



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

Chamber Ref: FTS/HPC/PR/22/3833

Re: Property at 12 Lintwhite Court, Bridge of Weir, PA11 3NW (“the Property”)

Parties:

Dr Andrew Tait, Miss Catriona Lockie, 0/2, 1 Greenlaw Avenue, Paisley, Renfrewshire, PA1 3RB (“the Applicant”)

Ms Ashley Martin, UNKNOWN, UNKNOWN (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined to grant an order against the Respondents for payment to the Applicant of the sum of £3,577.50 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

- 1.** This is an application under Rule 103 of the Procedural Rules and Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations). The application was made by the Applicants on 17.10.2022.
- 2.** The following documents were lodged in support of the application:
 - a)** Tenancy agreement
 - b)** Deposit payment screenshot
 - c)** Email exchange between parties 29.7.2022 to 9.10.2022
 - d)** Deposit scheme replies
 - e)** Timeline of events document
 - f)** Rightmove screenshot
- 3.** The application was accepted on 1 November 2022. A Case Management Discussion (CMD) was scheduled for 8.2.2023. Service by Sheriff Officers

failed. The CMD was re-scheduled for 27.3.2023 by teleconference. The application and CMD notification was served on the Respondent by Service by Advertisement on 21.2.2023 and notification of Service by Advertisement emailed to the available email address for the Respondent on that day. The Tribunal was satisfied that the Respondents had the required notice of the CMD as set out in Rules 17 (2) and 24 (2) of the Procedural Rules.

4. No formal representations were received from the Respondent.

B: THE CMD

1. Only the Applicants took part in the CMD.
2. The legal member explained the purpose and process of the CMD.
3. Dr Tait and Ms Lockie confirmed that they had paid the deposit of £1,192.50 to the Letting Agents as required. The address for the Respondent was taken from the Landlord register and was clearly no longer correct. They had not received any further contact from the former landlord. They had not received the deposit back. They had checked with all three deposit schemes and all advised them no deposit was lodged. The tenancy ended on 24.9.2022. When they had queried this with the former landlord, the former landlord had become quite threatening. She advised them she wished to sell the property. The Applicants stated this was clearly not the case as they saw the property advertised for rent at a higher rate just after they moved out. They had not been provided with any information about the deposit being registered and when they met the previous tenant by chance had been told there had been similar problems for the previous tenant as well.

C: THE LEGAL TEST

1. 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.
2. 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.”
3. 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; (b) provide the tenant with the information required under regulation 42.

4. Relevant procedural legislation:

In terms of Rule 17 of the Rules of Procedure:

Case management discussion

17.—(1) The First-tier Tribunal may order a case management discussion to be held—

(a) in any place where a hearing may be held;

(b) by videoconference; or

(c) by conference call.

(2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.

(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, including by—

(a) identifying the issues to be resolved;

(b) identifying what facts are agreed between the parties;

(c) raising with parties any issues it requires to be addressed;

(d) discussing what witnesses, documents and other evidence will be required;

(e) discussing whether or not a hearing is required; and

(f) discussing an application to recall a decision.

(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.

Power to determine the proceedings without a hearing

However, in terms of Rule 18 of the Rules of Procedure:

18.—(1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and

(b) must make a decision without a hearing where the decision relates to—

(i) correcting; or

(ii) reviewing on a point of law,
a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties

D: FINDINGS IN FACT

Based on the documents and the discussion at the CMD the Tribunal makes the following findings in facts:

1. The deposit of £1,192.50 was paid by the Applicants to the Respondent's Letting Agent on 7.7.2022.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 29.7.2022.
3. In terms of Clause 11 the landlord is obliged to lodge the deposit with a registered scheme. The deposit is ££1,192.50. No scheme was specified in the tenancy agreement.
4. The tenancy ended on 24.9.2022.
5. On 2.8.2022 the tenants initially asked for information as to which deposit scheme the deposit was lodged in. This information was never provided.

6. The deposit was not lodged with a tenancy deposit scheme and remained unprotected for the whole duration of the tenancy.
7. None of the information required in terms of Regulation 42 was provided to the Applicants by the Respondent.
8. The dispute resolution service of a deposit scheme was not available to the Applicants at the end of the tenancy when the deposit was not returned to the Applicants.
9. The Respondent had not updated her details in the landlord register.
10. The property had previously been rented out.

E: REASONS FOR DECISION:

1. The Tribunal did not consider that there was any need for a hearing as there had been no representations from the Respondent and thus the facts of the case are not in dispute.
2. The Tribunal makes the decision on the basis of the documents lodged by the Applicants and the information provided by the Applicants at the CMD.
3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.
4. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £1,192.50 would thus be £3,577.50
5. 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.
6. 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. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "repeated and flagrant non participation in , on non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale"..It was held that "Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances..."

7. In the case before the Tribunal there is a clear breach of the Regulations. The deposit was not lodged within 30 working days as required by Regulation 3 and the information in terms of Regulation 42 had not been provided to the Applicant, despite the Applicants querying this with the Respondent during the tenancy. The Tribunal is satisfied that the deposit had been unprotected for the whole duration of the tenancy.
8. The Applicants had queried the lodging of the deposit during the tenancy with the Respondent and despite this the deposit had not been lodged and the Applicants had not been provided with the information required under the Regulations. The deposit had not been lodged by the letting agent or the Respondent at any point and has not been returned at the end of the tenancy. The Applicants were deprived of the opportunity to make use of the dispute resolution service of the deposit schemes and had to apply to the Tribunal regarding the return of the deposit. This is the very situation the Regulations seek to prevent.
9. The Respondent has not updated the relevant records with the landlord registration body to allow the Applicants and the Tribunal to contact her at her actual address.
10. The Respondent has not engaged at all in the Tribunal process and has provided no information which would explain her conduct. There are no mitigating factors to take into account. The Respondent clearly was not an inexperienced landlord and had let the property previously. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal considers that the failure to comply with the Regulations in this case warrants a penalty at the highest end of the scale as this is a flagrant and not an accidental non compliance with the Regulations, which has deprived the Applicants from the protection of the deposit scheme facilities and has necessitated the Applicants having to make two applications to the Tribunal. 6 months after the end of the tenancy the Applicants still do not know where the deposit funds are held and still cannot access them.
11. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 3,577.50 which is 3 x the deposit amount, which reflects the seriousness of the breach, the fact that it covered the tenancy duration, the consequences of the breach for the Applicants and constitutes a meaningful sanction for non-compliance of the Regulations.

F: DECISION:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondents for payment to the Applicant of the sum of £3,577.50 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.

**Petra Hennig McFatridge
Legal Member**

Date : 27 March 2023