

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 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3861

Re: Property at 39D High Street, Banchory, Aberdeenshire, AB31 5TJ (“the Property”)

Parties:

Miss Holly Lawrie, Mr Liam Hamilton Lloyd, 16 Station Court, Banchory, Aberdeenshire, AB31 5WT; 5 Joss Court, Bridge of Don, Aberdeen, AB23 8FP (“the Applicant”)

Mr Scott McCombie, Ms Lisa McCombie, Fasgadh, Dungeith Avenue, Banchory, Aberdeenshire, AB31 5UA (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £1,300 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011(the Regulations) should be made.

BACKGROUND:

1. On 26 November 2019 the Applicants applied under Rule 103 of the First tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure (the Rules) for payment under Regulation 10 (a) of the Regulations.
2. The Applicant submitted to the Tribunal tenancy agreement for the tenancy commencing on 22.11.2018, list of grievances of the Applicants against the Respondents, correspondence between the Respondents and the Applicants between 29.10.2018 and 7.11.2018, 20.4.2019, 23.7.2019 to 26.7.2019, 15.12.2018 to 16.12.2018, 21.3.2018 to 24.4.2018, 22.10.2019 to 1.11.2019, email from SafeDeposit Scotland.

3. The Respondents lodged written representations and copies of invoices regarding repairs to PVC cills and patio door from Alan Buchan dated 29 January 2019 and regarding paint work from John Watson dated 29 November 2019. The Applicant Holly Lawrie lodged a further reply to the Respondent's representations on 23 February 2020. All documents are referred to for their terms and held to be incorporated herein.
4. A Case Management Discussion (CMD) was fixed for 27 February 2020. All parties attended. Ms Lawrie's father attended as supporter.
5. Both parties had been advised in the notification for the Case Management Discussion that the Tribunal may make a decision at that stage. The legal member explained the provisions under rules 17 and 18 of the Rules and both parties were aware that a decision could be made at the CMD.
6. The legal member explained at the start of the CMD that the only issue before the Tribunal at this stage is the issue of whether or not the requirements in the Regulations regarding the tenancy deposit had been complied with. This would not include the issue of repayment of the deposit and any other grievances raised between the parties.

The Case Management Discussion:

7. The parties stated that they agreed the tenancy had commenced on 22 November 2018 and ended on 22 October 2019. They agreed that a deposit of a total of £725 had been paid by the Applicants. Ms Lawrie had paid her share during a prior tenancy commencing December 2017 with another tenant and Mr Hamilton Lloyd had paid his share at the start of the current tenancy on 22 November 2018. The Applicants had made enquiries with all 3 registered deposit schemes and none had the deposit registered. In December 2017 a deposit account had been opened for the property and in the names of Ms Lawrie and her former co-tenant but no deposit had been paid in and there were no deposit accounts for the Applicants and the property anywhere else. The Respondents own 4 properties in the same block.
8. The Respondents do not dispute the deposit had been paid to them by the tenants and admitted that the deposit had not been paid into a registered scheme since the start of the tenancy. They explained that there had been a lot going on and due to Mr McCombie working full time and the family having had a new baby they had probably taken on too much and not lodged the deposit. Mrs McCombie said that after the baby arrived, she had been struggling a bit. Both confirmed that they had taken the deposit for Ms Lawrie in December 2017 and not paid it in at that time and then received the other half of the deposit for the tenancy relevant to this case in November 2018 and not paid that in either. They agreed that they had a total of 4 properties. Two had been rented out since 2016. The stated that for one tenancy they had paid the deposit in correctly, some others had not paid a deposit and for the

current tenants the deposits had been lodged. They further stated that the deposit funds had been paid into their normal bank account and not kept separately and that the funds had been used to pay for the two invoices they had submitted in evidence. They stated they had planned to lodge the deposit but simply not done so and had admitted that in their written representations. They had made a mistake and had not fully appreciated the issues regarding the Regulations.

9. Ms Lawrie stated she had not questioned the deposit as she had seen that the lease stated where the deposit would be lodged and in a previous tenancy, she had received her full deposit back with no problems. It was only after the end of the tenancy when the Respondents sent the messages regarding repairs they considered had to be carried out she enquired with all 3 deposit schemes and found out the deposit had not been lodged anywhere. She got advice from Citizen's advice. There is a dispute between the Applicants and the Respondents regarding the quotes for repairs given by the Respondents in the messages of 1 November 2019. She argued that the Respondents had various properties and that they had not complied with the obligations during both her tenancies. She considered any sanction should exceed the deposit amount.
10. Neither party considered that a hearing was required as the material facts of the case were undisputed and both parties were content for a decision to be made at the CMD.

The legal test:

11. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
12. In terms of Regulation 10 "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."
13. In terms of Regulation 3 "(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

Findings in fact:

- I. The Applicant and the Respondent entered into a Private Residential Tenancy Agreement for the property on 22 November 2018.

- II. The Respondents are the landlords stated in the Tenancy Agreement
- III. The Applicants paid a deposit of £725 to the Respondents
- IV. The deposit was not lodged with an approved scheme at any point.
- V. The tenancy ended on 22 October 2019.
- VI. The tenancy agreement stated that the deposit would be held by SafeDeposit Scotland and gives the address for the scheme in clause 10.
- VII. There is now a disagreement on the return of the deposit
- VIII. The Respondent have 4 rental properties and have been renting out property since 2016.
- IX. They manage the properties themselves without assistance from professionals.
- X. The Respondents were aware of the Tenancy Deposit Regulations and the Private Housing (Tenancies) (Scotland) Act 2016 and had opened an account with SafeDeposit Scotland for the property for a previous tenancy but not paid the deposit into the account.
- XI. The deposit funds were paid into the normal day to day account of the Respondents
- XII. The deposit has not been returned.
- XIII. It was used to pay decorating and repair invoices for the property, which are disputed by the Applicants
- XIV. The Respondents had some family issues at the time of the commencement of the tenancy.

Reasons for Decision:

- 14. The tribunal considers that the Respondents did not comply with the requirements of Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
- 15. The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement on 22 November 2018 and remained unprotected for the entire duration of the tenancy.
- 16. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the rules. The non-compliance with the Regulations is not disputed by the landlord.
- 17. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
- 18. The Tribunal considers that the discretion of the Tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015 by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.

19. This is a clear breach of the Regulations. The Tribunal took into account the length of time the deposit was unprotected, which is the entire period of the tenancy, the fact that the Respondents stated they were aware of the Tenancy Deposit Scheme and had not used it for the tenancy, the fact that the Respondents had been letting property for a considerable time and were aware of the mechanism of lodging the deposit. and that ultimately the action of the Respondents meant that the Applicants did not have access to the dispute resolution mechanism and would have to raise a separate civil action if they wished repayment of the deposit. The funds have been mixed with the Respondents' own funds and used to pay for repairs, the necessity of which is disputed by the Applicants. This is exactly the situation the Regulations sought to avoid.
20. It must be made clear to the Respondents that if they chose to let out property on the private rental market, they have an obligation to inform themselves about the legal framework in which they operate. It is not enough to be vaguely aware of the existence of Tenancy Deposit Scheme and to collect deposit funds from tenants and then not follow through with the obligations clearly stated in their own tenancy agreement. The Tenancy Deposit Schemes (Scotland) Regulations 2011 are legally binding and have been in force for 9 years. It is deeply concerning for the Tribunal that the Respondents frankly admit to not having used the scheme for this property whilst having been active as landlords for Ms Lawrie since 2017 for two separate lease periods. It is their responsibility to know what obligations they have and to ensure that these are adhered to even if they deal with the rental properties themselves. If they chose to act as landlords they have to put mechanisms in place to ensure they are reminded of their obligations to lodge the deposit funds even if there are stressful situations at home.
21. On the other hand the Tribunal also took into account that the Respondents admitted the breach as soon as they were aware of the application and have given an explanation in mitigation, which evidenced to the Tribunal that this was not a case of deliberate defiance of the Regulations.
22. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £1,300 which reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

- 23. The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £1,300 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**

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.

P. Hennig-McFatrige

Legal Member/Chair

27.2.2020

Date