



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/20/2444

Re: Property at 193A King Street, Broughty Ferrie, Dundee, DD5 2AX (“the Property”)

Parties:

Mr Aaron McIntyre, 1/2 St Helens Villa, Main Road, Sandbank, Dunoon, PA23 8PN (“the Applicant”)

Mr James Ferrie, 11 Ellie Avenue, Dundee, DD5 4TB (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent acted in breach of his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and, finding that an appropriate sanction is the sum of NINE HUNDRED POUNDS (£900) STERLING makes an order for payment of the sum of £900 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations).

Background

1. On 20 November 2020 the Applicant 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. The application was dated 10 November 2020.
2. The Applicant submitted to the Tribunal tenancy agreement for the tenancy commencing on 1 August 2019, email messages dated between 31 July 2020 and 17 October 2020, text messages between the parties, including a text message from the Applicant to the Respondent on 14 August 2020 stating the

Applicant wishes to terminate the tenancy, text messages between the Applicant and his cleaner, First Direct Bank statements of the applicant showing payment of the deposit to the Respondent on 1 August 2019. The Applicant also lodged correspondence with all three registered deposit schemes dated 12 January 2021 showing no deposit was registered..

3. The Respondent lodged written representations on 24 December 2020 together with copies of invoices for cleaning and carpet cleaning.
4. The Respondent had requested a postponement of the initial Case Management Discussion (CMD) scheduled for 14 January 2021, which was granted. A further postponement request on 12 February 2021 for a further postponement of the CMD scheduled for 17 February 2021 was refused.
5. The CMD took place on 17 February 2021 under participation of both parties.
6. 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.

The Case Management Discussion:

1. The Applicant's position at the CMD was that there had been no issues until he had started asking questions about the return of his deposit. He is a landlord himself but did not think there was a problem when no information about the deposit was provided after he moved in. He did not sign the tenancy agreement until shortly before he moved out. In the tenancy agreement Clause 6 deals with the deposit and actually states that the deposit will be lodged with SafeDeposits Scotland. The Respondent then refused to return the deposit. The Applicant considers that this was done deliberately. He had no access to the dispute resolution scheme. The deposit was unprotected for the whole period of the tenancy. Thus the Tribunal should make an order at the upper end of the spectrum of penalties available.
2. The Respondent admitted that the deposit was in his TSB bank account. This was not a separate bank account. He had been renting the flat out to friends and family previously and not taken a deposit before. He did not know he had to lodge the deposit. He had not read the tenancy agreement and just printed it out when the Applicant moved in and left a copy in the flat. He now has a new tenant and has lodged the deposit. He offered to return the deposit at the CMD. He didn't have a copy of the signed agreement and asked for that for his mortgage in September 2020. He simply did not inform himself of the obligations and did not use professional services to draw up the lease or manage the property.
3. Both parties agreed that there was no need for a hearing as the facts of the case were not in dispute. The Legal Member advised the parties clearly that the issue of the actual repayment of the deposit is a matter which will not be determined in these proceedings as the Rule 103 application only deals with

the issue of whether or not the landlord had complied with the obligations under the Regulations.

The legal test:

1. In terms of Rule 18 (1) of the Procedure Rules 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;
2. 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.
3. 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.”
4. 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:

Based on the documents and the discussion at the CMDs the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The Applicant and the Respondent entered into a Private Residential Tenancy Agreement for the property on 1 August 2019.
2. The tenancy agreement was in the wrong format and was incorrectly described as a Short Assured Tenancy.
3. The Respondent is the landlord stated in the Tenancy Agreement under clause 1.
4. The tenancy ended on 19 September 2020.
5. The deposit amount of £600 was paid at the start of the tenancy period.
6. Clause 6 states that the deposit of £600 will be paid into a tenancy deposit scheme within the timescales laid out in the regulations and specifically names SafeDeposit Scotland as the scheme administrator.
7. The deposit was not lodged with an approved scheme.
8. The Respondent has one rental property.
9. This was the first time he had granted a lease to an unknown third party and taken a deposit.
10. The deposit was not returned as there was a dispute about the state of the tenancy at the moving out date.

11. The deposit funds had been held in the Respondent's own day to day bank account.

Reasons for Decision:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the CMD and without a full hearing on the basis of the information provided by both parties.
2. The tribunal considers that the landlord did not comply with the requirements of Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
3. The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement.
4. It was admitted by the Respondent and also clear from the documents lodged that in this case a deposit of £600 was paid to the Respondent at the start of the tenancy and that the full deposit was not protected for the duration of the tenancy.
5. 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.
6. 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.
7. 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...*"
8. Whilst the Tribunal notes the submissions of the Applicant for payment of a penalty close to the maximum of three times the deposit amount, the Tribunal

does not agree that the case warrants the maximum remedy. However, the Tribunal finds that this was a clear and entirely avoidable breach of the Regulations and thus warrants a meaningful and substantial penalty.

9. The Tribunal took into account the length of time the deposit was unprotected, which the whole tenancy period, the fact that the landlord had provided a lease document which selected a specific registered scheme as stated in clause 6 of the lease and had access to the information about the landlord's obligation regarding the deposit from the information provided in the tenancy agreement and thus should have been aware of his obligations, that he had kept the deposit funds in a normal day to day use bank account and mixed the funds with his own funds, that ultimately the action of the Respondent meant that the Applicant would not have had access to the dispute resolution process envisaged to be used under the Regulations and that the deposit had in fact not been returned.
10. On the other hand the Tribunal also took into account that the Respondent credibly stated he failed to comply with the obligations through ignorance and had not deliberately ignored the Regulations, that the Respondent has been letting property only to friends and family previously and not taken a deposit before, that he had learned through the process and lodged the deposit for the current tenancy over the property and that he had admitted the breach as soon as the action was raised.
11. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £900, which constitutes a meaningful sanction for non-compliance of the Regulations at the level of 1 1/2 times the deposit sum of £600.

Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £900 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/Chair**

**17 February 2021
Date**