



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/2242

Re: Property at 112/3, Restalrig Road, Edinburgh, EH7 6UN (“the Property”)

Parties:

Miss Flora Machaira, 10/10 Murdoch Terrace, Edinburgh, EH11 1AZ (“the Applicant”)

Mr James Anderson, whose current whereabouts are unknown (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

This is an application dated 17th July 2019 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* (“the 2011 Regulations”).

The Applicant seeks payment of compensation in respect of an alleged failure by the Respondent to pay the deposit she originally asserts she provided of £1,175.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

The Applicant provided with her application copies of the lease agreement, various e-mail messages between her and the Respondent's representative, Conrad King, in which Mr King clearly accepts and acknowledges that the deposit of £1,175.00 was paid by her, and correspondence from the three tenancy deposit schemes confirming that none of them held her deposit.

The Respondent could not be validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal, as though he is named on the lease agreement as landlord, the Applicant has never been provided with his address or contact details despite requesting these from Mr King, and his current whereabouts are unknown.

Service was validly effected by advertisement in terms of Rule 6A of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, and the Tribunal was provided with the Certificate of Service by advertisement.

The Case Management Discussion

A Case Management Discussion was held on 27th September 2019 at George House, 126 George Street, Edinburgh. The Applicant appeared, and was not represented. The Respondent did not appear, nor was he represented. The Respondent has not responded to this application at any stage either in writing or by any other form of communication.

The Applicant explained that she had never met the Respondent, nor been given his address or any contact details, despite asking Mr King for them.

She had been shown the Property by Mr King, who said he acted for the Respondent. She made all payments to Mr King. Her only contact details for Mr King was his e-mail address.

She and two friends had signed the short assured tenancy agreement on 14th September 2018, and had quit the Property in late June 2019.

The Tribunal noted that short assured tenancy agreements could not be validly created after 1st December 2017, and that accordingly this agreement was in law deemed to be a private residential tenancy.

The Applicant had asked for return of her deposit by e-mail correspondence with Mr King. He accepted that it should be repaid, but the Applicant has only been repaid £755.00.

Mr King asserted in his e-mails with her that the balance was being retained by the landlord in respect of cleaning and repair costs, which costs the Applicant vigorously disputes.

After the Applicant queried and disputed this deduction, Mr King thereafter ceased to respond to any communications by e-mail from the Applicant.

The Applicant subsequently made enquiries with the three tenancy deposit schemes, who confirmed that none of them had any record of her deposit being lodged.

The Applicant had also checked the Register of Landlords, and found that the Respondent was not registered. The Tribunal had also checked the Register and confirmed that the Respondent is not registered thereon.

The Applicant sought payment of compensation in respect of the Respondent's failure to lodge her deposit in an approved scheme.

Reasons for Decision

This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

- “(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.”

The Respondent as landlord was required to pay the deposit into an approved scheme. He failed to do so.

Regulation 10 of the 2011 Regulations provides as follows:

- “If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal -
- (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 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.”

The Tribunal is satisfied that the Respondent did not comply with his duty under regulation 3, and accordingly it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached

thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the fact that the Respondent appears to have failed to comply with important legal obligations incumbent on a landlord.

The Respondent prepared and signed a short assured tenancy agreement, a form of lease which is no longer valid since 1st December 2019. He is an unregistered landlord, which is a criminal offence if entering into a lease such as this with a tenant. He has failed to lodge the deposit with an approved scheme, in terms of the regulations incumbent upon him. The Applicant has been unable to make contact with him or his agent, the latter of whom does not respond to her communications concerning this matter.

The 2011 Regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease. The period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (just over one year to today's date).

The Tribunal considered the Respondent's breach to be flagrant, and in these circumstances, the Tribunal considers that the sum of £3,525.00 (three times the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

For the foregoing reasons, the Tribunal orders the Respondent in respect of his breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £3,525.00 in terms of Regulation 10(a) of the 2011 Regulations.

The Tribunal will also report the Respondent's failure to register himself as a landlord on the Register of Landlords to the appropriate authorities.

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.

Neil Kinnear

Legal Member/Chair

3rd October 2019

Date