



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”)

Chamber Ref: FTS/HPC/PR/25/1733

Re: Property at Craigview, Over Abington, Biggar, ML12 6SF (“the Property”)

Parties:

Mrs Pauline McLemon, Mrs Peter McLemon, Craigview, Over Abington, Biggar, ML12 6SF (“the Applicant”)

Mr Craig Jenkins, 2-4 Bowling Green, Biggar, ML12 6ES (“the Respondent”)

Tribunal Members:

Sarah O'Neill (Legal Member) and Jane Heppenstall (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent failed to comply with his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Tribunal therefore makes an order requiring the Respondent to pay to the Applicants the sum of £800.

The Tribunal also makes an order in terms of Regulation 10 (b) of the 2011 Regulations, requiring the Respondent to pay the Applicants’ tenancy deposit into an approved scheme within 30 days of the date this decision is sent to the parties.

Background

1. An application was received from the first Applicant, Mrs Pauline McLemon, on 24 April 2025 seeking a payment order under Rule 103 of Schedule 1 to the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 rules”). The first Applicant sought an order for

payment in respect of the Respondent's alleged failure to lodge the tenancy deposit paid by the Applicants with an approved tenancy deposit scheme within 30 working days of the beginning of their tenancy, as required by Regulation 3 of the 2011 Regulations.

2. Attached to the application form were:
 - (i) Copy short assured tenancy agreement between the parties, which commenced on 11 November 2009.
 - (ii) Copy emails from all three approved tenancy deposit schemes dated in October 2023, confirming that they did not hold the Applicants' deposit.
 - (iii) Copy WhatsApp message from the first Applicant to the Respondent dated 9 December 2024 regarding the tenancy deposit.
 - (iv) Copy notification letter from the first Applicant to the Respondent dated 18 March 2025 regarding her intention to make the application.
3. Further to a request from the Tribunal administration, further information was received from the Applicants on 29 April 2025. This comprised: 1) confirmation that the application should proceed in the name of both Applicants and 2) confirmation from all three tenancy deposit schemes dated on or around 28 April 2024 that they did not hold the Applicants' deposit
4. The application was accepted on 30 April 2025. Notice of the case management discussion (CMD) scheduled for 4 June 2025, together with the application papers and guidance notes, were served on the Respondent by sheriff officers on behalf of the Tribunal on 9 May 2025.
5. The Respondent was invited to make written representations in response to the application by 28 May 2025. An email was received from the Respondent on 9 May 2025 requesting a postponement of the CMD, on the basis that he had submitted a civil proceedings application against the Applicants, and that it would make sense for the two applications to be dealt with together. That application (reference no: FTS/HPS/CV/25/2004) was accepted shortly afterwards and the Tribunal decided to proceed with both applications on a conjoined basis at the CMD. No further written representations were received from either party prior to the CMD.

The case management discussion

6. A CMD was held by remote teleconference call on 4 June 2025 to consider both the present application and the conjoined application (ref: FTS/HPS/CV/25/2004) made by the Respondent against the Applicants for a payment order in respect of alleged rent arrears. Both Applicants was present on the teleconference call and were represented by the first Applicant. The Respondent was present on the teleconference call and represented himself.

The Applicants' submissions

7. The first Applicant told the Tribunal that the Applicants' deposit had not been paid into an approved tenancy deposit scheme at the start of their tenancy in November 2009. They had paid a deposit of £400 to the Respondent at that time.
8. She had become aware at around the time the Respondent had sent a notice to leave to the Applicants in September 2023 that the tenancy deposit should have been paid into an approved scheme, following advice from Shelter. She had contacted the Respondent by WhatsApp message on 9 December 2023, informing him that he had a duty to lodge the tenancy deposit with an approved scheme, and that having checked with all three schemes, none of them held the tenancy deposit.
9. Despite this, the three approved tenancy deposit schemes had confirmed recently that the Applicants' deposit had still not been paid into a scheme. The Respondent had failed to comply with his legal obligations despite having been made aware of them, and the Applicants' deposit had remained unprotected for 15 years.
10. The Applicants therefore sought an order against the Respondent for £1200, three times the tenancy deposit.

The Respondent's submissions

11. The Respondent confirmed that the Applicants had paid him a tenancy deposit of £400 at the start of their tenancy. He admitted that he had failed to lodge the deposit with an approved scheme. He said that at the start of the tenancy there was no requirement to pay a deposit into an approved scheme.
12. The Respondent said that he had overlooked his responsibility to pay the deposit into an approved scheme, after this came into force. He had been made aware that this had not been done when the first Applicant raised it with him in December 2023. He had decided not to put the deposit into a scheme at that point because he thought it would be dealt with as part of his original eviction application against the Applicants (which was rejected because he had incorrectly served a notice to leave rather than a notice to quit).
13. The Respondent had previously owned three other rental properties, all of which he had sold in recent years. These tenancies had all started more recently than that of the Applicants' tenancy. He had a letting agent who dealt with these on his behalf, including lodging the tenancy deposits with an approved scheme. He was aware that as a landlord he now has a duty to place a tenancy deposit into an approved scheme, and the tenancy deposits for these properties had been lodged with an approved scheme.

Findings in fact

14. The Tribunal made the following findings in fact:

- The Respondent is the owner and registered landlord of the property.
- The parties entered into a short assured tenancy agreement, which commenced on 11 November 2009. The initial term of the tenancy ran until 11 May 2010 and thereafter it continued on a month to month basis by means of tacit relocation.
- A tenancy deposit of £400 was paid by the Applicants to the Respondent at the start of their tenancy.
- There was no requirement to lodge a tenancy deposit with an approved scheme at the time when the tenancy commenced.
- The tenancy is a 'relevant tenancy' in terms of the 2011 regulations.
- The Respondent did not pay the Applicants' tenancy deposit into an approved tenancy deposit scheme when this became a requirement in November 2012.
- The Respondent previously rented out several other properties via tenancies which commenced later than that of the Applicants. The tenancy deposits in respect of these tenancies were lodged with an approved tenancy deposit scheme.
- The first Applicant contacted the Respondent in December 2023 notifying him that the Applicants' tenancy deposit had not been paid into a scheme.
- The Respondent did not pay the Applicants' tenancy deposit into an approved scheme after receiving this notification.

The relevant law

15. Regulation 3(1) of the 2011 Regulations provides that: *"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.*

16. Regulation 47 of the 2011 Regulations states:

Transitional provisions

47. Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force, regulation 3 applies with the modification that the tenancy deposit must be paid, and the information provided, within 30 working days of the date determined under paragraph (a) or (b)—

(a) where the tenancy is renewed, by express agreement or by the operation of tacit relocation, on a day that falls three months or more, but less than nine months, after the first day on which an approved scheme becomes operational, the date of that renewal;

(b) in any other case, the date which falls nine months after the first day on which an approved scheme becomes operational.

Reasons for decision

17. In light of all the evidence before it, and having regard to the overriding objective, the Tribunal considered that it was able to make sufficient findings to determine the case without the need for a hearing, and that to do so would not be contrary to the interests of the parties.
18. The Tribunal noted that the tenancy deposit was paid by the Applicants to the Respondent on or around 11 November 2009. At that time, there was no requirement to pay a tenancy deposit into an approved scheme. The 2011 Regulations came into force on 7 March 2011 and the three tenancy deposit schemes became operational on 2 July 2012.
19. After 11 May 2010, the tenancy agreement continued by tacit relocation on a month to month basis. In terms of regulation 47 (a) of the 2011 Regulations, therefore, the Respondent had a duty to pay the tenancy deposit into an approved scheme within 30 working days of a date on which the tenancy was renewed which fell at least 3 months after the first day on which an approved scheme became operational. The duty therefore arose within 30 working days of 11 October 2012 i.e. the deposit should have been paid into a scheme no later than 22 November 2012.
20. The Respondent admitted that he had failed to comply with the duty under Regulation 3(1) of the 2011 Regulations to pay the Applicant's deposit into an approved tenancy deposit scheme by the date determined in accordance with regulation 47. The Legal Member explained to the parties that the Tribunal was therefore obliged to make an order requiring the Respondent to make payment to the Applicants, in terms of rule 10 of the 2011 Regulations.
21. The Tribunal is required to consider the sum which the Respondent should be ordered to pay to the Applicant, which could be any amount up to three times the amount of the tenancy deposit. The amount of any award is the subject of judicial discretion after careful consideration of the circumstances of the case, as per the decision of the Inner House of the Court of Session in the case of *Tenzin v Russell* 2015 Hous. LR. 11.

22. In considering the appropriate level of payment order to be made in the circumstances, the Tribunal considered the need to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach (*Sheriff Welsh in Jenson v Fappiano* 2015 GWD 4-89).
23. The Tribunal noted the view expressed by Sheriff Ross in *Rollet v Mackie* ([2019] UT 45) that the level of penalty should reflect the level of culpability involved. It did not consider that most of the aggravating factors which might result in an award at the most serious end of the scale were present in this case. The Respondent was aware of his duty to pay the Applicants' deposit into an approved scheme, and had admitted that he had failed to do so. As Sheriff Ross noted, at para 13 of his decision: *"The admission of failure tends to lessen fault: a denial would increase culpability"*.
24. The Tribunal considered the various factors to be taken into account as set out in *Rollet v Mackie*. It did not consider that there had been fraudulent intention on the part of the Respondent or a deliberate failure to observe his responsibilities at the time when the Regulations came into force in relation to the tenancy. While he should have been aware of his responsibilities when the Regulations at that time, and there was publicity at the time regarding the new duties, the Applicants had by then been in the property for almost 3 years. Because the tenancy agreement renewed itself every month by tacit relocation after the original six month term, there was no obvious trigger to alert him to the obligation to pay the deposit into an approved scheme by the required date. The Tribunal therefore accepted the Respondent's submission that he had overlooked the requirement to do so.
25. The Tribunal notes, however, that the Respondent was later made aware of his responsibilities under the Regulations by the Applicants. He should also have been aware of this given that he was a landlord who had various other rented properties in respect of which a tenancy deposit had been lodged with a scheme. He should therefore have paid the deposit in when he became aware of his responsibilities, albeit that this would have been some years after the date when the deposit should have been lodged with an approved scheme. Not to have done so involved a deliberate or reckless failure to observe his responsibilities. It is unclear why he thought the matter would be resolved as a result of his initial unsuccessful eviction application. In any case, 18 months have passed since that time, during which the Applicants' deposit has remained unprotected.
26. There was, on the other hand, no evidence of repeated breaches against other tenants. The financial sum involved (£400) is not high and there has not as yet been any actual loss to the Applicants as a result of the Respondent's failure to lodge the deposit with an approved scheme.

27. While the Applicants' tenancy deposit has not been unprotected for 15 years as stated by them, it has nevertheless been unprotected for most of their tenancy, over a period of more than 12 years to date. It was the Respondent's responsibility to ensure that it was so protected.
28. The purpose behind the 2011 regulations is to ensure that tenancy deposits are protected, and the schemes also facilitate the resolution of any dispute between landlord and tenant over what should happen to the deposit money at the end of the tenancy. Should the tenancy deposit remain unprotected at the end of the Applicant's tenancy, there is a potential for dispute over what should happen to it. At that point, the Applicants could potentially suffer financial loss and would have no opportunity to dispute any claim made on the deposit by the Respondent.
29. Taking all of the above considerations into account, the Tribunal considered that an award at the middle to upper level of the possible penalty scale would be appropriate. It therefore determined that an order for £800, representing twice the amount of the tenancy deposit paid, would be fair, proportionate and just, having regard to the seriousness of the breach.
30. The Tribunal granted an eviction order on the same day as this decision was made, ending the tenancy on 4 December 2025. The tenancy therefore still has six months to run until its end date. The Tribunal considers that it would be in the interests of both parties if it were to order the Respondent to pay their tenancy deposit into an approved scheme. This would provide protection for both parties in the event of any dispute over the deposit at the end of the tenancy.

Decision

31. The Tribunal determines that the Respondent has failed to comply with the duty in terms of Regulation 3 of the 2011 Regulations to pay a tenancy deposit to the scheme administrator of an approved scheme within the prescribed timescale. The Tribunal therefore makes an order requiring the Respondent to pay to the Applicants the sum of £800.
32. The Tribunal also makes an order in terms of Regulation 10 (b) of the 2011 Regulations requiring the Respondent to pay the Applicants' tenancy deposit into an approved scheme within 30 days of the date this decision is sent to the parties.

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.

S.O'Neill

Legal Member/Chair

16 June 2025

Date