



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/23/4695

Re: Flat 1-2, 822 Maryhill Road, Glasgow, G20 7TB ("the Property")

Parties:

Miss Yixue Li, 09 Xinnan St Baolin Town, Qiong Lai, Cheng Du City, Sichuan Province, 611 530, China ("the Applicant")

Asif Haque, Flat 1/1, 1 Beaumont Gate, Glasgow, G12 9EE ("the Respondent")

Tribunal Member: Jacqui Taylor (Legal 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 £3000 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 24th December 2023 and was in the following terms:

'Asif asked us to move out with three months notice by 30 June 2023 but our lease was supposed to end on September 30. After we moved out I realised that our £2000 deposit had not been lodged with a registered tenancy deposit scheme by Asif. Asif intends to default on the £2000 deposit. He still owes me £75 deposit.'

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 August 2022. The signature section of the agreement shows that the agreement was signed by the parties and also Shu Wu (additional Tenant).

3. Notice of Acceptance.

By Notice of Acceptance by Lesley Ward, Convener of the Tribunal, dated 4th January 2024, she intimated that she had decided to refer the application (which application paperwork comprised documents received between 25 December 2023 and 30 December 2023) to a Tribunal.

4. The First Direction dated 31st May 2024.

4.1 The Tribunal issued a Direction to the parties dated 31st May 2024, in the following terms:

‘The Applicant is required to provide the Tribunal with:-

One. Confirmation of the date the Applicant vacated the Property.

Two. Confirmation of the date the keys were returned to the Respondent.

Three. Confirmation of the period the rent was paid over throughout the tenancy.

Four. Evidence of the rent and deposit paid to the Respondent such as bank statements or receipts by the Respondent.

Five. Evidence of transactions relating to return of the deposit at the end of the tenancy.

Six. Confirmation from the three tenancy deposit schemes that the deposit had not been lodged with them.

The three tenancy deposit schemes are:

- Letting Service Protection Scotland
- Safe Deposits Scotland and
- My Deposits Scotland.’

4.2 Direction Response.

The Applicant sent the Tribunal an email dated 26th June 2024 in the following terms:

One. Confirmation of the date the Applicant vacated the Property: 30th June 2023.

Two. Confirmation of the date the keys were returned to the Respondent: 30th June 2023.

Three. Confirmation of the period the rent was paid over throughout the tenancy and

Four. Evidence of the rent and deposit paid to the Respondent such as bank statements or receipts by the Respondent: 1st October 2022 to 30th September 2023:

‘According to our contract our rent is £24,000 a year. I transferred £24,000 to the bank account provided to me by the intermediary Florence (also a friend of Asif) on 26th September 2022. The bank transaction confirmation for the transfer of the rent is provided. The deposit was transferred to the intermediary Florence by her room mate Shu Wu, but she couldn’t find the receipt as it was so long ago.’

Five. Evidence of transactions relating to return of the deposit at the end of the tenancy.

‘The total amount of the deposit was £2000, excluding the unreturned £75, the remaining £1925 has been returned to us. £1125 was returned by cash which was given to us by Asif’s friend. Also, our intermediary Florence, so I cannot provide

evidence of transactions for this. The remaining £800 was in the form of a bank transfer by Asif'

A copy of the bank transfer transaction was provided. A copy of the text messages from 'Asif' were also provided.

The messages read: *'Hi, do you remember you still owe us money? 'In 3 weeks' Don't call me just message. Still 75 pounds left right.'*

Six. Confirmation from the three tenancy deposit schemes that the deposit had not been lodged with them.

'We have not received a confirmation email from the three tenancy deposit schemes since we moved into the property, and both Asif and Florence returned most of the deposit to us by cash and bank transfer. So I do not think the deposit had been lodged with the three tenancy deposit schemes.'

5. The Second Direction dated 21st July 2024.

5.1 The Tribunal issued a Direction to the parties dated 21st July 2024, in the following terms:

'The Applicant is required to provide the Tribunal with:-

Confirmation from the three tenancy deposit schemes that the deposit had not been lodged with them. The three tenancy deposit schemes are:

- Letting Service Protection Scotland
- Safe Deposits Scotland and
- My Deposits Scotland.'

5.2 Direction Response.

The Applicant sent the Tribunal the following:

5.2.1 'Email from Safe Deposits Scotland dated 23rd July 2024 advising that they had been unable to locate a deposit on their system. However, they did find a deposit account with the dates 'Tenancy start date 1st October 2022 Tenancy End Date 30th September 2023. The account was closed as no payment had been received.'

5.2.2 Live chat transcript from My Deposit Scotland advising that they did not hold a deposit.

5.2.3 Email from The Letting Protection Service Scotland confirming that *'they were not currently protecting and have never protected a deposit for the applicant at that address.'*

6. Determination of the Application on the basis of written representations.

The Applicant sent an email to the Tribunal asking for the application to be determined on the basis of the written representations submitted. The Tribunal administration sent the Respondent a letter dated 30th July 2024 asking that he provide the Tribunal with representations regarding whether the hearing should be an oral hearing or if the Tribunal should determine the applications on the basis of written representations. The Respondent did not reply to the letter.

In terms of Procedure Rule 18 the Tribunal decided to determine the proceedings without a hearing as they were satisfied that it was able to make sufficient findings to determine the case and it would not be contrary to the interests of the parties.

7. Findings in Fact

The Tribunal made the following findings in fact:

7.1 The lease agreement between the parties was a private residential tenancy agreement.

7.2 The Applicant had been Tenant of the Property. The tenancy had started on 1st October 2022.

7.3 Clause One of the lease is headed 'Tenant'. The Applicant's name has not been inserted at this section of the lease but the Applicant's name and signature are detailed as the tenant at clause 39 of the lease together with the name and signature of Shu Wu, the joint tenant.

7.4 Clause One of the lease states that the tenant is jointly and severally liable for all obligations of the tenant under the lease.

7.5 The Respondent is heritable proprietor of the Property in terms of Land Certificate title number GLA18228.

7.6 The Respondent had been the Landlord of the Property in terms of the lease between the parties.

7.7 The tenancy ended on 30th September 2023 as the rent had been paid to that date, even though the keys had been returned earlier.

7.8 The rent due in terms of the lease was £2000 per month and £24,000 had been paid on 1st October 2022.

7.9 Clause 11 of the lease states that a deposit of £2000 will be paid by the tenant to the Landlord.

7.10 The Applicant and her co tenant Shu Wu had paid the sum of £2000 to the Respondent in payment of the deposit.

7.11 The deposit, less the sum of £75, had been repaid to the Applicant.

7.12 The deposit had not been lodged with any of the three tenancy deposit schemes Letting Service Protection Scotland, Safe Deposits Scotland or My Deposits Scotland.

8. Decision.

8.1 The tenancy was a relevant tenancy for the purposes of the 2011 Regulations.

8.2 The tenancy ended on 30th September 2023 and the Applicant sent the application to the Tribunal on 24th December 2023. The application had been made timeously.

8.3 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;

8.5 In assessing the level of sanction the Tribunal considered the following cases:-

8.5.1 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.

8.5.2 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.

8.5.3 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.

8.5.4 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.

8.5.5 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.

8.5.6 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.

8.6 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.

8.7 The Tribunal found that the deposit had been unprotected for the duration of the tenancy to be a moderate risk aggravating factor.

8.8 The Tribunal found that the fact that the tenant had been deprived of her right to invoke the dispute resolution service to be a moderate risk aggravating factor.

8.9 The Respondent had not provided any written representations or details of any mitigating circumstances. However, the Tribunal considered it to be a mitigating fact that 96.25% of the deposit had been repaid to the Applicant and her co tenant.

8.10 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 £3000.

8.11 The Tribunal orders the Respondent to pay the Applicant the sum of £3000 by way of sanction under Regulation 10 1(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

The Tribunal acknowledge that Shu Wu may be due a share of the sum of £3000 but find that would be a private matter between the Applicant and Shu Wu.

9. 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.

J.Taylor

..... Legal Member

4th November 2024