/AP/23/0006

In this case Sheriff Jamieson found that ignorance of the Regulations is no excuse and cannot be a mitigating factor. The Tribunal are bound to take into account as an aggravating factor any deliberate intention on the part of a landlord to ignore the tenancy deposit scheme when the landlord had knowledge of the scheme but had deliberately chosen to flout the Regulations. The deposit had been unprotected throughout the tenancy but had been returned to the tenant at the end of the tenancy. Whilst the actual risk was relatively insignificant, as one of the purposes of the Regulations is to guard against any level of risk, moderate weight ought to be attached to this factor. Significant weight ought to be attached to the appellant's ignorance of the scheme over a prolonged period of five years as a landlord but significant weight also falls to be attached to the mitigating factors that the deposit was repaid in full immediately after the termination of the tenancy and the respondents suffered no loss or inconvenience as a consequence of the appellant's failure to comply with the Regulations. The maximum sanction he could have awarded was £6000 and he awarded £2500.

9.2 The Tribunal acknowledged that the 2011 Regulations were intended to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit at the termination of a tenancy.

9.3 The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach.

9.4 The Tribunal were concerned that the deposit had been unprotected for the duration of the tenancy and the Respondent was deprived the benefit of having the deposit adjudicated by a tenancy deposit scheme at the end of the tenancy. However, allowing for the subtraction of the rent liability from the deposit which the tenant proposed in a text message of 4th June 2023, a relatively modest sum was deducted for cleaning and repairs and an explanation provided, with the remainder of the deposit returned quickly.

9.5 The Respondent has not provided any explanation for this failing. It is regrettable that the Respondent has not engaged fully with the Tribunal, although her written submission to the Tribunal offers some justification for this insofar as she believes the case is misconceived as her late husband was the registered landlord. However, she is named on the tenancy agreement as a joint landlord.

9.6 The Tribunal find a strong weight mitigating factor to be that the Respondent's late husband was the registered landlord and he had agreed to lodge the deposit in a tenancy deposit scheme but he died before the end of the tenancy. No evidence was presented that the Respondent was aware of this failure at the time the tenancy started. Her husband committed suicide on the 11th May 2023, less than four months after the tenancy began, and less than a month before the tenants gave notice. This

was clearly a very difficult time for the Respondent. The question of the deposit was only raised with her when the tenants gave notice on the 3rd June 2023.

9.7 In the circumstances the Tribunal considers it to be fair, proportionate and just to sanction the Respondent for non compliance by awarding the Applicant a sum of £300.

9.8 The Tribunal orders the Respondent to pay the Applicant the sum of £300 by way of sanction under Regulation 10 1(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

10. 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.

Jacqueline Taylor

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..... Legal Member

9th September 2024