



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

Chamber Ref: FTS/HPC/PR/21/0436

Re: Property at 89 Robertson Road, Dunfermline, KY12 0AR (“the Property”)

Parties:

Miss Danielle Paul, 23 Sunnybraes Terrace, Steelend, KY12 9NE (“the Applicant”)

Burnside Properties (Dundee) Ltd, Mr James Symons, 50 Dudhope Cres Road, Dundee, DD1 5RR; c/o Burnside Properties, 50 Dudhope Cres Road, Dundee, DD1 5RR (“the Respondent”)

Tribunal Members:

Graham Harding (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant was entitled to an order for payment by the Respondent in the sum of £700.00.

Background

1. By application dated 16 February 2021 the Applicant applied to the Tribunal for an order for payment by the Respondent under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 alleging that the Respondent had failed to place her deposit paid at the commencement of her tenancy of the property in an approved Tenancy Deposit Scheme in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicant submitted a copy of the tenancy agreement in support of the application. The Applicant submitted further documents in support of her application in response to queries from the Tribunal.

2. By Notice of Acceptance dated 18 March 2021 a legal member of the Tribunal accepted the application and a Case Management Discussion was assigned. Intimation was given to the Applicant by post and to the Respondent by Sheriff Officers on 26 March 2021.
3. The Applicant submitted further written representations by email dated 26 March 2021.
4. The Respondent's representatives, Burnside Properties (Dundee) Ltd submitted written representations by letter dated 9 April 2021.

The Case Management Discussion

5. A Case Management Discussion was held by teleconference on 28 April 2021. The Applicant attended personally. The Respondent did not attend but was represented by Ms Carla Ritchie from Burnside Properties (Dundee) Ltd.
6. By way of a preliminary matter the Tribunal confirmed with the Applicant that she understood that her application was in respect of a failure on the part of the Respondent to lodge her deposit in an approved tenancy deposit scheme and that she was asking the Tribunal to impose a financial sanction on the Respondent as opposed to claiming repayment of the deposit. The Applicant confirmed this was indeed the case. For the Respondent Ms Ritchie also confirmed that she understood that this was the basis of the application.
7. Ms Ritchie went on to explain that it was accepted by the Respondent that as a result of an error on his part the Applicant's deposit had not been lodged in an approved scheme. Ms Ritchie explained that she would normally have dealt with the handling of the deposit and was responsible for lodging deposits with a scheme. She went on to say that on this occasion it had been the Respondent himself who had met the Applicant to hand over the keys to the property and to collect the deposit. She said that due to an oversight on his part the deposit had remained in the company's business account throughout the tenancy.
8. In response to a question from the Tribunal Ms Ritchie advised that the Respondent owned approximately 10 properties in Dundee and Fife which he rented out and was also the owner of Burnside Properties (Dundee) Ltd. She thought that the Respondent had at least 15 years' experience as a landlord.
9. The Tribunal referred Ms Ritchie to the terms of the tenancy agreement and queried why it purported to be a Short Assured Tenancy when it had commenced on 20 January 2018 and after the coming into force of the Private Housing (Tenancies)(Scotland) Act 2016 on 1 December 2017. Ms Ritchie was unable to explain other than to say this had been another oversight.
10. The Tribunal then referred Ms Ritchie to the Clause in the agreement that dealt with the deposit in which it said that the deposit would be held in trust by the landlord. The Tribunal queried why there was no mention in the agreement to the deposit being placed in an approved scheme. Again, Ms Ritchie was unable

to explain this other than to say that the tenancy agreements now used were Private Residential Tenancy Agreements and did refer to the deposit being lodged in an approved scheme.

11. Ms Ritchie went on to say that neither the company nor the Respondent as an individual had been involved in any other Tenancy Deposit Scheme Regulations applications. She believed that at the time of handing over the keys to the property and collecting the deposit the Respondent had been about to leave the country and the handover had taken place early and because of this the normal procedures had not been followed.
12. The Applicant explained that she had been unaware it was a legal requirement for the landlord to lodge her deposit in an approved scheme until she became aware after the end of her tenancy. She said that because it had not been lodged her deposit had been unprotected throughout the whole of the tenancy and she had been deprived of using a scheme's dispute resolution service to challenge the deduction of £130.00 made from the deposit returned by the landlord.
13. Both the Applicant and Ms Ritchie agreed that the Tribunal had sufficient information before it to make a decision without the need for a hearing.

Findings in Fact and Law

14. The parties entered into a tenancy agreement that commenced on 20 January 2018 and ended on 17 December 2020 at a monthly rent of £350.00.
15. Although the tenancy purported to be a Short-Assured Tenancy as it was entered into after the coming into force of the Private Housing (Tenancies)(Scotland) Act 2016 it would have been deemed to be a Private Residential Tenancy.
16. The Applicant paid the Respondent a deposit of £350.00 on 18 January 2018.
17. The deposit ought to have been lodged in an approved tenancy deposit scheme within 30 working days of 20 January 2018 but the Respondent did not lodge the deposit in any approved scheme throughout the duration of the tenancy.
18. The Respondent did not provide the Applicant with the prescribed information as required by Regulation 42 of the 2011 Regulations.
19. The Respondent is in breach of Regulation 3 of the 2011 Regulations.
20. The Applicant submitted an application to the Tribunal in terms of Regulation 9 of the 2011 Regulations timeously.
21. The Tribunal must impose a sanction on the Respondent in terms of Regulation 10 of the 2011 Regulations.

Reasons for Decision

22. It was accepted that there had been a failure on the part of the Respondent to lodge the Applicant's deposit in an approved scheme for the duration of the tenancy. It was also accepted that the Applicant had paid a deposit of £350.00. It was also accepted that the Respondent had not complied with the terms of Regulation 42.
23. Regulation 9 requires that the Applicant make an application under Rule 103 within 3 months of the date of termination of the tenancy. It was accepted the tenancy ended on 17 December 2020 and therefore any application to the Tribunal would have to be made by 17 March 2021. The application was submitted on 16 February 2021 and is therefore timeous.
24. Where a Landlord is in breach of Regulation 3 and an application is made in terms of Regulation 9 then in terms of Regulation 10 the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the deposit. Accordingly, having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what penalty to impose having regard to the particular facts and circumstances of the case.
25. Any award under Regulation 10 requires to reflect a sanction which is fair and proportionate and just given the circumstances (*Jensen v Fappiano* 2015 GWD 4-89). In *Tenzin v Russell* 2015 Hous. L.R. 11 it was held that any payment in terms of Regulation 10 is the subject of judicial discretion after careful consideration of all the circumstances of the case
26. The Tribunal took into account that the Applicant's deposit had remained unprotected for a period of just under three years. It also acknowledged that as a result of the deposit not being lodged in an approved scheme the Applicant was denied the opportunity of availing herself of a scheme's alternative dispute resolution service to challenge the deduction made by the landlord from the deposit. Whilst the Tribunal accepted that this was the first occasion on which the Respondent had been taken to a Tribunal for a breach of the 2011 Regulations it did have concerns as regards the wording of the deposit clause in the tenancy agreement some six years after the coming into force of the regulations particularly given that the Respondent is a professional landlord running a property letting business. The Tribunal considered it was entitled to expect higher standards from someone in the Respondent's position. The Tribunal did however accept that the failure to lodge the deposit in an approved scheme appeared to be due to an oversight rather than a wilful failure and for that reason determined that it should not impose a sanction at the upper end of the scale. However, this was by no means a minor breach and accordingly determined that an appropriate sanction would be to award the Applicant an amount equivalent to two times the deposit namely £700.00.

Decision

27. The Tribunal finds the Applicant entitled to an order for payment by the Respondent in the sum of £700.00.

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.

**Graham Harding
Legal Member/Chair**

**28 April 2021
Date**