



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) in respect of an application under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) and Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).

Chamber Ref: FTS/HPC/PR/23/1485

Re: Property at 5 Copland Place, Flat 2/1, Glasgow, G51 2RS (“the Property”)

Parties:

Mr Russell Barrie, 7 Armadale Road, Whitburn, Bathgate, EH47 0ET (“the Applicant”) per his agents, Govan Law Centre, Orkney Street Enterprise, 18-20 Orkney Street, Glasgow, G52 2BX (“the Applicant’s Agents”)

Mr Sanjay Sharma, 17 Ninian Crescent, Kirkintilloch, G66 3JR (“the Respondent”) per his agents, OSK Solicitors, 343, Victoria Road, Glasgow G42 7SA (“the Respondent’s Agents”)

Tribunal Members:

Karen Moore (Legal Member) and Mike Scott (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”), determined that the Respondent did not comply with Regulation 3 of the Regulations and granted an Order in the sum of FOUR THOUSAND TWO HUNDRED POUNDS (£4,200.00).

Background

1. By application received on 9 May 2023 (“the Application”), the Applicant’s Agents on behalf of the Applicant applied to the Tribunal for an Order in terms of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”).

2. The Application comprised a copy of a tenancy agreement between the Parties 27 May 2022 with a codicil that a tenancy deposit of £1,400.00 had been paid by the Applicant to the Respondent and copy correspondence from all three approved schemes confirming that the tenancy deposit had not been lodged in accordance with the Regulations. The Application was accepted by the Tribunal and a Case Management Discussion (the "CMD") was fixed for 7 July 2023 at 14.00 by telephone conference and intimated to the Parties.
3. Prior to the CMD, both Parties submitted written representations.
4. By email dated 4 July 2023, the Respondent submitted representations that a deposit was not paid but a sum of £1,400.00 was paid as a reserve in the event of non-payment of rent. The Respondent submitted a tenancy agreement in a different format to that submitted with the Application and with the codicil referring to a "reserve" payment of £1,400.00.
5. By email dated 5 July 2023, the Applicant's Agents submitted case law in respect of factors which the Tribunal should take into account in determining the amount of the Order and copy correspondence with the Parties in which the Respondent refers to the "deposit". The Applicant's Agents submitted that the tenancy agreement submitted by the Respondent on 4 July 2023 was counterfeit.

CMD

6. The CMD took place on 7 July 2023 at 14.00 by telephone conference. The Applicant was present and was represented by Ms. Slowey of the Applicant's Agents. The Respondent took part and was not represented.
7. Ms. Slowey confirmed that an Order was sought and that the maximum sum of £4,200.00 was requested.
8. The Respondent stated that he opposed the Application as the sum retained by him was not a "deposit" but was a sum held in reserve. The Tribunal explained that the statutory definition of a "*tenancy deposit*" is set out in Section 120(1) of the Housing (Scotland) Act 2006 which states: "*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.*" The Tribunal asked the Respondent if the sum was advance rent or a security for rent. The Respondent agreed that it was security for rent. The Tribunal advised the Respondent that in that case, the sum held is a "*tenancy deposit*" in terms of the legislation.

9. The Tribunal asked the Respondent if he had paid the deposit into a statutory approved scheme or if he had provided the Applicant with information on the deposit, in terms of Regulations 3 and 42 of the Regulations. He confirmed that he had not done so and stated that he had misunderstood the Regulations.
10. The Tribunal advised that, as the Respondent accepted that he had not complied with the Regulations, it was bound to make an Order in terms of Regulation 10.
11. As the Respondent opposed the sum sought by the Applicant, the CMD was adjourned to a Hearing on the amount of the Order to be granted.

Hearings

12. A Hearing was fixed for 2 October 2023.
13. Prior to the Hearing, by email dated 21 September 2023, the Applicant's Agents submitted further written submissions expanding on their earlier submissions with reference to further cases in respect of determining the amount of the Order.
14. Also, prior to the Hearing the Respondent submitted a statement by email dated 29 September 2023 in which he explained that there were two leases as one had been sent by email and one was an "*original*". He stated that "*it was the original one that was signed by all parties and not the first lease which was not signed*" and explained that this lease was witnessed and "*agreed on*". He explained that there was a "*mix up with the concept of the held payment for one month to cover any shortfall in rents etc.*" which "*was not classed as a deposit in my view*". He considered that he had been tricked by the Applicant "*to extract money*". The Respondent's statement set out that he "*gave him back money as a gesture of leaving when he did and I believe the level of fine should only be a maximum of one times the deposit due to the fact I had given him a good will gesture payment*" and had "*never messed him about or had wrong intentions to keep any of his money*". The Respondent urged that "*a maximum one x the deposit*" be awarded.
15. The Hearing fixed for 2 October 2023 and postponed at the request of the Respondent on mental health medical grounds evidenced by a medical certificate. A further Hearing was fixed for 19 January 2024 and, again, postponed at the request of the Respondent on the same medical grounds, although not evidenced by a medical certificate.
16. A third Hearing was fixed for 8 May 2024.

17. Prior to the third Hearing, the Respondent by email dated 10 April, the Respondent submitted an email with copy correspondence between him and Glasgow City Council relating to council tax for the Property.
18. By email dated 7 May 2024, the Respondent requested a further postponement on different medical grounds and, although not evidenced by a medical certificate, the request was evidenced by proof of illness. In the email, the Respondent stated that his previous medical condition remained an issue for him.
19. The third Hearing took place on 8 May 2024 at 10.00 by telephone. The Applicant was present and was represented by Ms. Brookes of the Applicant's Agents. The Respondent did not take part and was not represented.
20. On behalf of the Applicant, Ms. Brookes strongly opposed a further postponement, citing the effect of the continuing delays on the Applicant. The Tribunal had regard to the Overriding Objective as set out in Rule 2 of the Rules and took the view that, on balance and in the interests of justice, the Hearing should be postponed for one final occasion.
21. The Tribunal issued the following Direction to the Respondent:
"The Respondent is required to provide:
1. A Statement setting out his reasons for opposing the Applicant's claim that an Order for the maximum penalty should be granted;
2. The Statement should be supported by evidence showing: i) in which bank or building society the tenancy deposit was lodged, the date of lodging and the date of uplift; ii) repayment or refund of all sums made by the Respondent to the Applicant and iii) the Respondent's current financial position in respect of his ability to make payment of any Order granted;
3. In the event that the Respondent's health might continue to cause him concern, the Respondent is directed to appoint a representative to act on his behalf at any future proceedings and to advise the Tribunal and the Applicant's Agents of the identity of the representative.
The said documentation should be lodged with the Chamber and copied to the Applicant's Agents no later than close of business on 8 June 2024"
22. The Respondent did not comply with the Direction.
23. A fourth Hearing was fixed for 31 October 2024.
24. Prior to the fourth Hearing, the Applicant's Agents submitted productions being confirmation from Glasgow City Council that the Respondent has five current rental properties.

25. Also, prior to the fourth Hearing, the Respondent submitted an email stating that he had disposed of two of the rental properties and had appointed solicitors to represent him. He also submitted correspondence received by him in respect of council tax liability.
26. The fourth Hearing took place on 31 October 2024 at 10.00 by telephone. The Applicant was present and was represented by Ms. Brookes of the Applicant's Agents. The Respondent was not present and was represented by Mr. Khan of the Respondent's Agents.

Evidence heard at the Hearing.

27. Mr. Khan advised the Tribunal that, although he had been instructed on 30 October 2024, he had had an opportunity to review the case papers and had taken instructions from the Respondent. Mr. Khan stated that the Respondent's position remains that he genuinely misinterpreted the Regulations and was mistaken in failing to lodge the deposit paid by the Applicant. Mr. Khan asked the Tribunal to take into account the facts that the deposit was quickly repaid to the Applicant and that the Applicant was given an ex gratia payment of around £700.00.
28. For the Applicant, Ms. Brookes confirmed that the Applicant sought the maximum civil penalty of three times the amount of the deposit paid.
29. Ms. Brookes submitted that, as set out in the Application and in the written submissions lodged on behalf of the Applicant that, the Respondent, as a commercial landlord was well aware of the Regulations and deliberately flouted them. She referred to the email correspondence between the Parties dated 9 and 11 December 2022 and lodged on behalf of the Applicant on 21 September 2023 in which the Applicant requested details of the deposit scheme and the Respondent replied : *"This is something I need to still set up I actually forgot I will get done."* Ms. Brookes submitted that the Respondent's conduct throughout has been a deliberate attempt to mislead the Tribunal. She referred to the second tenancy agreement lodged by the Respondent and his lack of candour in communications with the Tribunal as evidence that the Respondent the credibility and reliability is undermined. She submitted that the Respondent's non-compliance with the Regulations were a "flagrant disregard" on his part.
30. With regard to the ex gratia payment of £700.00 to the Applicant, Ms. Brookes advised that there had been no proof that this had been made and that the denied receiving it. Mr. Barrie, the Applicant, confirmed that he had received

two payments from the Respondent: £1,400.00 in refund of rent for the last month of his tenancy agreement and £1,400.00 in refund of the tenancy deposit.

31. Mr. Khan had nothing further to add and, during a brief adjournment of the Hearing, confirmed with the Respondent by telephone that there had not been a separate ex gratia payment. Mr. Khan stated that the Respondent had given the Applicant a full month's refund and so the Applicant had had occupancy for part of the last month, the Respondent considered this to be an ex gratia payment of £700.00.

Documents before the Tribunal.

30. The Tribunal had the benefit of the documents lodged by the Parties.

31. With regard to the copy correspondence between the Parties and lodged on behalf of the Applicant on 21 September 2023, the Tribunal noted that the Respondent's email signature and address show him to be a Branch Director of "ewemove", a letting agency, which purports to be "multi award winning".

Findings in Fact

32. From all of the information before it, the Tribunal made the following findings in fact: -

- i) There had been a tenancy of the Property between the Parties at a monthly rent of £1,400.00 which began on 27 May 2022;
- ii) A tenancy deposit of £1,400.00 was paid by the Applicant on 27 May 2022 to the Respondent;
- iii) The tenancy deposit was not lodged with an approved scheme within the statutory period and no information on the deposit was provided to the Applicant by the Respondent in that time;
- iv) The Respondent was in breach of Regulations 3 and 42 of the Regulations;
- v) The tenancy ended on or around 13 February 2023;
- vi) The Respondent refunded the final month's rent of £1,400.00 to the Applicant by bank transfer on 13 February 2023;
- vii) The Respondent refunded the tenancy deposit of £1,400.00 to the Applicant by bank transfer on 13 February 2023;
- viii) The Respondent made no further payments to the Applicant;
- ix) The Respondent deliberately held out to that he had made an ex gratia payment to the Applicant;
- x) The Respondent did not make an ex gratia payment to the Applicant;
- xi) The Respondent is a professional landlord;

- xii) The Respondent is, or had been in 2022, employed as a branch director of a letting agency;
- xiii) The Respondent was aware of the Regulations at on 27 May 2022 when the tenancy began and
- xiv) The Respondent was not mistaken in failing to adhere to the Regulations.

Decision

33. Having made those findings and being satisfied that the Respondent did not comply with any duty in Regulations 3 and 42 of the Regulations, the Tribunal had regard to Regulation 10(a) of the Regulations which states that the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.
34. The Tribunal had regard to the submissions put forward by the agents for the Parties. The Tribunal accepted that Mr. Khan's position, on behalf of the Respondent, is that the Respondent was genuinely mistaken and had not acted in bad faith. However, the Tribunal's view is that, as set out by Ms .Brookes at the Hearing and in the written submissions lodged on behalf of the Applicant, the Respondent's actions lacked transparency and that he has not been wholly truthful with the Tribunal. The Tribunal's view is that the Respondent has set out to mislead the Tribunal and that he deliberately ignored the Direction of 8 May 2024.
35. The Tribunal had regard to the case law submitted by the Applicant's Agents, and, in particular, had regard to Stuart *Russell, Laura Clark v Samdup Tenzin [2013] WL 7090698* in which the court clarified the entitlement of the now tribunal "to impose a penalty including the maximum to promote compliance with the regulations" and stated that "the Regulations have as their main purpose the safeguarding of the tenant's deposit."
36. As stated *in Marcus Jenson v Gieseppe Fappiano (2015) WL 376066*, the Tribunal has an 'unfettered discretion' in determining the sum amount awarded and "ignorance of the regulations is, however, no excuse. Non-compliant landlords can expect no mercy from the courts if they conduct their business in flagrant disregard to statutory controls.'
37. In this case, it is inconceivable that the Respondent as a commercial landlord with managerial role in a letting agency is either "ignorant" of the Regulations or "mistaken" as to the definition of a tenancy deposit. The Tribunal had no hesitation in reaching the decision that the Respondent's actions are at the highest end of the penalty scale and so imposed the highest penalty.
32. Accordingly, the Tribunal made an Order for Payment in the sum of £4,200.00.

38. This Decision is unanimous.

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.

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| Karen Moore | <u>31 October</u> |
| <hr/> | <u>Date</u> |
| Legal Member/Chair | |