

Housing and Property Chamber
First-tier Tribunal for Scotland



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/18/2669

Re: Property at 3 Crossveggattes, Milngavie, G63 6RA (“the Property”)

Parties:

Ms Verlaine McKay, Flat 20 Oakburn Garderns, 1 Oakburn Avenue, Milngavie, G627NQ (“the Applicant”)

Mr Brian Girvan, 22 Hunter Road, Milngavie, G62 7PX (“the Respondent”)

Tribunal Members:

Lesley Johnston (Legal Member)

Decision in the absence of the Applicant

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent as landlord for the property at 3 Crossveggattes, Milngavie, G63 6RA did not comply with Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and makes an order for the Respondent to pay to the Applicant the sum of five hundred and thirty pounds (£530).

Background

The Applicant applies to this Tribunal in terms of Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (‘the Regulations’). The application is made to the Tribunal in terms of rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules for Procedure) Amendment Regulations 2017 (‘the Rules’).

The Applicant seeks an Order for Payment from the Tribunal in terms of regulation 10 in respect that the Respondent failed to pay the tenancy deposit into an approved tenancy deposit scheme.

The Case Management Discussion

The case called on 28 November 2018 at 10am for a Case Management Discussion.

The Respondent was in attendance at the hearing. The Respondent was represented by Mr Doull, Solicitor of Brunton Miller Solicitors.

The Applicant was neither present nor represented.

The Tribunal was satisfied that notice of the hearing was provided to the Applicant by letter dated 6 November 2018. Accordingly, the Tribunal proceeded with the hearing in the absence of the Applicant in terms of Rule 29.

The following documents were lodged by the Applicant in respect of the application:

1. Application form dated 9 October 2018 and received by the Tribunal on 9 October 2018;
2. Tenancy Agreement between Brian Girvan (Landlord) and Verlaine McKay (Tenant) dated 22 May 2017 in respect of the property at 3 Crossveggates, Milngavie, Glasgow, G62 6RA;
3. Email from the Applicant to the Respondent dated 1 September 2018;
4. Email from the Applicant's son (Brad McKay) to the Respondent dated 4 September 2018;
5. Email from the Applicant's son to the Respondent dated 8 September 2018
6. Email from the Respondent to the Applicant dated 11 September 2018;
7. Email from the Respondent to the Applicant's son dated 16 September 2018;
8. Email from the Applicant's son to the Respondent dated 17 September 2018.

Submissions for the Respondent

By letter dated 21 November 2018 the Respondent's representative lodged written submissions with the Tribunal.

The written representation accepted that the Respondent had failed to register the tenancy deposit into an Approved Scheme and had failed to register himself as a Landlord, the latter of which had since been rectified.

The written representation sought to argue that the Applicant was personally barred from making the application under the Regulations in light of the fact she had agreed that the deposit should be applied to the final month's rent.

At the hearing, Mr Doull accepted that personal bar did not arise in relation to the Regulations and made no further submission in that respect.

Mr Doull provided a detailed written submission; list of authorities and an inventory of productions containing the Respondent's bank statements from June 2018 to October 2018. He made the following submissions.

The Respondent received a deposit of £530 at the outset of the tenancy around 22 May 2017 which he had not paid into an Approved Scheme. He accepted that the deposit was unprotected for the entire duration of the tenancy (22 May 2017 to 29 September 2018).

The Respondent accepted that he had breached his duty under the Regulations and that in the circumstances Regulation 10 was engaged.

In considering what level of payment the Tribunal should order to be paid by the Respondent, Mr Doull asked that the Tribunal take into account that the Respondent was an amateur Landlord and had breached the Regulations through oversight. The lease with the Applicant was his experience as a Landlord. He purchased the property by way of an investment following his divorce around two and half years ago.

The documentation constituting the lease between the parties was a pre-printed lease pack and was provided by the Applicant. There is no reference in the lease to the requirement to pay the deposit into an Approved Scheme.

When the Applicant gave notice of her intention to leave the property, it was agreed that the deposit would be applied to the last month's rent. While Mr Doull accepted that was not relevant in terms of whether or not the Respondent had breached his duty under Regulation 3, he invited the Tribunal to take into account in determining the level of Order under Regulation 10 that the Applicant had not lost her deposit.

Mr Doull submitted that the Respondent had learned from his mistake. He has since appointed a professional Letting Agent in respect of the property. He had also sought advice from Brunton Miller, Solicitors.

Mr Doull submitted that the level of sanction imposed by the Tribunal under Regulation 10 should be "fair, proportionate and just" having regard to the purpose of the regulations and the gravity of the breach (*Kirk v Singh* 2015 SLT (Sh Ct) 111; and *Jenson v Fappiano* 2015 SCEDIN 6). He submitted that each case required to turn upon its own facts (*Russell-Smith & Others v Uchegbu* [2016] SC Edin 64 at para 8). He submitted that the Tribunal ought to take account of these cases and referred to two decisions of the First-tier Tribunal Housing and Property Chamber (FTS/HPC/PR/18/1958 and FTS/HPC/PR/18/1862) in which these cases had been considered.

In Mr Doull's submission, a fair, proportionate and just approach in the circumstances of this case would be a sanction akin to that imposed by the court in *Jenson v Fappiano* in respect that the Landlord in that case was an amateur who had breached the regulation by ignorance. In that case, the court had awarded a sanction amounting to one third of the deposit.

Findings in Fact

1. The Applicant and Respondent entered into an assured tenancy in respect of the property at 3 Crossveggattes, Milngavie, Glasgow, G62 6RA on 22 May 2017;

2. The Applicant paid a deposit of £530 to the Respondent on or around 22 May 2017;
3. The Respondent did not pay the deposit into an Approved Tenancy Deposit Scheme;
4. The Applicant gave notice of her intention to terminate the lease on 1 September 2018;
5. The lease ended by agreement between the parties on or around 29 September 2018 when the Applicant moved out of the property;
6. The parties agreed that the deposit would be applied to the final month of rent for the property;
7. The Applicant applied to this Tribunal for an Order under Regulation 10 on 9 October 2018;
8. The Respondent is not a local authority, registered social landlord or Scottish Homes;
9. The Applicant and Respondent are not related

Reasons for Decision

The tenancy is a 'relevant tenancy' for the purposes of regulation 3.

The Applicant made an application to the Tribunal timeously in terms of regulation 9, having lodged the application not later than three months after the tenancy ended.

The Tribunal is satisfied that the Landlord did not comply with his duty under regulation 3. The Respondent was candid in his acceptance of his breach by failure to lodge the deposit into an Approved Scheme.

In terms of Regulation 10, the Tribunal must therefore order the Landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit (Regulation 10(a)).

The Tribunal has taken into account the Respondent's submissions and all of the authorities referred to by the Respondent.

The Tribunal has an "unfettered discretion" as to the level of penalty to be paid under regulation 10(a) (see *Fraser and Pease v Meehan* (2013 SLT (Sh Ct) 119 per Sheriff Mackie at p 121). The Tribunal is also mindful of the need to proceed in a manner that is fair, proportionate and just having regard to the circumstances of the cases including the seriousness of the breach and the purpose of the regulations (see *Tenzen v Russell* 2014 GWD 4-90; *Kirk v Singh* 2015 SLT (Sh Ct) 111; *Jenson v Fappiano* 2015 SCEDIN6).

The Tribunal has taken into account that the Respondent has, from the outset of these proceedings, accepted his breach of the Regulations. This was the Respondent's first experience of acting as a Landlord. The Tribunal accepts that the Respondent's breach of the Regulations was due to ignorance of the rules rather than a wilful breach. The Tribunal has taken into account that the Respondent has since appointed a Letting Agent in respect of the property and sincerely regretted the situation he had found himself in.

The Tribunal is also mindful of the purpose of the Regulations. The Regulations were introduced in order to protect the tenancy deposit throughout the duration of the tenancy and for parties to have access to the dispute resolution procedure should any issues arise on termination of the lease. Amateur landlords are not exempt from compliance from the regulations.

In this case, no issues arose such as to require to the dispute resolution service and the deposit was, by agreement, appointed by the Landlord to the final month's rent. However, that does not escape the fact that for the entire duration of the tenancy (May 2017 to September 2018) the deposit was unprotected and exposed to potential risk for the entire period of the tenancy.

The maximum penalty which may be imposed by the Tribunal is three times the deposit (£1,590). In all the circumstances of the case, the Tribunal exercises its discretion and orders the Respondent to make payment of the sum of £530, being a sum equal to the tenancy deposit. The Tribunal considers that a payment equal to the tenancy deposit is fair, proportionate and just in all the circumstances of the case.

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.

L Johnston

Legal Member

Date

28/11/18