

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 3 of the Tenancy Deposits (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/18/1092

Re: Property at 7 Glen Orchy Road, Motherwell, ML1 5SA ("the Property")

Parties:

Mrs Katarzyna Nowak, 368 Blackley New Road, Manchester, M9 8FR ("the Applicant")

Mr Graham Hendry, 5509 Gunnison Turn Road, Austin, Texas, United States ("the Respondent")

Tribunal Members:

Alison Kelly (Legal Member) and Leslie Forrest (Ordinary Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment in the amount of two thousand two hundred pounds (£2,200) should be made.

- **Background**

An Application was lodged by the Applicant on 4th May 2018 in terms of Rule 103 of the Tribunal's Procedural Rules.

Lodged with the Application were;

- Copy Tenancy Agreement
- Copy letter to the Respondent dated 5 March 2018

A Case Management Discussion (CMD) was scheduled for 26 July 2018 but was cancelled as papers were not served on the Respondent.

A further CMD was scheduled for 4 March 2019 once an address for the Respondent had been obtained.

The CMD, which was to take place by Conference Call on 4 March 2019 had to be cancelled due to the lack of a Polish interpreter.

A further CMD was arranged for 10 April 2019. The Respondent was represented by Mr. Kane of Freelands Solicitors. He confirmed that the Respondent accepted that he had not placed the deposit in an approved Tenancy Deposit Scheme (TDS). He advised the Tribunal that the Respondent had raised a separate application against the Applicant in relation to damage to the Property, with a CMD fixed for 5 June 2019 and he suggested that this matter be adjourned to that date to allow both cases to be dealt with at the same time. It was suggested by the Chairperson that the Parties could attempt to negotiate a settlement.

At the CMD on 5 June 2019 it was noted that no attempt at negotiation had been made but that both Parties were open to attempting this. The CMD was adjourned until 11 July 2019 to allow this.

At the CMD on 11 July 2019, the Respondent's solicitor Mr Kane advised that full submissions would be made at a hearing. Mr Kane also outlined the elements of the Respondent's claim and that he may seek to amend by adding alleged rent arrears in the sum of £1,100. Both Parties acknowledged that considerable time and expense would be incurred if a full hearing had to be prepared for and they agreed to attempt a further compromise discussion to see if agreement could be reached.

A further CMD took place on 27 August. The Applicant did not attend and was not represented. Mr Kane for the Respondent explained that negotiations had not been successful and that a full hearing was required.

A full hearing was fixed for 9 October 2019 but was postponed as Mr Kane was not available to conduct it.

- The Hearing

The Applicant did not appear and was not represented. The Respondent was present and was represented by Mr. Kane of Freelands Solicitors.

The Tribunal was satisfied that the Applicant had been given sufficient notice of the Hearing date time and place in terms of Rule 24 of the Tribunal's procedural rules and in terms of Rule 29 the case could be heard in her absence.

Mr Kane was asked to address the Tribunal on the Respondent's failure to place the deposit in an approved TDS in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) 2011.

Mr Kane started by saying that it was accepted that the deposit should have been placed in a TDS and that what he intended to do was put forward mitigation to allow the Tribunal to use their discretion in deciding the amount of any award.

He submitted that;

- 1-The Respondent is an amateur Landlord
- 2-He had made a mistake
- 3-He has learned his lesson
- 4-The purpose of the Act is not to unreasonably punish mistakes
- 5-The case law appears to suggest that the Regulations are intended to punish "serial offenders".

The Respondent relocated to USA 8 years ago and had decided to rent out his former family home. Mr Kane explained that the Respondent had used a Letting Agent with a previous Tenant but had decided to manage the property himself. The Respondent himself stated that his first tenants had been in the property for 4 years and in the final year of the Tenancy they had run into financial difficulties and he decided to dispense with the services of the Letting Agent in order to offer his Tenant a reduced rent amount. He confirmed when asked that the Letting Agent had held the deposit but returned it to the Tenant when their services had been dispensed with. He confirmed that those Tenants moved out in May / June 2017 and said that he then redecorated the house and advertised it to let on Gumtree.

The Tribunal asked the Respondent if the Property was currently tenanted and the Respondent stated that he had had two tenants since the Applicant had moved out. He did not take a deposit from the first Tenant, and having learned of his obligations, a deposit taken from his current tenant is held in a TDS.

The Tribunal members had been unable to trace any Landlord Registration for the Respondent. He was asked to provide his Landlord Registration number and he did so, but the Registration still could not be found. The Tribunal adjourned to allow the Respondent and his Solicitor to verify the position.

The Tribunal reconvened. Mr Kane stated that he had spoken to the Local Authority and they confirmed that the Respondent's registration had expired in July 2019. He explained that the Respondent's previous employers had shut down his email address and he had therefore not received the renewal notification. He gave an undertaking on behalf of his client that an application for registration would be made today.

Mr Kane was asked to make submissions on behalf of the Respondent. He made it clear that the Respondent accepted that ignorance of the law was no excuse and that there is an abundance of case law on the matter. He submitted that the Respondent was an amateur landlord with no previous findings against him, and that this was a one-off mistake.

He made reference to the case of Jensen vs Fappiano decided by Sheriff Welsh at Edinburgh on 28 January 2015. He referred to Paragraph 6 of the decision where the Sheriff had given consideration to the purpose of the new regime. He referred to Paragraph 7 where the Sheriff had stated that "the mischief which these Regulations are designed to curb is the Rachmanite practice, on the part of certain unscrupulous Landlords, of retaining the Tenancy Deposit in the knowledge that some Tenants

may choose to walk away from a Tenancy Deposit dispute, at the end of a Tenancy and lose the money that they are entitled to, rather than go to court to try and recover their deposit in, what might be, a lengthy court case over a relatively small sum”.

He also made reference to Paragraph 11 where the Sheriff set out a number of settled equitable principles being (1) judicial discretion is a rational act and (2) the reasons supporting it must be sound and articulated, and (3) the result must not be disproportionate and it must be fair and just.

Mr Kane submitted that the Respondent was far away from being an unscrupulous Landlord using the system to defraud a Tenant.

- Findings in Fact

- 1-The Parties entered into a Tenancy Agreement for the Property
- 2-The Applicant paid the Respondent the sum of £1,100 by way of a deposit
- 3-The Respondent did not place the deposit in an approved TDS

- Reasons for Decision

Mr Kane addressed the Tribunal regarding his interpretation of the purpose of the legislation in that in his view it was to punish “serial offenders” who took deposits from tenants and did not return them.

This is not the only purpose of the legislation. The legislation provides a mechanism for resolving disputes between landlords and tenants regarding the deposit being used towards rent arrears and/or damage to property. It is clear in this case that the Applicant has been denied the protection and dispute resolution mechanism afforded by a TDS.

The Tribunal also were of the view that renting out property is by its very nature a professional arrangement and should not be entered into casually.

It was submitted that the Respondent had made a mistake and had learned his lesson. However during the course of the hearing, it was discovered that the Respondent had allowed his Landlord Registration to lapse thereby casting doubt on the extent to which lessons have indeed been learned by the Respondent.

The fact that the Tenancy in this case was the first that the Respondent had entered into on his own account is however evidence of a lack of experience.

Given the circumstances, the Tribunal decided that an award of twice the deposit amount would be appropriate.

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.

Alison Kelly

Legal Member/Chair

11/11/19

Date