



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/24/0286**

**Re: Property at 7/1 HIGH STREET, HAWICK, TD9 9BZ (“the Property”)**

**Parties:**

**MISS DAWN BERRY, 7/1 HIGH STREET, HAWICK, TD9 9BZ (“the Applicant”)**

**MR GARY CAIRNS, BELL HOUSE, HASSENDEANBURN, HAWICK, TD9 8RU (“the Respondent”)**

**Tribunal Members:**

**Yvonne McKenna (Legal Member) and Elizabeth Dickson (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an Order for Payment is made in the sum of £675 (SIX HUNDRED AND SEVENY FIVE POUNDS ONLY).**

**Background**

1. The Applicant made an application in Form G ("Application") lodged on 18 February 2024 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("Rules") stating that the Respondent had failed to timeously lodge a tenancy deposit for the Property into an appropriate scheme in breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations").
2. The documents produced to the Tribunal by the Applicant were;
  - a series of messages exchanged between the parties by text and social media and e-mail;
  - a deposit certificate for the Property with My Deposit (Scotland);
  - a Scottish Fire Service Incident Information Sheet dated 27 December 2023.

3. A copy of the Application and notification of a Case Management Discussion (“CMD”) fixed for 28 May 2024 was served on the Respondent by Sheriff Officer on 18 April 2024.
4. The Respondent provided written submissions to the Tribunal on 21 April 2024 together with;
  - messages from contractors and tenants (item A)
  - sellers survey receipt (item B)
  - written notice to vacate and proof the tenant received this (item C)
  - First Tier Tribunal Application to evict (item D)
  - previous eviction case won against the applicant (item E)
  - gas safety certificate (item F)
  - chat transcript and images of damage caused as seen from the floor below (item G)
  - written notices for access to repair (item H)
  - message from Bank concerning balcony damage (item J)
  - message from Bank concerning water damage (item K)
  - message from tenant to plumber (item L)
  - messages between plumber and landlord (item M)
5. Further revised written submissions were received from the Respondent dated 2 May 2024.

### **The Case Management Discussion (CMD)**

6. A CMD took place by teleconference on 28 May 2024.
7. The Applicant attended. The Respondent attended and was represented by Dr A Carrington, his Representative.
8. The Tribunal set out the procedure and explained the purpose of the CMD. The Applicant said that she was unsure if she had received the Respondent’s revised submissions and requested a further copy to be sent out to her.
9. The Tribunal indicated that the only remedy which the Tribunal would be able to deal with in terms of this application was her request for a penalty payment in respect of the Respondent landlord’s alleged failure to comply with the Tenancy Deposit Schemes (Scotland) Regulations 2011. The Applicant had sought other remedies in her application including for the Respondent to be given a formal warning by the Tribunal, and for a requirement for him to be educated in landlord responsibilities. The Applicant accepted this position.

#### *The Applicant’s Position at the CMD*

10. The Applicant said that she was seeking three times the deposit by way of a payment for the deposit being unprotected.

11. According to the Applicant she said that she had been in contact with My Deposit Scotland in August 2023 and had been advised by them verbally, that due to the fact that the Respondent had provided them with an incorrect postcode for the Property, that her deposit was still unprotected. She had no further contact with the organisation since that time.
12. Her position was therefore, that her deposit had been unprotected for the period from when the tenancy commenced, until the current time, and that moving forward, it remained unprotected.
13. She remains resident in the Property.
14. The Applicant stated that it was untrue that she was friends with the landlord, and that this somehow mitigated his requirement to protect her deposit. She said that the Property had been advertised for rental on Facebook marketplace, and a friend had provided her with the link. She met the Respondent to view the Property. She referred to documentation which she had lodged with her application in which she was asking the Respondent for a professional relationship.

*The Respondent's Position at the CMD*

15. Dr Carrington said that the Respondent refutes the claim for payment. The Respondent's position is that when he was reminded that he required to pay the deposit into a protected scheme that he did so.
16. She has written verification from My Deposit Scotland confirming that the deposit for the Property is protected, and has been paid into the scheme. She said that she will be able to produce that.
17. The Respondent's position is that there was an error on his part, in that he forgot to pay the deposit into a protected scheme. He maintains in his submissions;

*"The legal provision, as explained on the Scottish Government public sector information website (item C, evidence file), clarifies that a tenant would be entitled to make a claim if I had not lodged the deposit when reminded, which is not the case. As soon as the Applicant reminded me, the payment was submitted and a certificate obtained."*

18. It was suggested that an application could only be made to the Tribunal after a reminder to pay the deposit into an approved scheme was ignored.
19. The Respondent made an error when the deposit was sent in to My Deposit Scotland. He provided an incorrect postcode. He inserted the second part of his home postcode as opposed to the postcode for the Property. It is only the second part of the postcode that is incorrect. This issue has been resolved and verification can be produced. This is simply down to human error and is a mistake easily made.

20. Dr Carrington said that it was not as if the Respondent would be running off with the deposit. She suggested that the parties met in social circumstances, and that this should therefore restrict the obligation for the deposit to be protected from the outset. She stated that she had provided in item A of her documentation, an e-mail from a person who had witnessed the tenancy agreement and the parties' initial social encounter. She can produce evidence that the deposit, which was paid in cash, and not via a bank transfer, was held in a bank account until paid over to the deposit scheme. She said that the Respondent has a good name and has experience of being a landlord over a 20 year period. She also stated that the Applicant had not paid any rent for the Property since November 2023.

#### *Further Procedure*

21. Parties are in dispute regarding a number of matters and in the circumstances a Hearing is required to resolve the application.

22. Separate Directions have been issued by the Tribunal in relation to documents required to be produced for the Hearing, and requirements for details of witnesses.

23. Parties are able to agree the following;

- A PRT was entered into between the parties for the Property with a start date of 1 March 2022.
- The deposit payable in terms of the PRT amounted to £450.
- The Applicant paid the deposit at the commencement of the tenancy.
- The deposit was paid into My Deposits (Scotland) on 1 August 2023.
- The Applicant remains resident in the Property.

24. The Applicant and the Respondent are likely to be the only witnesses giving evidence at the Hearing, although parties were advised that in terms of the Direction they would be able to intimate any witnesses to the Tribunal during the following 14 day period.

#### **Outcome**

25. The case was adjourned (proceeding to a Hearing on a date to be afterwards fixed).

#### **The Hearing**

26. The Hearing took place by teleconference on 13 November 2024. The Applicant was present. The Respondent was not present and was represented by his new representative, Ms Lee-Anne McGeorge, of Lowrie Property, who had taken over the management of the Property, and had taken over representation of the Respondent in respect of this application.

27. Since the date of the CMD, further documentation had been received by the Tribunal, namely;

- The tenancy agreement
- Evidence of the Respondent's solvency during the period the deposit was unprotected
- My Deposits (Scotland) certificate
- Information regarding a criminal case against the Respondent, in which he had been found not guilty in the Justice of the Peace court.

28. The Tribunal explained the procedure which would be adopted. The Respondent's representative was told that the information regarding the criminal proceedings had been requested in connection with an action of eviction raised by the Respondent against the Applicant. She should submit that to the Tribunal again in connection with the eviction case.

29. Ms Berry said that she wanted to provide some screenshots which she had taken which clarified how the tenancy had commenced. She said that she had found out about the Property on 'facebook' marketplace. She had not known the Respondent before that. She said that she had sent these messages to the Tribunal shortly after the CMD. They had not been received. They were uploaded and provided to the Tribunal and parties. There was no objection taken to the late lodging of these. The date of the messages was 26 and 27 January 2022.

30. Ms Berry said that the deposit was not paid into an approved safety deposit scheme in the time that it was supposed to have been.

31. She said that she had first realised this when issues arose during the tenancy, and her relationship with the landlord had broken down. She said that the Respondent had asked her if she could buy the Property, and there were discussions regarding a possible purchase price. She had been given a figure which was £40,000 over the valuation price. She had ended up asking the Respondent about where the safety deposit was being held, and in which scheme, so that she could look at other options in the event that the tenancy was no longer viable.

32. Ms Berry was able to confirm that she had asked the Respondent about which scheme the deposit was held, on 18 August 2023. She accepted that it was that very day that the Respondent had paid the deposit into 'My Deposit Scotland'. She was able to upload a copy of that message confirming the date at Ms McGeorge's request.

33. She commented on how difficult things had been for her in relation to the security of her tenancy, and the payment of the deposit into an approved scheme was something which should have been done.

34. Ms McGeorge accepted that it was, "as clear as day", that the deposit had not been paid into the approved scheme until 18 August 2023. She accepted that the deposit had been unprotected from the commencement of the tenancy until 18 August 2023.

35. In respect of the reason why that had happened, Ms McGeorge said that the Respondent's position was that this had 'slipped his mind'. She said that the Respondent had been a landlord for over 20 years and currently had 10 properties in total. He had a few properties to maintain, and he also ran a forestry business. It had not been until the Applicant had mentioned it, that the deposit was paid into the approved scheme. There had been no malice. He had attended to it straight away. He had provided evidence of his liquidity during the period the deposit was unprotected.
36. Ms McGeorge said that the Respondent had found this matter equally difficult, in a Tribunal setting.
37. Neither party addressed the Tribunal in relation to the level of sanction which should be imposed by the Tribunal.

### **Relevant Law**

38. The relevant law is contained within the Housing (Scotland) Act 2006 and the Tenancy Deposit Scheme (Scotland) Regulations 2011.
39. *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**

40. The Applicant entered into a tenancy agreement with the Respondent which commenced on 1 March 2022.
41. In terms of the said tenancy agreement the Applicant undertook to pay a tenancy deposit in the sum of £450. The Respondent undertook to lodge said deposit with a government approved safety deposit scheme in accordance with the 2011 Regulations.
42. The Applicant paid the tenancy deposit of £450 to the Respondents at the commencement of the tenancy.
43. The Respondent did not pay the deposit into an approved deposit scheme within the statutory timescale.
44. On 18 August 2023 the Applicant contacted the Respondent via ‘facebook’ messenger querying the status of the tenancy deposit.
45. On 18 August 2023 the Respondent paid the deposit into ‘My Deposit (Scotland) which is a government approved scheme.
46. The deposit was unprotected in an approved scheme from 1 March 2022 until 18 August 2023. The Respondent forgot to pay the deposit into an approved scheme during that period of time.
47. The Respondent rents out 10 other properties. He has been a registered landlord for over 20 years.
48. The Respondent was in funds in his own personal account of at least the amount of the deposit throughout the period of time that the deposit was unprotected.
49. The Applicant remains resident in the Property.

## Reasons for Decision

50. The Tribunal determined the application having regard to the application paperwork, the written representations and the verbal submissions from parties at the Hearing. At the CMD the Respondent had raised the fact that it was detailed on a Scottish government public sector website that an obligation to pay the deposit into a tenancy only arose when a tenant brought this to a landlord's attention. That position is incorrect in law, and does not comply with the 2011 Regulations as specified above. The Respondent's representative did not argue the point at the Hearing but the Tribunal have considered the position and reject the proposition for the reasons specified.
51. It appeared 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 breach of the 2011 Regulations.
52. 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.
53. It was a matter of agreement between the parties that the tenancy had commenced on 1 March 2022, that the Applicant had paid a deposit of £450 at the commencement of the tenancy, and that the Respondent had not ensured that the deposit was paid into an approved tenancy deposit scheme until 18 August 2023.
54. The Respondent was therefore in breach of Regulation 3, which was conceded in the verbal submissions by Ms McGeorge at the Hearing.
55. 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.
56. 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 3 times £450 i.e. £1350. 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.”*

57. The Tribunal accepted that the deposit had not been protected for a period of 1 year and 5 months, and agreed with the Applicant that the landlord's duty to secure tenancy deposits was a fundamental obligation. The Tribunal also noted that the Respondent only paid the deposit into an approved scheme after receiving the Applicant's enquiry. The Respondent is, by his own admission, an experienced landlord managing a portfolio of properties, for in excess of 20 years. These were aggravating factors which the Tribunal took into account.
58. However, the Tribunal did not believe there was any intention on the Respondent's part to evade his responsibilities under the 2011 Regulations. He had proved that he was in a position to pay the deposit back from his own funds during the period the deposit was unprotected. He had paid the money into an approved scheme as soon as it was brought to his attention, indeed on the very same day.
59. The Respondent himself had elected not to give evidence and therefore the Applicant and the Tribunal were not able to ask him any questions about his error and the circumstances in respect of why this had arisen. However, his representative had conceded that there had been an error.
60. It is clear from the safety deposit certificate provided to the Tribunal, that the deposit remains protected, and the Applicant has not been prevented from making use of the deposit scheme adjudication process in the event of a dispute occurring. The Applicant has not therefore suffered any pecuniary detriment as a result of the breach.
61. The Tribunal found these all to be mitigating factors to which significant weight could be applied, and the Tribunal therefore concluded that this was not a case in which a significant sanction was required as the level of culpability was lower.
62. 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 concluded that this was not a case where an award at the maximum end of the scale was merited. Accordingly the Tribunal made an order in the sum of £675 which is one and a half times the deposit.

## **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.

# Y McKenna

Yvonne McKenna

13 November 2024

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Legal Member/Chair

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Date