



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 3 & 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/22/1227

Re: Property at 2 Rigfoot Estate, Strathaven, ML10 6RP (“the Property”)

Parties:

Miss Lisa Simpson, David Simpson, 71 Saucel Crescent, Paisley, PA1 1UD (“the Applicants”)

Mr Gordon Bavaird, Rigfoot Farm, Strathaven, ML10 6RP (“the Respondent”)

Tribunal Members:

Susan Christie (Legal Member) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for payment of Four Thousand Pounds (£4,000) to the Applicants:

Background

1. The Applicants applied for an Order for an award following on from a failure to lodge a deposit in an approved scheme timeously in line with regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The application was accepted by the tribunal on 20 May 2022.
2. Sheriff Officer’s served the paperwork on the Respondent on 24 June 2022.
3. The Respondent was invited to give written representations by 14 July 2022. Written submissions were submitted.
4. Both Parties sent into the tribunal further written comment which is included in the bundle of papers.
5. A Case Management Discussion assigned for 3 August 2022 was postponed on the application of the Respondent as he was on holiday.
6. Both Parties participated in the Case Management Discussion (CMD) on 14 September 2022 at 2 p.m. by conference call.
7. The tribunal explained at the CMD the purpose of it to the Parties, referred to the wording of regulations 3, 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (‘the Regulations’) and sought to clarify the

undisputed facts on which the application proceeds. There was agreement on material facts as follows-

- (1) The Parties entered into a Private Residential Tenancy (PRT) over the Property with a start date of 1 November 2021.
 - (2) The deposit taken was £2000 and it is noted in the PRT at clause 11 that the deposit is to be paid into a scheme administrator "TBC". To be confirmed.
 - (3) The deposit was paid into an account of the Respondent.
 - (4) The tenancy ended on 1 April 2022.
 - (5) The deposit was never paid into an approved scheme.
 - (6) The deposit was repaid to the Applicants by the Respondent near to the end of the tenancy.
 - (7) The Property is the subject of an alleged criminal investigation, and the Respondent is assisting the authorities with this.
8. The additional written submissions of the Parties which formed part of the paperwork were also considered and the Parties gave additional comment.
 9. Both Parties had made written submissions with their view on whether the Respondent as the landlord had complied with his duties as a landlord in relation to repairs and the Respondent made complaint regarding the conduct of the tenancy by the Applicants. Whilst the Parties held different views on this area, it was noted by the tribunal that the focus of this application was whether the tenancy deposit Regulations were complied with, and it was not a different type of application, for example for repairs issues or access etc.
 10. The Respondent accepted that he was the landlord in terms of the PRT but explained that the ownership is in his daughter and son in laws names because of the criminal matter pending, the change of ownership from him and his wife having taken place around 2014. This did not tie in exactly with a Land title search in the paperwork before the tribunal but there may be an explanation for that. The Respondent noted that the intention is to return the ownership to them at the conclusion of the criminal matter.
 11. As the Respondent had believed he was/ is a registered landlord for the Property and as this did not accord with information in the paperwork, clarification and evidence of landlord registration was to be provided to clarify the factual position.
 12. The Respondent raised a fresh response to the application orally at the CMD and suggested that as the Property had 'transitional ownership' then compliance with the Regulations may not have been required and referred to the *my.gov.scot* website. It was also suggested that as the Applicants had not approached the Respondent to ask for the tenancy deposit to be placed in an approved scheme that this was also relevant. Further written detail of the Respondent's position on this is required.
 13. A Hearing was assigned and the issues to be determined at the hearing are
 - (1) Whether the Respondent had obligations under the Regulations to lodge the tenancy deposit into an approved scheme, or not;
 - (2) If so, the appropriate sanction?
 14. A Direction was issued to the Parties as follows:

The Respondent was required to provide by 1 November 2022:

 - (1) *Documents showing or tending to show evidence of his registration as a landlord over the Property in the Landlord Register for Scotland for the period*

around 2021- 1 April 2022.

- (2) *Written submissions outlining why he considers the Tenancy Deposit Schemes (Scotland) Regulations 2011 do not apply to the tenancy between the Parties. He requires to give authority for this, such as referring to the part of the Regulations that say this or any other material he relies on.*

The Applicants were required to provide:

- 1) *Any additional written representations in response to the Respondent's assertion that the Regulations do not apply to the tenancy agreement of the Parties, including reference to any authority.*
15. A Hearing took place on 16 November 2022 at 10am. The Applicant Ms Simpson participated and represented both Applicants and the Respondent participated.
16. Neither Party called any witnesses.
17. Both Parties relied on the written information and submissions they had made to date.

Ms Simpson

18. Ms Simpson summated their case as follows:

On the day of signing of the PRT it was signed in the Respondents house. She works in a letting agent office and had told the Respondent that the correct type of lease was a PRT, not a short- assured tenancy. She had provided the style PRT agreement which was filled out. His details were in it. She asked him to say where the deposit was going and as it was not stated the letters 'TBC' were inserted in the deposit clause-'to be confirmed'. She received no legal certificates EICR, no EPC and no Inventory. She disputed that there was an actual offer by the Respondent to terminate their lease on 6 January 2022 but the text that had been produced by the Respondent had been sent to her husband not her. There had been issues and some friction between the Parties, and she felt like the Respondent wanted them to go after a while. Their children liked living there and they were happy there. There had been a problem with the gardener cutting logs with a chainsaw near to her son's bedroom and this led to a disagreement with the gardener as it caused upset to her child. The Respondent had still not lodged the deposit in 30 days. She did get the deposit back at the end on the early hours of 2 April 2022. She was not involved in text conversations with the Respondent, but her husband had exchanged texts with the Respondent. She had not seen them. She speculated that the Respondent owned several properties under his daughter's name and questioned whether any other deposits had been registered.

Mr Bavaird

19. Mr Bavaird summarised his position as follows:

Ms Simpson had produced the lease as it is her line of work. He had possibly been lackadaisical then. The deposit was not discussed at that time. He had exchanged around 60 texts with her husband and there was no mention of the deposit in them by her husband and he had exchanged around 10 texts with her and there was no mention of the deposit. The lease was ended by mutual consent. He had hastened to return the deposit to them and as he was in the Lake District, he had to set up the new payment to them it went through in the early hours of the day after termination of the lease. He disputed the gardener was being as unreasonable as was suggested and thought the physical layout

of where the store was situated, and its size would not allow logs to be cut under the child's bedroom. He referred to the pending criminal matter involving an alleged fraud of which they were said to be the victims. His wife had been paid out compensation as a result. Due to the alleged fraud, there had been a transitional change of ownership of the Property to his daughter and son in law and they were registered as the owners and on landlord registration. He had now registered as a landlord and had quoted his registration number. He had not been registered at the time this lease was entered into. The lease should have been put in his daughter's name, but he allowed it to be put in his name on the day. It was intended that ownership would go back to him once the criminal matter was at an end. It being in his family's name was only a temporary arrangement. The tenants had not raised with him the issue of which Scheme the deposit was to be placed in and had they done so he would have done it.

When asked some further questions by the tribunal Mr Bavaird accepted that he had let out properties in the past, years ago, and in his wife's name and this property had been let by his daughter as she owned it. She had been registered as the landlord. He was stupid to sign it in his name. They did not have a system as such for lodging deposits and had found it to be a rigmarole when tenants were leaving, and funds were to be deducted and sometimes people did not pay their last month's rent.

20. The Parties were given opportunity to ask and further questions or add any further information but declined. The Parties were advised a written decision would follow.

Findings in Fact

- I. The Parties entered into a Private Residential Tenancy (PRT) over the Property with a start date of 1 November 2021.
- II. The deposit taken was £2000 and it is noted in the PRT at clause 11 that the deposit is to be paid into a scheme administrator "TBC". The identity of the approved Scheme was still to be confirmed.
- III. The deposit was paid into an account of the Respondent.
- IV. The tenancy ended on 1 April 2022.
- V. The deposit was never paid into an approved scheme.
- VI. The deposit was repaid to the Applicants by the Respondent in the the early hours of 2 April 2022.
- VII. The tenancy deposit was unprotected throughout the period of the Applicants occupation of the Property.
- VIII. The Respondent did not comply with Regulation 3 as he did not pay the tenancy deposit into an approved scheme within 30 days of the beginning of the tenancy and did not provide the Applicant with the required information under regulation 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and is in breach of regulation 3.
- IX. The Respondent is required to pay the Applicant a sum of money and the Tribunal must make an Order to that effect by virtue of regulation 10.
- X. An order is made for the Respondent to pay to the Applicant the sum of £4,000.

Reasons for Decision

21. The extract from the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) relied upon are noted below. The Regulations came into force on 7 March 2011.
22. The material facts are not in dispute. A tenancy deposit paid over to the Respondent at the outset and was never paid into any of the approved tenancy deposit schemes. It was repaid in full to the Applicants at the end of the tenancy.
23. The tribunal considered the paperwork produced, the written and oral submissions.
24. The Applicant provided a copy of the Private Residential Tenancy Agreement. The tenancy agreement stated at clause 11 that the deposit taken would be paid into an approved scheme and the Regulations are referenced. It was made clear in the clause that a tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid. A link to obtaining more information on the scheme is provided in the clause.
25. The Respondent did not appear to be entirely unfamiliar with the tenancy deposit scheme as such. Instead, it appeared that the Respondent either himself or through a family member had chosen for the reasons he explained not to participate in it.
26. The tribunal is mindful that the Respondent and his wife seem to have been the victim of fraudulent activity and this had triggered a change of ownership of the property in 2019 from the Respondent to a family member due to the circumstances they found themselves in. It was however made clear that this is only a temporary arrangement, and it is intended that the Respondent will again be the registered owner of the Property as soon as this can happen. The Respondent had effectively declared himself to be the landlord at the signing up of the tenancy paperwork and his name being on the paperwork as the landlord. The tribunal appreciates that difficulties occurred due to the alleged fraud, but it did not seem in any way to be the cause of the failure to lodge the deposit in an approved Scheme.
27. The tribunal noted that the Respondent had been a landlord in the past but had not been organised around the formalities in the setting up of this tenancy with regards to the obligations that apply to a landlord under the Regulations.
28. The purpose of Regulation 10 is to impose a *sanction* on the landlord for the failure and non-compliance with the statutory scheme. The deposit was exposed to risk for the duration of the tenancy. The failure to lodge the tenancy deposit into an approved Scheme was not due any obvious mistake. The deposit funds were fully under the control of the Respondent and therefore exposed to risk. The tribunal noted that there appeared to be no system that he could cite that either he or his family had put in place to deal with tenancy deposits. It seemed that the Regulations were not contemplated.
29. The tribunal makes an order for the Respondent to pay to the Applicants twice the deposit which is less than the maximum award. The tribunal considered that this is an appropriate amount, exercising its discretion and having regard to the particular circumstances of this application. The tribunal could find limited mitigation in what was said as it appeared that the failure to place the

deposit in an approved scheme was deliberate until the Respondent was pushed to do so by the Applicants. The tribunal did not consider it was an obligation of the Applicants, as tenants, to proactively pursue the Respondent to have him comply with the Regulations. The tribunal had regard to the fact that the deposit was repaid almost immediately at the end of the tenancy.

30. Whilst the Parties had differing views around the friction arising from the log cutting incident outside the Property and there appeared to have been a minor disagreement over that, it was noted by the tribunal that the focus of this application was whether the Regulations were complied with. The Parties did not disagree with this approach. The tribunal makes no observations regarding the ancillary matters that are not directly relevant to this application.

Extract from the Regulations

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.*

(1A) Paragraph (1) does not apply—

- (a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and*
- (b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord, within 30 working days of the beginning of the tenancy.*

(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.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

- (a) the references to deposit were to each instalment of the deposit, and*
- (b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.*

(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]¹ 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 [...]2 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]1 —

(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and

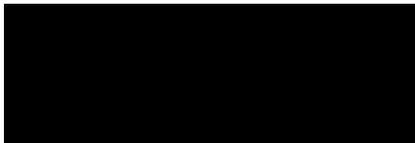
(b) may, as the [First-tier Tribunal]1 considers appropriate in the circumstances of the application, order the landlord to—

(i) pay the tenancy deposit to an approved scheme; or

(ii) provide the tenant with the information required under regulation 42.

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.



Susan Christie
Legal Member/Chair

16 November 2022
Date