



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

Chamber Ref: FTS/HPC/PR/21/3116

Re: Property at 11 Hamilton Wynd, Edinburgh, EH6 4EH (“the Property”)

Parties:

Mr Mamadou Diop, Flat 35A, Allerton House, Provost Estate, London, N1 7QX (“the Applicant”)

Ms Ashley Liu, 87 Moredun Park Gardebs, Edinburgh, EH17 7LQ (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member) and Ahsan Khan (Ordinary Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £ 960 should be made in favour of the Applicant.

Background

1. The Applicant seeks an order in terms of Regulations 9 and 10 of the 2011 Regulations. Two related applications were also submitted to the Tribunal under Chamber references CV/21/3117 and PR/21/3115. Various documents were lodged in support of the applications including a copy private residential tenancy agreement, Notice to Leave, emails from the three Tenancy Deposit Schemes and copies of emails between the parties.
2. The parties were notified that a case management discussion (“CMD”) would take place by telephone conference call on 29 March 2022 at 10am. They were provided with the telephone number and passcode and information about how to join the call. Prior to the CMD the Respondent lodged written submissions and documents. The CMD took place by telephone conference call on 29 March 2022 at 10am. The Respondent participated. The Applicant did not participate. The Legal Member advised the Respondent that the Tribunal Clerk had

contacted the Applicant. He was travelling and was unable to dial into the conference call. He thought that the Tribunal would call him. He requested a postponement of the CMD. Having regard to the overriding objectives of the Tribunal, the Legal Member determined that it would be in the interests of justice to postpone the CMD to another date so that the Applicant could arrange to participate.

3. The parties were advised that a CMD would take place on 24 May 2022. At the request of the Respondent, it was postponed to 1 September 2022 and then again to 15 September 2022. The CMD took place on 15 September 2022 at 2pm. The Applicant participated. The Respondent was represented by her mother, Ms Lui, as the Respondent was unavailable
4. At the CMD, the Legal Member noted that the Applicant had lodged emails from all three tenancy deposit schemes which appeared to confirm that the deposit was not lodged in an approved scheme. Ms Lui said that Mr Diop had been difficult from the start of the tenancy, especially in relation to utility bills. He was using additional heaters and the bills were mounting up. The Respondent became concerned that the deposit would not cover these. When asked if she accepted that the deposit had not been lodged in an approved scheme, Ms Lui said that she was not able to answer that. The Legal Member referred to the evidence lodged by Mr Diop and advised parties that it would be for the Respondent to demonstrate that the deposit had been lodged.
5. The Legal Member determined that the application should proceed to a hearing and issued a direction to the parties for the production of information and documents. The parties were notified that the hearing would take place by telephone conference call on 29 November 2022 at 10am.
6. Prior to the hearing both parties lodged written representations and documents. The Applicant provided some email correspondence between himself and the Respondent and a letter from the Local Authority in relation to a complaint/enquiry he had submitted. On 26 November 2022 he lodged a submission which stated that he had paid the rent for November. He also stated that he had experienced emotional distress, that there was no lock on his bedroom door or the bathroom door at the property, that the Respondent was not fit to be a landlord and was targeting foreign tenants to extort money from them. He added that he was requesting a copy of the BULB bill, that he had corresponded with the Local Authority and that the Landlord had failed to arrange a cleaner for the property. He also stated that there were often strangers in the house, that there were two tenants there when he moved out, that the heating did not work, that he had been evicted during the pandemic and had to move back to London as he could not obtain accommodation in Edinburgh at short notice. The Respondent stated that the deposit had not been lodged in a scheme as Mr Diop told her that he would only be staying for a short time. Not long after he moved in, there were issues with his heating, and he refused to pay any bills. She felt that the deposit would cover these as the

consumption was high. She provided some information about the complaints made about the heater and the steps she took to address the matter

7. On 28 November 2022, the Applicant notified the Tribunal that he was having problems with his phone. He did not request a postponement of the hearing. Prior to the hearing the Applicant was notified that he could dial in early to the call to check that he was able to join the call. He was also notified that the hearing would proceed in his absence if he did not request a postponement. No further communication was received.
8. The Hearing took place by telephone conference call in relation to the application and the two related applications. The Respondent participated. The Applicant did not participate.

The Hearing

9. Ms Lui told the Tribunal that the deposit of £480 had not been lodged in an approved scheme. She stated that Mr Diop told her that he was only intending to live at the property for a short period of about three months as he was not sure about the area. Although the deposit was discussed, and she explained it would be used to cover unpaid bills, they did not discuss whether the deposit would be lodged in a scheme. Ms Lui confirmed that the tenancy agreement specifically states that it would be lodged with Safe Deposit Scotland.
10. In response to questions from the Tribunal, Ms Lui said that she purchased the property in 2019 and lived there for a while. She then decided to convert the mortgage to a buy to let mortgage. Mr Diop was the first tenant at the property, with another tenant (the second tenant) moving in on 26 September. After she moved out on 31 October 2021, a friend of a friend (the third tenant) moved in for an agreed short term let until 9 December 2021. The second tenant was not asked to provide a deposit. Mr Diop was asked for a deposit because he insisted on a formal tenancy agreement. The second tenant did not want this. The third tenant provided a very small deposit. This was not lodged in a scheme and was returned to him in full.
11. Ms Lui said that she only owns one property, the subject of the applications. There are no tenants in the property at the present time. It is a three-bedroom house although one of the rooms is little more than a box room. Mr Diop occupied a full-size double bedroom upstairs. The house has been unoccupied since the tenants moved out.

Findings in Fact

12. The Respondent is the owner and former landlord of the property

13. The Applicant paid a deposit of £480 prior to the start of the tenancy on 21 August 2021.
14. The tenancy terminated on 29 November 2021, following service of a Notice to Leave on the Applicant.
15. The deposit paid by the Applicant was not lodged by the Respondent in an approved tenancy deposit scheme.
16. The deposit paid by the Applicant was not repaid to him at the end of the tenancy.

Reasons for Decision

17. Regulation 3 of the 2011 Regulations states –
 - (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.
18. The Tribunal is satisfied that the Applicant's tenancy is a relevant tenancy in terms of the 2011 Regulations and that a deposit of £480 was paid and not lodged in an approved deposit scheme within 30 days of the start of the tenancy. The Tribunal notes that the application was lodged with the Tribunal between 15 and 21 December 2021. The Applicant has therefore complied with Regulation (9)(2) of the 2011 Regulations, which requires an application to be submitted no later than 3 months after the tenancy had ended.
19. Regulation 10 of the 2011 Regulations stipulates that if the Tribunal is satisfied that the landlord did not comply with a duty in terms of regulation 3, it “**(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.**” The Tribunal therefore determines that an order must be made in favour of the Applicant.
20. The Applicant did not participate in the hearing. Although he lodged some written submissions and documents, these do not appear to be relevant to this

application but instead address some of the issues raised in the related applications. The Tribunal therefore did not hear evidence from the Applicant in relation to the impact of the Respondent's failure to comply with the regulations. From the documents lodged with the application, and the Respondent's evidence and submissions, the Tribunal noted the following: -

- (a) The deposit was not returned to the Applicant at the end of the tenancy and, as it was not secured in a deposit scheme, the Applicant was deprived of the opportunity to use the scheme's adjudication process.
- (b) The tenancy only lasted three months. The deposit was therefore unsecured for a relatively short period of time.
- (c) The tenancy contract specifically states that the deposit would be lodged with Safe Deposit Scotland. It is assumed that the Applicant relied on this clause.
- (d) The Respondent made a deliberate and conscious decision to retain the deposit. The failure to comply with the regulations was not the result of oversight or ignorance of her obligations.
- (e) From the information available, it appears that the Respondent was an inexperienced landlord when the tenancy started.

21. In addition to the failure to lodge the deposit, the Tribunal noted several other irregularities in the way the Respondent managed the lease of the property. In terms of the 2016 Act, tenants who share a property in terms of a private residential tenancy (whether this is in writing or otherwise) are joint tenants. In this case, only the Applicant was issued with a proper tenancy agreement. The others had more informal arrangements for short, fixed term stays at the property, although Landlords are not entitled to impose a term on tenants under the 2016 Act. The other tenants moved in and out on different dates and times and the Applicant was not consulted (and did not agree) to the tenancy being amended to include them or release them. When the Notice to leave was issued, it was only given to the Applicant, although there was another tenant in the property at that time. It is therefore evident that the Respondent had a somewhat casual attitude to her responsibilities as landlord and the rules and regulations which apply to renting property.

22. The Tribunal is also not persuaded by the reasons provided for the failure to lodge the deposit. A Landlord is required to do this at the beginning of the tenancy. There was no evidence provided that the Applicant told the Respondent that he was not prepared to pay for electricity, before or after he moved in. He may have expressed concern that the account was to be in his name, although other people also lived in the property. The fact that he also made complaints about his heating and other tenancy issues is also irrelevant. The purpose of the Regulations is to ensure that deposits are protected and, where there is a dispute, to ensure that an independent third party can decide whether it is to be returned or otherwise.

23. In the case of *Rollett v Mackie* (2019 UT 45), the Upper Tribunal refused an appeal by the Applicant who argued that the maximum penalty ought to have been imposed. Sheriff Ross commented that the “level of penalty requires to reflect the level of culpability” and that “the finding that the breach was not intentional...tends to lessen culpability” (13). He goes on to say, “Cases at the most serious end of the scale might involve repeated breaches against a number of tenants, fraudulent intention, deliberate or reckless failure to observe responsibilities, denial of fault, very high financial sums involved, actual losses caused to the tenant.”
24. In the present case, the only aggravating factors established are that the Respondent deliberately chose to retain the deposit and that the Applicant may have experienced financial loss. The Respondent admitted that she had also failed to lodge the deposit paid by the third tenant. However, as he only stayed for a month, and if the deposit was returned in full, she could have relied on Regulation 17(1)(A). It was not established that there had been repeated breaches and the Respondent did not deny that she was at fault. In the circumstances, and having regard to the factors in paragraph 20, the Tribunal is satisfied that the breach warrants the imposition of a relatively high penalty. The sum of £960, being twice the deposit, is awarded to the Applicant.

Decision

25. The Tribunal determines that an order for payment of the sum of £960 should be made in favour of the Applicant.

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.

Josephine Bonnar

Josephine Bonnar, Legal Member

5 December 2022