

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 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/1447

Re: Property at 2 Glendale Mews, Union Glen, Aberdeen, AB11 6FN (“the Property”)

Parties:

Mr Erik Miseikis, 47b Nelson Street, Aberdeen, AB24 5ER (“the Applicant”)

Mr Andrew Dines, 17 Muray Terrace, Aberdeen, AB11 7SA (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £700 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011(the Regulations) should be made and that the Respondent should be ordered in terms of Regulation 10 (b) (i) of the Regulations to pay the tenancy deposit to an approved scheme within 30 days of receipt of the Tribunal’s order.

BACKGROUND:

The Applicant Mr Miseikis made an application under Rule 103 of the Rules of Procedure on 4 May 2019 for payment under Regulation 10 (a) of the Regulations.

The Applicant submitted to the Tribunal tenancy agreement signed on 4 April 2016, AT5 document and text messages between the Applicant and the Respondent between 27 February 2019 and 23 April 2019. The Applicant’s representatives on 16 June 2019 lodged written submissions and further text messages of 31 March 2017 and 23 April 2019. The Respondent lodged written submissions on 25 June 2019. The documents lodged by both parties are referred to for their terms and held to be incorporated herein.

A Case Management Discussion was fixed for 2 July 2019. Both parties had been advised in the notification for the Case Management Discussion that the Tribunal may make a decision at that stage.

The Case Management Discussion:

The Applicant attended with his representative Mr Murphy from the Aberdeen Law Project. The Respondent attended the Case Management Discussion (CMD). The legal member explained the purpose of the CMD to both parties and both parties agreed that no hearing would be necessary.

Both parties agreed that the tenancy commenced on 1 May 2016 and ended on 31 March 2019. A deposit of £660 had been paid to the Respondent by the Applicant and not returned. The Respondent admitted that the deposit had not been paid into an approved scheme.

The Respondent stated that he had been unaware of the duty to lodge the deposit in an approved scheme as can be seen from deposit clause in the tenancy agreement, which does not refer to such a scheme. He had used an old style tenancy agreement and just updated this with the new details. He had not involved an agent. He only has this one rental property and is what he describes and "accidental landlord". He has had the property for 10 years and is still in negative equity. He referred to his written submissions, which deal with an agreed rent reduction over an 18 month period for the property and his view was that this included an agreement that the deposit would be used to top up rental payments during that time. He stated that he now has new tenants and used a letting agent and had now become aware of the duty to pay the deposit into an approved scheme and had done so for the new tenants.

The Applicant and the Respondent confirmed that they had had a good relationship as landlord and tenant. The Applicant confirmed that he had not raised the issue about the payment of the deposit into an approved scheme during the tenancy period.

The Applicant's representative referred to the written submissions and stated that the Tribunal should take into account that the deposit was unprotected for the entire duration of the tenancy, that the Respondent was a landlord and had not looked at the recent legislation relevant to such an undertaking although it is the duty of a landlord to keep up to date with such matters, that there was no status as an amateur landlord and that the failure to lodge the deposit in accordance with the Regulations meant that the tenant had been deprived of the option of the dispute resolution scheme available in the protected schemes.

The legal test:

In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 an application under that Regulation must be made within 3 months of the end of the tenancy. In terms of Regulation 10 "if satisfied that the landlord did not comply with any duty in Regulation 3 the First tier Tribunal 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."

In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 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.”

In terms of Regulation 42 (2) the information includes “ (a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord, (b) the date on which the tenancy deposit was paid to the scheme administrator...(d) a statement that the landlord is , or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of 2004 Act, (e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid and (f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement. (3) the information in paragraph (2) must be provided (a) where the tenancy deposit is paid in compliance with regulation 3 (1) , within the timescale of set out in that regulation”

Findings in fact:

1. The Applicant paid a deposit of £660 to the landlord at the start of the tenancy period.
2. The tenancy started on 1 May 2016.
3. The tenancy ended on 31 March 2019.
4. The deposit was not lodged with an approved scheme during the whole duration of the tenancy.
5. The Respondent has one rental property and did not use the services of an agent in drawing up the tenancy agreement.
6. The clause in the tenancy agreement dealing with the deposit states: “On the date of entry together with the first payment of rent the Tenant shall deposit the sum of £660 (herein after referred to as “the deposit”) with the Landlord or the Landlord’s agents which shall be held by or on behalf of the Landlord for behoof of the Tenant to meet any claims against the Tenant at the instance of the Landlord..... “
7. The Respondent did not return the deposit to the Tenant at the end of the tenancy.
8. The Respondent considers that it had been agreed between the parties that the deposit should be retained as a reduction in rent had been agreed in 2017 for an 18 months period.
9. The Respondent has paid the deposit for the new tenants of the property into an approved scheme.

Reasons for Decision:

The tribunal considers that the landlord did not comply with the requirements of Regulations 3 and 42 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement. The Tribunal accepted that the Respondent had used an old style tenancy agreement and had been unaware of the duty to lodge the deposit into an approved scheme. The tenancy agreement does not mention an approved scheme and states that the deposit will be held by the

Landlord or the Landlord's agent. He now realises that this should not have happened and that he should have paid the deposit into an approved scheme at the time. He had not refused to pay the deposit into an approved scheme but had simply not know about the duty to do so. He has had the property for 10 years and has acted as a landlord to tenants previously and again after the tenancy with the Applicant ended. He thought he had agreed that the deposit could be retained in light of his agreement to a reduced rental payment. However, this is a matter under dispute and relates to the issue of whether or not the deposit should be returned, not the issue of what amount should be imposed by the Tribunal in terms of Regulation 10 (a) of the Regulations.

Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the rules. The non compliance with the Regulations is not disputed by the landlord.

Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.

Whilst the Tribunal notes the request in the written submissions of the Applicant for payment of the maximum of three times the deposit amount, the Tribunal does not agree that the case warrants the maximum remedy.

The Tribunal considers that the discretion of the Tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015) by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.

The Tribunal took into account the length of time the deposit was unprotected, the fact that the landlord had clearly not kept up to date with his documentation and with the requirements of the legislation and that he had deprived the tenant of the protection of the scheme for the entire duration of the tenancy. On the other hand the tribunal took into account that the Respondent had not done this deliberately and had fully admitted the breach of the Regulations. He was not a professional landlord. The matter had not been a wilful defiance of the Regulations but a failure to keep up to date with the legislation. Although ignorance is no excuse in the matter, the Tribunal did not consider that this case warranted the maximum amount possible. The Tribunal further considered that in this case the matter of the return of the deposit should be dealt with by the expert service set up for dispute resolution in the approved schemes and thus that the deposit will have to be paid into an approved scheme within 30 days to ensure that the Applicant will ultimately receive the benefit of the dispute resolution scheme. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £700, which constitutes a meaningful sanction for non compliance of the Regulations.

Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £700 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland)

Regulations 2011 and orders the Respondent to pay the tenancy deposit to an approved scheme in terms of Regulation 10 (b) (i) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 within 30 days of receipt of the Tribunal's order.

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.

Petra Hennig-McFatrige

Legal Member/Chair

2 July 2019

Date