



**Statement of Decision by the First-tier Tribunal (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/19/2099**

**Re: Property at 46B Union Glen, Aberdeen, AB11 6ER (“the Property”)**

**Parties:**

**Miss Ionela Tatu and Mr Mihai Kovacs, both residing at 148 Ruthrieston Circle, Aberdeen, AB10 7LU (“the Applicants”)**

**Miss Sarah Hutcheon, 6 Rubislaw Drive, Aberdeen, AB15 4BX (the Respondent”)**

**Tribunal Members:**

**Ruth O'Hare (Legal Member)**

**Decision**

**Background**

1 By application dated 3 July 2019 the Applicants sought an order for payment under regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”) due to the Respondent’s failure to lodge their deposit with an approved tenancy deposit scheme. The Applicants submitted the following documents to accompany their application:-

- (i) Copy Tenancy Agreement between the parties dated which commenced on 6<sup>th</sup> January 2018;
- (ii) Copy email correspondence between the Applicant and Respondent; and
- (iii) Copy Deposit Protection Certificate from Safe Deposits Scotland dated 9 April 2019; and
- (iv) Correspondence from Safe Deposits Scotland to Applicant dated 10<sup>th</sup> April 2019 confirming receipt of deposit.

- 2 By Notice of Acceptance of Application dated 22 July 2019 the Legal Member of the Tribunal with delegated powers of the Chamber President determined that there were no grounds for rejection of the application. A Case Management Discussion was therefore assigned for 18 September 2019.
- 3 A copy of the application together with notification of the Case Management Discussion was served upon the Respondent by Sheriff Officers on 9<sup>th</sup> August 2019. Following service of the application the Respondent emailed the Tribunal administration to state she did not believe a hearing was required as the deposit had been placed in an approved scheme.
- 4 Following a request from the Applicants the Tribunal agreed to postpone the Case Management Discussion, there being no prejudice to the Respondent, on the basis that the Applicants were unable to attend due to being abroad.

#### **The Case Management Discussion**

- 5 The Case Management Discussion took place on 2<sup>nd</sup> October 2019. The Applicants were present. The Respondent did not attend.
- 6 The Legal Member noted that notification of the Case Management Discussion had been sent to the Respondent on the 21<sup>st</sup> August 2019 by first class mail. She had previously received service of the application paperwork by Sheriff Officers and had been in touch with the Tribunal administration in response. The Legal Member was therefore satisfied that she was aware of the proceedings and had been given the opportunity to attend. On that basis the Legal Member determined to continue with the Case Management Discussion in the absence of the Respondent.
- 7 The Legal Member explained the purpose of the Case Management Discussion. She explained that this was an application raised under the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations). The matter the Tribunal required to determine was therefore whether the Respondent had complied with her duties under those Regulations and if not, what level of sanction would be appropriate.
- 8 The Legal Member confirmed with the Applicants that the tenancy had commenced on 6<sup>th</sup> January 2018 and the deposit had been paid in the sum of £525 at that time. They had not however received confirmation that the deposit had been lodged with a scheme until 9<sup>th</sup> April 2019, four days after their tenancy had ended, and only after they had queried the position with the Respondent. The Legal Member therefore noted that on the basis of the evidence before her she was in a position to find the Respondent in

breach of her duties under regulation 3 of the 2011 Regulations. The Legal Member therefore had to consider whether she had sufficient information to make a determination as to what level of sanction would be appropriate.

- 9 The Legal Member asked the Applicants to address her on this issue. It was noted that the Respondent had said in email correspondence with the Applicants that confirmation of the deposit having been lodged in scheme had been sent to the Applicants in January 2018 when this was clearly at odds with the certificate she had produced, noting the date of lodging at 9<sup>th</sup> April 2019. The Respondent had therefore tried to hide her failure to lodge the deposit with the statutory timescale from the Applicants.
- 10 The Applicants explained that the relationship between themselves and the Respondent had become acrimonious towards the end of the tenancy. The Applicants had been looking at alternative flats in the area towards the end of the first term of the tenancy and had noted that there were cheaper rents available. They had subsequently sought to discuss with the Respondent whether she would allow a reduction in rent. She had refused. The Applicants then advised the Respondent that they were moving out. She had asked them for a payment of rent which they had then sought advice on from Citizens Advice Bureau and Shelter as there was a dispute over the required notice period. The Applicants had then discovered that the tenancy agreement was incorrect in that it sought to contract out of the statutory private residential tenancy regime, by stating that the tenants were not individuals and thereby giving them less security of tenure. They had advised the Respondent of this. The relationship broke down further and during one telephone call the Respondent had started yelling and threatening the Applicants, stating that her father was a lawyer. She then tried to make the Applicants pay for the cost of repairing damage for which they were not liable.
- 11 The Legal Member queried whether the Applicants had been able to make use of the independent dispute resolution process offered by the scheme? The Applicants confirmed they had gone through that process and had been successful in obtaining the majority of their deposit back in the sum of £475, despite claims by the Respondent for additional sums. The Applicants had agreed a deduction in the sum of £50 for minor damage caused. It was noted that the scheme had asked the Respondent for a copy of the tenancy agreement but she had failed to provide this.
- 12 The Legal Member then adjourned the Case Management Discussion to allow for deliberation. The Legal Member was subsequently satisfied that she had sufficient information upon which to make a determination of the application.

## **Findings in Fact and Law**

- 13 On the information before the Tribunal the Legal Member found the following facts to be established:-
- 14 The parties entered into a Tenancy Agreement for the property which commenced on 6<sup>th</sup> January 2019;
- 15 The first page of the Tenancy Agreement states "*This agreement creates a Contractual Tenancy outside the Housing (Scotland) Act 1988 because the Tenant is not an individual. The tenancy does not guarantee the Tenant any right to remain in possession after the fixed term*".
- 16 Clause 7 of the said Tenancy Agreement provides that the Tenant shall pay a deposit of £525 and that the Landlord shall pay the deposit to a tenancy deposit scheme of the Landlord's agents choosing in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
- 17 The Applicant paid the deposit to the Respondent at the time the tenancy commenced. The Respondent failed to pay the deposit in an approved tenancy deposit scheme within thirty working days of the commencement of the tenancy.
- 18 The tenancy between the parties terminated on 5<sup>th</sup> April 2019.
- 19 The Respondent paid the deposit into an approved tenancy deposit scheme on 9<sup>th</sup> April 2019 and provided the prescribed information to the Applicant by email dated 10<sup>th</sup> April 2019.
- 20 The Respondent is in breach of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.
- 21 The application to the Tribunal was made timeously by the Applicants, within three months of the end date of the tenancy.

#### Reasons for decision

- 22 The Legal Member was satisfied at the Case Management Discussion that there was sufficient information upon which to make a determination of the application and that to do so would not be prejudicial to the interests of the parties. The Legal Member was satisfied that the Respondent had been given the opportunity to enter the proceedings but had chosen not to do so.
- 23 The application before the Tribunal proceeded under the 2011 Regulations. Accordingly the issue for the Tribunal to determine was whether the Respondent had complied with the duties imposed on her under those regulations, and if not, what penalty should be imposed.

- 24 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. 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.
- 25 It was clear from the evidence before the Tribunal that the Respondent had not lodged the tenancy with an approved scheme within thirty working days of the commencement of the tenancy which was 6<sup>th</sup> January 2019. The deposit protection certificate produced confirmed that the deposit had not been lodged until 9<sup>th</sup> April 2019, which was after the tenancy had ended. The Respondent was therefore in breach of Regulation 3.
- 26 Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. If satisfied that the landlord has failed 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 was in breach of Regulation 3 the Tribunal then had to consider what penalty to impose, having regard to the particular facts and circumstances of the case. The Tribunal considered that it was able to determine this issue without the requirement for a hearing as the Respondent had not put forward any dispute as to the substantive facts of the case.
- 27 The Tribunal considered the need to proceed in a manner which was fair, proportionate and just, having regard to the seriousness of the breach. In doing so, the Tribunal took into account the fact that the Respondent had made provision in the tenancy agreement for lodging the deposit with a scheme but had failed to comply with that obligation within the statutory timescale. When considered alongside the attempts by the Respondent to contract out of the security of tenure offered by the statutory private residential tenancy regime the Tribunal considered that showed a blatant disregard for the statutory protections offered to her tenants and a wilful attempt to avoid them. The Tribunal further noted the tone of the email correspondence between the parties as produced by the Applicants which led the Tribunal to accept the evidence put forward by them at the Case Management Discussion regarding the shouting and threats from the Respondent, conduct which the Tribunal found to be wholly unacceptable.
- 28 The Tribunal therefore concluded that Respondent had been fully aware of the requirement to lodge a deposit with an approved scheme and had not done so. She had then attempted to cover up that fact by stating to the Applicants that the information had been provided to them in January 2018

when the certificate produced by her dated 9 April 2019 was proof that was not the case. The Respondent as a Landlord was clearly acquitted with the knowledge of the duties that were incumbent upon her in that role and it appeared to the Tribunal that she had failed to take heed of her responsibilities in that regard.

- 29 The Tribunal also had to consider the purpose of regulation 9, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The Tribunal took into account the fact that the deposit had been unprotected for the entirety of the tenancy and had not been lodged under after the tenancy had ended. However it did take into account the fact that at the end of the tenancy the Applicants had been given the benefit of independent arbitration through the scheme dispute resolution process. This was a fundamental aspect of the protection offered by the tenancy deposit scheme and it was noted that the Applicants had received the majority of their deposit back.
- 30 The Tribunal was not therefore satisfied that the particular circumstances of the case warranted the maximum award of three times the amount of the deposit. However the Tribunal did consider having regard to the relevant considerations as set out above that an amount more than the deposit was justified, particularly in light of the conduct of the Applicant. The Tribunal therefore considered that a sanction of £1050 would be appropriate in the particular circumstances of this case, being a sum of twice the amount of the deposit.
- 31 The Tribunal therefore made an order for payment by the Respondent in the sum of £1050.

### 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

~~Legal~~ Member/Chair

2/10/19  
Date