



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/24/1088

Re: Property at PF2, 5 Edina Place, Edinburgh, EH7 5RN (“the Property”)

Parties:

Mr Adam Williamson, Miss Betty McDermott, 204/10 Bonnington Road, Edinburgh, EH6 5BH; 204/10 Bonnington Road, Edinburgh, EH6 5BH (“the Applicant”)

Ms KATHARINE LACKIE, COILLIE MHOR LETTERS, LOCH BROOM, GARVE, ROSS-SHIRE (“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 Eight hundred pounds (£800) against the Respondent in favour of the Applicants

Background

- 1 By application to the Tribunal dated 5 March 2024 the Applicants sought a payment order against the Respondent in relation to her failure to lodge their tenancy deposit with an approved tenancy deposit scheme.
- 2 By Notice of Acceptance of Application, a Legal Member of the Tribunal with delegated powers from the Chamber President intimated that there were no grounds upon which to reject the application. A Case Management Discussion (“CMD”) was therefore assigned to take place by teleconference. The application paperwork was served upon the Respondent by Sheriff Officers, together with notification of the date and time of the CMD and instructions for joining the teleconference.

- 3 On 11 June 2024 the Respondent emailed the Tribunal with her response to the application. In summary the Respondent requested that the CMD take place in an alternative format on the basis that she would find it challenging to participate in a teleconference due to her hearing difficulties. The Respondent further advised that the tenancy deposit was not lodged with an approved scheme due to a clerical error. She listed various breaches of the tenancy agreement by the Applicants which justified the retention of the deposit. She explained that it would have made no difference had the deposit been lodged with a scheme as the Applicants had not left the property in a reasonable condition.

The Case Management Discussion

- 4 Both the Applicants and Respondent were present at the Case Management Discussion which took place on 12 September 2024 by videoconference.
- 5 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. For the avoidance of doubt the following is a summary of what was discussed at the Case Management Discussion in terms of the matters relevant to the Tribunal's determination of the application.
- 6 The Applicants advised that they had discovered upon leaving the property that the deposit had not been placed in a tenancy deposit scheme. It clearly stated in the tenancy agreement that the deposit would be lodged in a scheme, and specifically named SafeDeposits Scotland. The Respondent had then made deductions from the tenancy deposit at the end of the tenancy and the Applicants had been unable to challenge these. The Applicants therefore believed that they were entitled to a level of compensation. They believed an appropriate amount would be the minimum award, or up to twice the amount of the deposit.
- 7 The Respondent explained that the failure to lodge the deposit with a scheme had been a simple mistake. She had been letting the property for a long time, approximately seventeen years, and had always lodged deposits with a scheme since the 2011 Regulations came into force. It was simply a clerical error. The Respondent advised that it would not have made any difference as the property was left in a mess and the Applicants had breached the terms of the tenancy agreement. They had removed a perfectly good mattress. The internal bathroom was suffering from damp and condensation, with wallpaper coming off the wall. The extractor fan in the bathroom was broken and the Applicants had failed to notify her of that, and a valued picture had been removed from the room without any explanation. The Respondent had spent a significant period of time reinstating the property to a reasonable condition. The Applicants had not provided any explanation for the condition of the property at the end of the tenancy.

- 8 The Respondent advised that she had never before had any problem returning the deposit to her previous tenants. However the property was in the worst condition she had seen in seventeen years of letting. Unfortunately it was on this occasion that she made the mistake in not lodging the deposit. She had other things going on in her personal life at the time. She was surprised when she went back to check at the end of the tenancy. The Respondent advised that she previously used a letting agent but had recently stopped using them. They had previously handled the tenancy deposits.
- 9 The Applicants were given the opportunity to make further comment. They advised that they had not sought to respond to the Respondent's deductions as the deposit was not in a scheme. Ordinarily they would have had the opportunity to put their explanation forward to a third party. They didn't feel comfortable arguing with the Respondent over email. Because the deposit was not lodged with a scheme they had no option but to apply to the Tribunal. The Applicants confirmed that the extractor fan in the bathroom had stopped working shortly before they moved out. Up until then it had been working, albeit it didn't appear to do very much in terms of ventilation. The Applicants explained that they had sent numerous emails to the Respondent asking for an update regarding the deposit but didn't receive any reply. They confirmed that the bathroom suffered from mould, which got progressively worse during the tenancy. The Applicants pointed out that the Respondent had never visited the flat during the term of the tenancy. If she had they would have raised the issue with condensation in the bathroom. The Applicants conceded that they had removed the mattress and picture from the property.

Relevant Law

- 10 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."

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

- 11** The Applicants entered into a tenancy agreement with the Respondent in respect of the Property which commenced on 7 June 2022.
- 12** The tenancy between the parties was a private residential tenancy under section 1 of the Private Housing (Tenancies) (Scotland) Act 2016.
- 13** The tenancy between the parties terminated on 23rd January 2024.
- 14** The Applicants submitted their application to the Tribunal on 5 March 2024.

- 15 Clause 11 of the tenancy agreement states “*The Landlord must lodge any deposit they receive with a tenancy deposit scheme within 30 working days of the start date of the tenancy (when a deposit is paid in instalments then each instalment must be lodged within 30 working days of that instalment being paid. A tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid. At the start date of the tenancy or before, a deposit of £800 will be paid by the Tenant to the Landlord. The Landlord will issue a receipt for the deposit to the Tenant. No interest shall be paid by the Landlord to the Tenant for the deposit*”.
- 16 The tenancy agreement goes on to state that the scheme administrator is SafeDeposits Scotland.
- 17 The Applicants paid the tenancy deposit of £800 to the Respondent prior to the commencement of the tenancy.
- 18 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.
- 19 The Respondent has been letting the property for approximately seventeen years.
- 20 The failure to lodge the deposit was a result of a clerical error on the Respondent’s part.
- 21 The Respondent previously engaged a letting agent who would handle tenancy deposits. The Respondent no longer employs a letting agent to manage the property.
- 22 The Respondent retained the Applicants’ deposit in full.

Reasons for Decision

- 23 The Tribunal determined the application having regard to the application paperwork, the written representations from the parties and the verbal submissions 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 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. The Tribunal considered that there was no

requirement to fix a hearing as there were no issues to be resolved other than that particular point which was a matter for judicial discretion.

- 24 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.
- 25 It was a matter of agreement that the Applicants had paid a tenancy deposit of £800 to the Respondent and the Respondent had not paid the deposit into an approved tenancy deposit scheme in accordance with Regulation 3 of the 2011 Regulations and the terms of Clause 11 of the tenancy agreement between the parties. The Respondent had also failed to provide the prescribed information to the Applicants regarding the scheme in which their deposit had been placed. The Respondent was therefore in breach of Regulation 3, which was accepted in her written response to the application and her verbal submissions at the Case Management Discussion.
- 26 Regulation 9 provides that any tenant may apply to the Tribunal for an order within three months of the end date of the tenancy where the landlord has not complied with the duty under regulation 3. Based on its findings in fact the Tribunal was satisfied that the application had been made timeously.
- 27 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 going forward.
- 28 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 £2,400. 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.”

- 29 In this case the deposit had remained unprotected for the entirety of the tenancy. The Respondent had then retained the deposit in full to put towards the costs of reinstating the property to a reasonable condition. For the avoidance of doubt, it was not for the Tribunal in this case to make a determination as to whether the Respondent was entitled to retain the deposit. The purpose of the 2011 Regulations is to ensure landlords and tenants are on an equal footing and provide a mechanism for resolving any dispute between the parties at the end of a tenancy. The Respondent had become aware of the failure to lodge the deposit at the end of the tenancy and a decision had been made to retain the deposit due to put towards reinstatement costs. As a result of the deposit having not been lodged with a scheme the Applicants had been unable to challenge this decision and had therefore required to submit a separate application to the Tribunal seeking the return of the deposit. The Tribunal considered these all to be aggravating factors to which significant weight could be applied.
- 30 The Respondent had submitted that the deposit had not been lodged due to a clerical error. She made reference to issues in her personal life which had been a contributing factor. The Tribunal accepted that she had been letting the property for approximately seventeen years, and had previously engaged an agent to manage the tenancies on her behalf, including handling any tenancy deposits. The Tribunal found her submissions to be credible on this point, and could understand why the error in the failure to lodge the deposit had occurred. The Respondent was clearly remorseful and accepted she was in breach of the 2011 Regulations. The Tribunal therefore gave significant weight to this as a mitigating factor.
- 31 Accordingly balancing the aggravating and mitigating factors here, and 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 at the lesser end of the scale. The Applicants appeared to share this view, having stated that they were not seeking the maximum award against the Respondent. The Tribunal commended their approach in this regard. The Tribunal therefore determined to make an award in the sum of £800 which, in the Tribunal’s opinion represented a fair and proportionate sanction.

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.

R.O'Hare

23 September 2024

Legal Member/Chair

Date