



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/24/2474

Re: Property at 19A Wellmeadow Street, Paisley, PA1 2EF (“the Property”)

Parties:

Mr Lewis MacDonald, 19A Wellmeadow Street, Paisley, PA1 2EF (“the Applicant”)

Mr Stuart Henderson, 4 Stirrat Crescent, Paisley, PA3 1RA (“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 in the sum of £600 against the Respondent in favour of the Applicant.

The First-tier Tribunal also determined to make an order requiring the Respondent to lodge the Applicant’s tenancy deposit of £200 with an approved tenancy deposit scheme and provide the Applicant with the information required under Regulation 42 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 within fourteen days of the date of this decision.

Background

- 1 The Applicant applied to the Tribunal under Rule 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations) seeking an order for payment as a result of the Respondent’s failure to lodge his deposit in an approved tenancy deposit scheme. The Applicant also sought as part of his application an order under Regulation 10(b)(i) of the 2011 Regulations requiring the Respondent to lodge the deposit with an approved scheme.

- 2 By Notice of Acceptance of Application dated 3rd December 2023 a 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.

The Case Management Discussion

- 3 Both the Applicant and Respondent were present at the Case Management Discussion which took place on 6 September 2024 by teleconference.
- 4 The Tribunal explained the purpose of the Case Management Discussion and the legal test to be applied under Rule 10 of the 2011 Regulations, and asked the parties to address the Tribunal on their respective positions
- 5 The Applicant explained that he had moved into the property in August 2022. He had received text messages from the Respondent and a tenancy agreement which required payment of a £200 tenancy deposit. The agreement stated that the deposit would be lodged in an approved scheme. The Applicant was aware from his previous experience as a tenant that the landlord was required to provide confirmation once the tenancy deposit had been lodged. The Respondent had failed to do so. This rung some alarm bells. The Applicant had then contacted the three approved tenancy deposit schemes asking if they held his deposit. They confirmed that they did not, and never had. The Applicant explained that it was clearly stated in the tenancy agreement that the landlord had a responsibility to lodge the deposit in an approved scheme. He was therefore looking for the maximum sanction of three times the deposit. The Applicant confirmed that he was still in the tenancy and was therefore seeking an order requiring the Applicant to lodge the deposit in an approved scheme.
- 6 The Respondent confirmed that the deposit had not been lodged with an approved scheme and he was “bang to rights” on that point. He confirmed that he would arrange for the deposit to be lodged. The Tribunal explained that where a landlord was found to be in breach of the 2011 Regulations the Tribunal has no discretion and must make an order for payment of up to a maximum of three times the deposit against the landlord. The Tribunal explained that it could take into account any mitigating circumstances on the landlord’s part that may account for the breach in assessing an appropriate sum to award. The Respondent stated that there were no excuses from his side. He would not like the maximum amount to be awarded but stated that “it is what it is”. In response to questions from the Tribunal the Respondent confirmed that he did own other properties that he let out. He was fully aware of the legal duty on landlords to lodge tenancy deposits with an approved scheme. The Tribunal asked again if there were any mitigating circumstances that the Respondent wished to put forward in his defence. The Respondent confirmed that he had nothing else to say in mitigation.

- 7 The Case Management Discussion concluded and the Legal Member advised parties that the decision would be issued in writing in due course.

Relevant Law

- 8 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.”

- 9 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 First-tier Tribunal —

(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 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

- 10 The Applicant entered into a tenancy agreement with the Respondent which commenced on 24 August 2022 in respect of the Property.
- 11 The tenancy agreement is titled “Short Assured Tenancy Agreement” with references to the relevant provisions of the Housing (Scotland) Act 1988 throughout. The tenancy between the parties is however a private residential tenancy under section 1 of the Private Housing (Tenancies) (Scotland) Act 2016, having commenced after 1 December 2017.
- 12 Clause 3 of the said tenancy agreement states *“The Tenant shall, prior to the commencement of the tenancy, pay to the Landlord a deposit of 200 POUNDS (£*) and after payment to the Landlord the deposit shall be paid into an approved tenancy deposit scheme to account of any sum or sums due in respect of damage to the fittings and fixtures and the cost of any outstanding Accounts due by the Tenant at the expiry of the tenancy et cetera.”*
- 13 The Applicant paid the tenancy deposit of £200 to the Respondent prior to the commencement of the tenancy.
- 14 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.
- 15 The Respondent is aware of his obligations under the 2011 Regulations, and in particular the duty to lodge a tenant’s deposit with an approved tenancy deposit scheme.
- 16 The Respondent owns other properties which he lets out.

Reasons for Decision

- 17 The Tribunal determined the application having regard to the application paperwork, the written representations and the verbal submissions from

parties 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 primary 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 which, based on the submissions from the parties, did not require a hearing to be fixed.

- 18 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.
- 19 It was a matter of agreement between the parties that the tenancy had commenced on 24 August 2022, that the Applicant had paid a deposit of £200 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 Applicant 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 the Respondent at the Case Management Discussion.
- 20 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.
- 21 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.
- 22 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 £600. 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.”

- 23 In this case the deposit had remained unprotected for the entirety of the tenancy to date, a period of over two years. The tenancy agreement clearly provided for the tenancy deposit to be placed in an approved scheme and the Respondent had confirmed his understanding of his duties under the 2011 Regulations. However he had provided no explanation as to why he had not complied with his statutory obligations in this case. The Tribunal considered these to be aggravating factors to which significant weight could be applied.
- 24 The Tribunal also noted that, as well as failing to comply with the 2011 Regulations, the Respondent had issued an outdated tenancy agreement which referred to the previous statutory regime under the Housing (Scotland) Act 1988, as opposed to that which would apply to the Applicant’s tenancy under the Private Housing (Tenancies) (Scotland) Act 2016. This suggested a lack of attention on the Respondent’s part to his legal obligations as a landlord in Scotland. The Respondent had confirmed that he had multiple properties, which caused the Tribunal serious concern in terms of the management of his other tenancies. The Tribunal therefore considered this to be another aggravating factor that attracted significant weight.
- 25 The Respondent had put forward nothing in mitigation that the Tribunal could take into account, despite being questioned on this at the Case Management Discussion. Accordingly, taking into account 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, there being nothing in terms of mitigating factors that would offset the aggravating factors in this case. The Tribunal therefore determined that it had no option but to award the maximum sanction of three times the deposit.
- 26 The Tribunal therefore made an order for payment in the sum of £600. The Tribunal also made an order requiring the landlord to lodge the Applicant’s deposit in an approved tenancy deposit scheme and provide the Applicant with the information required under regulation 42 of the 2011 Regulations within fourteen days of the date of this decision.

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:

Date: 10 September 2024

R O'Hare