



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/24/2708

Re: Property at 42 Edison Court, Motherwell, ML12FY (“the Property”)

Parties:

Mr Stephen Gordon, 14 Senate Place, Motherwell, ML13GE (“the Applicant”)

Mr Alan Cozens, 14 Waterside Street, Kilmarnock, KA1 1RJ (“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 against the Respondent in the sum of Three thousand seven hundred pounds (£3700) Sterling

Background

1 On 10 June 2024 the Applicant applied to the Tribunal seeking an order for payment as a result of the Respondent’s failure to lodge their deposit in an approved tenancy deposit scheme under Rule 103 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 (“the Rules”) and Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”). In support of the application the Applicant submitted the following documentation:-

- (i) Copy tenancy agreement between the parties dated 22 January 2023;
- (ii) Excerpt Whatsapp messages between the Applicant and the Respondent; and
- (iii) Written confirmation from the three approved tenancy deposit schemes confirming that the deposit was not lodged in any of the scheme;

- (iv) Bank statement confirming payment of the deposit to the Respondent;
and
- (v) Photographs of the property.

2 By Notice of Acceptance of Application a Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. The application was therefore referred to a Case Management Discussion (“CMD”) to take place by teleconference on 15th November 2024 at 2pm. Both parties were written to with the date of the CMD in accordance with Rule 17(2) of the Rules and invited to make written representations in advance of the CMD.

3 On 10th October 2024 sheriff officers served the letter with notification of the CMD date and application paperwork upon the Respondent.

4 No written representations were received from the parties in advance of the CMD.

The CMD

5 The CMD was held on 15th November 2024 at 2pm by teleconference. The Applicant was present. The Respondent was not in attendance. The Tribunal had confirmation that the Respondent had been given notification of the CMD together with a copy of the application paperwork and therefore determined to proceed in his absence.

6 The Tribunal explained the purpose of the CMD to the Applicant and the legal test to be applied under the 2011 Regulations. The Tribunal asked the Applicant for his submissions on the application.

7 The Applicant explained that he had rented a property from the Respondent over a twelve month period. He had paid the deposit of £1850 approximately one month before the tenancy commenced. The Applicant referred to the bank statements he had submitted with the application as evidence of the payment. The Applicant had moved out of the property in May 2024. It was always going to be a short term arrangement. Towards the end of the tenancy the Applicant and the Respondent had a disagreement regarding the return of the deposit. The Applicant had requested that any discussion take place via the tenancy deposit scheme. It then transpired that the deposit had not been lodged with any of the schemes. The deposit was not protected.

8 The Applicant explained that he had subsequently lodged applications with the Tribunal under Rule 103 in respect of the breach of the 2011 Regulations by the Respondent, and under Rule 111 seeking the return of the deposit. The Applicant was then notified at the end of June 2024 that the Respondent had lodged the deposit with SafeDeposits Scotland and he had withdrawn the

application under Rule 111. He was currently going through the scheme's dispute resolution process for the return of the deposit.

- 9 The Applicant explained that the deposit had been unprotected for the entire term of the tenancy. He referred to text messages he had submitted in which the Respondent assured him that his deposit would be safe, and not to worry. That did not turn out to be the case. The Applicant believed it had been an intentional act on the part of the Respondent not to protect the deposit. The Applicant also stated that the Respondent was not registered on the landlord register.
- 10 The Tribunal asked about the dispute resolution process, in terms of what stage that had reached. The Applicant confirmed that he had applied for the full deposit back of £1850. The Respondent had rejected that. The Applicant had subsequently agreed to a small deduction. The Respondent had not submitted any evidence, therefore the Applicant did not know if he had engaged with the process. He saw this as a lack of understanding on the Respondent's part about how the scheme operated.
- 11 The Tribunal asked the Applicant what he considered fair in terms of a sanction against the Respondent, were the Tribunal to conclude that he was in breach of his duties in relation to the Applicant's deposit. The Applicant advised that it would be a matter for the Tribunal but he would be looking for an award at the higher end of the scale. Looking back he felt he was being gaslit by the Respondent. He believed the deposit was only lodged with a scheme after he submitted the applications to the Tribunal. The Applicant confirmed that the deposit had been lodged at the end of June 2024 after he had completed his initial applications. He then had to go through the dispute resolution process months after the tenancy ended. The process had not yet concluded and he was yet to get his deposit back more than six months down the line. If it had been a simple oversight on the Respondent's part the Applicant could have accepted that. However the Respondent had specifically referenced the tenancy deposit scheme, both in the tenancy agreement and in the text messages he had sent to the Applicant at the start of the tenancy. The Applicant confirmed that the Respondent had other properties that he rented out therefore he should be aware of his responsibilities as a landlord. The property the Applicant occupied had been let out prior to the Applicant's tenancy and he believed it was now occupied by new tenants.

Relevant Law

- 12 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.

13 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

- 14 The Applicant entered into a tenancy agreement with the Respondent which commenced on 27 February 2023.
- 15 In terms of Clause 11 of the tenancy agreement the Respondent undertook to pay a deposit of £1850 to the Applicant. The Applicant undertook to lodge the deposit with a tenancy deposit scheme within 30 days of the commencement of the tenancy.
- 16 The Applicant paid a tenancy deposit of £1850 to the Respondent by bank transfer on 27 January 2023.
- 17 The Respondent did not pay the deposit into an approved deposit scheme within 30 days of the commencement of the tenancy.
- 18 The Respondent advised the Applicant via text message on 4 February 2023 that the deposit would be paid to the tenancy deposit scheme and that *“everything is being done in line with normal practice or ahead of time”*.
- 19 The tenancy between the parties terminated on 30th May 2024.
- 20 The Respondent paid the tenancy deposit into an approved deposit scheme, namely SafeDeposits Scotland, on or around 28 June 2024.
- 21 The Applicant has applied for the return of the deposit via the deposit scheme’s dispute resolution process. The dispute resolution process has not yet concluded as at the date of the CMD. The Applicant had not yet received the deposit back either in whole or in part.
- 22 The Respondent is not registered on the landlord register.
- 23 The Respondent owns other properties that he rents out.
- 24 The property let to the Applicant was rented out prior to his tenancy commencing and has since been let again to new tenants.

Reasons for Decision

- 25 The Tribunal determined the application having regard to the application paperwork and the verbal submissions at the CMD. The Tribunal considered it could make a decision on the application in the absence of the Respondent. He had been given the opportunity to participate in the proceedings but had not made any written representations, nor attended the CMD. The Tribunal

accordingly identified no issues to be resolved, or facts in dispute, that would require a hearing to be fixed.

- 26 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 and provide information to the tenant regarding the deposit. 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.
- 27 The Tribunal accepted the Applicant's account of the circumstances pertaining to the deposit as fact. He had provided supporting evidence to corroborate his submissions at the CMD and there was nothing before the Tribunal to contradict his version of events. The Tribunal accepted that he had paid a deposit to the Respondent in the sum of £1850 on 27 January 2023, which was evidenced by the bank statement he had produced, and that the Respondent had not paid the deposit into an approved tenancy deposit scheme within thirty working days of the commencement of the tenancy. The Respondent had therefore failed to comply with his duties under Regulation 3 of the 2011 Regulations.
- 28 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.
- 29 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 £5550. 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.”

- 30 In this case the deposit had remained unprotected for the entirety of the tenancy. The tenancy agreement clearly placed an obligation on the Respondent to lodge the deposit in an approved scheme within thirty working days of the beginning of the tenancy, and the Respondent had reiterated this obligation in text messages to the Applicant. It was a significant sum of money and the Applicant would have been rightly concerned about the lack of protection. The Respondent was clearly aware of the duties incumbent upon him in relation to tenancy deposits. There was no reasonable explanation as to why he had failed to lodge the deposit with a scheme within the statutory timescale. The Tribunal considered these to be aggravating factors to which significant weight could be applied.
- 31 The Tribunal also noted that, as well as failing to comply with the 2011 Regulations, the Respondent did not appear to be registered as a landlord in the local authority area in which the property was located. The Applicant had confirmed this to be his understanding, and the Tribunal could find no record of the Respondent on the register. The Respondent appeared to have multiple properties, and his lack of registration caused the Tribunal serious concern in terms of his approach to his responsibilities as a landlord. The Tribunal therefore considered this to be another aggravating factor that attracted significant weight.
- 32 The Tribunal considered whether there were any mitigating factors in this case. The Tribunal took into account the fact that the deposit was eventually lodged with a deposit scheme, after the tenancy had ended and following what appeared to be a dispute between the parties regarding possible deductions. The Applicant had therefore had the benefit of the independent dispute resolution process, and would have had the opportunity to challenge any deductions sought by the Respondent. However the fact remained that over six months after the tenancy had ended the Applicant had yet to receive his deposit back. He had also been put to the inconvenience of having to make an application to the Tribunal seeking the return of the deposit. Accordingly whilst the Tribunal could give some weight to the fact that the Respondent had latterly lodged the deposit with a scheme as a mitigating factor, this did not outweigh the aggravating factors in this case.
- 33 Having weighed the aggravating and mitigating factors in this case the Tribunal considered that the level of culpability was serious based on the Respondent's approach to his dealings with the Applicant and his responsibilities as a landlord, albeit he had eventually sought to comply with his duties after the tenancy had ended. Accordingly taking into account the potential for a maximum award of £5500 the Tribunal determined that a fair and proportionate sanction in this case would be £3700.
- 34 The Tribunal therefore made an order for payment in the sum of £3700.

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.

Ruth O'Hare

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Legal Member/Chair

22 November 2024

Date