

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

Chamber Ref: FTS/HPC/PR/21/2284

Re: Property at 7b West Maitland Street, Edinburgh, EH12 5DS (“the Property”)

Parties:

Miss Tayyibah Haq, 124/28 Lothian Road, Edinburgh, EH3 9BG (“the Applicant”)

Miss Joanna Motyl, UNKNOWN, UNKNOWN (“the Respondent”)

Tribunal Members:

Sarah O'Neill (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the original landlord under the tenancy agreement had failed to comply with his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. It also determined that, following the death of the original landlord, the respondent was the landlord under the tenancy as defined in regulation 2 of the 2011 regulations and section 194(1) of the Housing (Scotland) 2006. The tribunal therefore makes an order requiring the respondent to pay to the applicant the sum of £550.

Background

1. An application dated 13 September 2021 was received from the applicant under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ('the 2017 rules') in respect of the respondent's alleged failure to comply with the duties under regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the 2011 regulations').

2. In her application form, the applicant stated that she sought an order against the respondent for three times her monthly rent for failing to protect her deposit and withholding it at the end of her tenancy. Attached to the application form were:
 - i. An undated and unsigned copy tenancy agreement relating to the party between the applicant and Rep Apartments, named as the landlord (a further undated copy of the tenancy agreement signed only by the applicant was later provided to the tribunal).
 - ii. copy WhatsApp messages between the parties dated between 23 July and 31 August 2021.
3. The application was accepted on 7 October 2021. A case management discussion (CMD) was scheduled for 16 November 2021 but had to be postponed as sheriff officers were unable to serve the papers on the respondent on behalf of the tribunal at the property address, which was the address provided in the application. A further CMD was therefore scheduled for 15 December 2021.
4. Details of the postponed CMD were served by advertisement on the Housing and Property Chamber Website. An email was sent to the respondent's email address on 5 November 2021, notifying her of this. A response was received from the respondent on 17 November 2021, asking for further information about the application. On 14 December 2021, it became apparent that due to an administrative error, the papers had not been sent to the respondent. The tribunal therefore postponed the CMD again, as the respondent had not had fair notice of the proceedings.
5. On 23 November 2021, the tribunal issued a direction to the applicant directing her to provide:
 - i. written confirmation from the three approved tenancy deposit schemes that they did not hold her tenancy deposit.
 - ii. Any further information which she could provide about Rep. Apartments, the landlord named in the tenancy agreement, and/or the property manager referred to in her application.
 - iii. A signed and dated copy of the tenancy agreement between the parties.
 - iv. A copy of any receipt or other written evidence that a tenancy deposit was paid by the applicant to the landlord at the commencement of her tenancy.

Responses to the direction were received from the applicant's representative on 20 December 2021 and 31 December 2021.

6. A second direction was issued to the respondent on 22 December 2021, requiring her to provide to the tribunal:
 - i. Written confirmation as to the relationship between Rep. Apartments, the landlord named in the tenancy agreement, and herself.

- ii. Written confirmation of: i) the reasons why she took over as the landlord / property manager for the property during the applicant's tenancy, and ii) when she did so.
 - iii. A signed and dated copy of the tenancy agreement between the parties, should this be available.
7. No response was received from the respondent to the second direction.
8. Notice of the postponed CMD scheduled for 9 February 2022, together with the application papers and guidance notes, were sent to the respondent by email on 6 January 2022. A further email was sent to the respondent on 14 January 2022, inviting her to make written representations in relation to the application by 26 January 2022. No written representations were received from the respondent by that date.
9. A further direction (the third direction) was issued to the respondent on 28 January 2022. This directed her to provide the same information as had been required by the second direction, as well as her postal address and confirmation as to the relationship between herself and the registered owner of the property, Representacio D'Apartament I Villa Online SAU, a company incorporated in Andorra. A brief response was received to the second direction by email on 6 February 2022.

The first CMD

10. A CMD ('the first CMD') was held by remote teleconference call on 9 February 2022. Both the applicant and her representative, Miss Rona Munro, a Welfare Adviser with Edinburgh University Student's Association, were present on the teleconference call. The respondent was not present and was not represented. The tribunal was satisfied that the respondent had been given reasonable notice of the date, time and dial-in details of the CMD and therefore proceeded with the CMD in her absence.
11. The tribunal part heard evidence from the respondent and her representative at the CMD. It was satisfied on the basis of this that the tenancy was a "relevant tenancy" in terms of regulation 3(3) of the 2011 regulations. It was also satisfied on the basis of the evidence before it that the applicant had paid a tenancy deposit of £275 to the late Mr Ian Scott, whom the applicant had understood to be her landlord. The tribunal was satisfied that this sum had not been paid into an approved tenancy deposit scheme, as required in terms of the 2011 regulations.
12. The tribunal noted that it appeared on the face of the information before it that the respondent had been acting as the applicant's landlord following the death of Mr Scott. This however appeared to be disputed by the respondent in her email of 6 February 2022.

13. The tribunal considered that, in the absence of any further information from the respondent, it did not have sufficient information as to the identity of the landlord and therefore who was liable in respect of the failure to comply with regulation 3 of the 2011 regulations. It therefore adjourned the CMD to a later date in order to obtain further information about this from the respondent.
14. The tribunal issued a further direction (the fourth direction) to the respondent on 9 February 2022 alongside a note of the first CMD, requiring her to provide the following information by 2 March 2022:
- i. the information required by the tribunal's direction of 28 January 2022.
 - ii. confirmation as to the capacity in which she was acting in relation to the property and the applicant's tenancy following the death of Ian Scott- i.e. whether she was acting as landlord, the landlord's agent or in some other capacity.
 - iii. if she was not acting as landlord of the property, the reasons why this was the case.
 - iv. who became the landlord of the property following Mr Scott's death, if not herself.
 - v. details of the executor(s) of Mr Scott's estate, if she has this information.
15. No response to the direction was received from the respondent prior to the second CMD, which was arranged for 16 March 2022.

The second CMD

16. Both the applicant and her representative, Miss Rona Munro, were present on the conference call at the second CMD. The respondent was not present or represented on the conference call. Shortly before the start of the CMD, it became apparent to the tribunal that due to an administrative error, the respondent had not been given reasonable notice of the date, time and teleconference dial-in details for the CMD.
17. The tribunal therefore decided to adjourn the CMD to a later date to ensure that the respondent was given the opportunity to attend. A further CMD was fixed for 1 April 2022. The respondent was notified of the date and time of the CMD by email on 21 March 2022.

The third CMD

18. A third CMD was held by remote teleconference call on 1 April 2022. Both the applicant and her representative, Miss Rona Munro, were present on the conference call. The respondent was not present or represented on the conference call.
19. The tribunal was satisfied that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date, time and place of a CMD

had been duly complied with. The tribunal delayed the start of the CMD by 10 minutes in case the respondent had been detained. She did not appear, however, and no telephone calls, messages or emails had been received from her. The tribunal therefore proceeded with the CMD in the absence of the respondent in terms of rule 29 of the 2017 rules.

20. In light of all the evidence before it, and having regard to the overriding objective (particularly bearing in mind how long the case had been ongoing, the respondent's failure to attend any of the CMDs and the lack of any response from the respondent to the tribunal's directions), the tribunal considered that it was able to make sufficient findings to determine the case without the need for a hearing, and that to do so would not be contrary to the interests of the parties.

Findings in fact

21. The tribunal made the following findings in fact:

- i. The application had been made within 3 months after the tenancy ended.
- ii. The respondent entered into a tenancy agreement with Rep Apartments in relation to the property. The tenancy began on 9 April 2021.
- iii. The applicant's tenancy was of an ensuite bedroom in a guest house. The kitchen was shared with several other tenants who also lived in the building.
- iv. The rent payable under the tenancy agreement was £550 per month, payable in advance on or before the first of each month.
- v. The tenancy agreement stated at paragraph 14 that the applicant was required to pay a tenancy deposit of £275.
- vi. The tenancy agreement stated at paragraph 15 that the landlord would lodge the tenancy deposit with a tenancy deposit scheme in accordance with the 2011 regulations.
- vii. The tenancy agreement also stated at paragraph 17 that the landlord would return the tenancy deposit at the end of the tenancy, less such deductions as were provided for in the agreement.
- viii. The tenancy was a 'relevant tenancy' in terms of the 2011 regulations.
- ix. The applicant paid a tenancy deposit of £275 to Mr Ian Scott, whom she understood to be her landlord, on 9 July 2021.
- x. Mr Scott was the secretary of two companies, FestivalApartments Ltd and HenEdinburgh.Com Ltd, which were both dissolved in December 2011. The correspondence address given for both companies was the property address.
- xi. The respondent was a director of both of the above companies.
- xii. The property was not registered on the Scottish landlord register.
- xiii. The land certificate for the property (title no: MID70262) showed that it was owned by Representacio D'Apartment I Villa Online SAU, a company registered in Andorra.

- xiv. The tenancy deposit paid by the applicant was not paid into one of the three approved tenancy deposit schemes.
- xv. On 6 June 2021, the applicant received a WhatsApp message from Mr Sean Anderson, the property manager for the property, advising her that Mr Scott, whom he referred to as 'the property owner', had died the previous week, and stating that "his partner has asked me to get copies of your tenancy agreement and moving in dates."
- xvi. The following day, 7 June 2021, Mr Anderson sent the applicant a further WhatsApp message asking her to pay future rent payments into the respondent's account and providing details of that account and the respondent's email address.
- xvii. The applicant asked the respondent in a text message of 12 August 2021 to confirm whether she had taken over from the previous landlord. The respondent replied the following day, stating: "Yes. I took over from the previous owner."
- xviii. The applicant made two rent payments to the respondent before the end of her tenancy.
- xix. On 23 July 2021, the respondent sent the applicant a WhatsApp message asking her to leave the property no later than 15 August 2021. The message stated that due to the condition of the building, it was to be closed down for renovation and it would be a health risk to the tenants if they were to stay there. It also said that the applicant's deposit would be paid back to her after reviewing her room on the day she would be leaving.
- xx. No notice to leave was received by the applicant in relation to her tenancy.
- xxi. The applicant moved out of the property on 15 August 2021.
- xxii. The respondent returned the sum of £126.57 to the applicant from her tenancy deposit. She had retained the remainder of the deposit in respect of rent which was allegedly owed and cleaning which was allegedly required.

Statement of reasons for decision

Preliminary issue

- 22. Given the circumstances, there was a question over who the landlord was under the tenancy in terms of the 2011 regulations. In terms of regulation 2, 'landlord' refers to a landlord, within the meaning of the Housing (Scotland) Act 2006 ('the 2006 Act') of a relevant tenancy. "Landlord" is defined in section 194 (1) of the 2006 Act as follows – "*landlord means any person who lets a house under a tenancy, and includes the landlord's successors in title*".
- 23. While the landlord named in the tenancy agreement was "Rep. Apartments", and the property is not on the Scottish landlord register, the evidence before the tribunal suggested that the landlord at the start of the tenancy was in fact the late Mr Scott. Mr Anderson referred to Mr Scott in his WhatsApp message of 6 June 2021 to the applicant as 'the property owner'.

24. Miss Munro said that she understood that the property had previously been let out as short-term holiday apartments, and she had provided a link to the TripAdvisor website which appeared to demonstrate this. She said that as a result of the coronavirus pandemic, a decision had been taken to let the apartments out under private residential tenancies.
25. The applicant said that Mr Scott was the landlord whom she had dealt with. She had asked him several times to provide a tenancy agreement. He had told her to relax and said he would provide an agreement soon. She finally received the tenancy agreement around 9 or 10 April 2021. The applicant had provided a tenancy agreement which was undated and had been signed by her. She had never received a final copy of the agreement signed by the landlord. The printed agreement included a signature line above the applicant's signature. It was stated above that line: "Signed for and on behalf of Rep. Apartments by Sean Anderson", with the name "Sean Anderson" underneath, but there was no signature.
26. The applicant said that she believed that Sean Anderson was the property manager. She had dealt directly with Mr Anderson regarding practical issues such as keys, and with Mr Scott in relation to issues such as the rent and deposit. She said that after the start of her tenancy, Mr Scott had given her Mr Anderson's phone number and told her to contact him if there were any issues with the tenancy. She had understood from Mr Scott that he was planning at that point to go and live in Spain for two years.
27. On 9 April 2021, the applicant had paid the sum of £775 to Mr Scott personally, as evidenced by a bank statement which she produced to the tribunal. The tribunal chairperson noted that the tenancy agreement stated that the monthly rent was £550 payable on or before the first of each month, and that the first month's rent plus the £275 deposit should therefore have come to £825. The applicant said that this Mr Scott had clearly told her that she was to pay him £775 for the first month's rent plus the tenancy deposit.
28. The applicant said that she had assumed on the basis of the WhatsApp messages received from Mr Anderson on 6 and 7 June 2021 that the respondent was Mr Scott's partner, and that she had taken over as the landlord of the property. She had never met the respondent in person, and all communication with her had been by WhatsApp message.
29. The applicant asked the respondent in a WhatsApp message of 12 August 2021 to confirm whether she had taken over from the previous landlord. The respondent replied the following day, stating: "Yes. I took over from the previous owner." The applicant said that she had been waiting for a new tenancy agreement from the respondent, but that she had never been provided with one.

30. On 23 July 2021, the respondent had sent the applicant a WhatsApp message asking her to leave the property no later than 15 August 2021. The message stated that due to the condition of the building, it was to be closed for renovation and it would be a health risk to the tenants if they were to stay there. Miss Munro told the tribunal that no notice to leave had been served on the applicant, and no evidence of the need for renovation of the property had been provided by the respondent. She believed that the applicant had therefore been illegally evicted from the property.
31. Other than an email asking for further details about the case which was received on 17 November 2021, there had been no contact with the tribunal from the respondent aside from an email which was received on 6 February 2022. In this email, she stated that she had never signed a tenancy agreement with the applicant and had never received any deposit from her. She said that she “did take control over the building temporarily as the director of a company who was operating in the building and had agreement with the tenants, has passed away.” She said she had only received rent from the applicant for four weeks, even though she had stayed for six weeks. She had let the applicant stay until she found new accommodation as she “did not want her to end up on the street.”
32. It appeared to the tribunal on the basis of the information before it, particularly the WhatsApp messages between the parties, that the respondent had been acting as the applicant’s landlord following the death of Mr Scott, from around 6 / 7 June 2021. The respondent had asked the applicant to pay rent to her and had accepted such rent, and she admitted this in her email to the tribunal of 6 February 2022. She had told the applicant on 23 July 2021 that she was required to leave the property, and that her deposit would be repaid after she left. She therefore appeared to have access to the applicant’s deposit and had in fact retained some of this.
33. The tribunal gave the respondent several opportunities to explain why she had not been acting as the landlord following Mr Scott’s death and if she had not, who the landlord was. She did not appear at any of the CMDs. She did not provide the information requested in the tribunal’s second, third or fourth directions, which she had been notified was a criminal offence. She also refused to provide her postal address to the tribunal, despite being asked to do so on several occasions.
34. In the absence of any information to the contrary from the respondent, despite having given her numerous opportunities to do so, the tribunal determined on the balance of probabilities that the respondent had acted as the landlord for the property following Mr Scott’s death. She continued to let out the tenancy and was his successor as landlord. She was therefore the landlord under the tenancy as defined in regulation 2 of the 2011 regulations and section 194(1) of the 2006 Act.

The appropriate level of sanction to be applied

35. The tribunal was satisfied that the landlord (and therefore the respondent as the original landlord's successor) had failed to comply with the duty under regulation 3 (1) of the 2011 regulations to pay the applicant's deposit into an approved tenancy deposit scheme within 30 working days of the start of the tenancy. The tribunal was therefore obliged to make an order requiring the respondent to make payment to the applicant, in terms of rule 10 of the 2011 regulations. The question before the tribunal was the amount which the respondent should be ordered to pay to the applicant, which could be up to three times the amount of the tenancy deposit.
36. Miss Munro pointed out that the tenancy agreement stated that the landlord would lodge the tenancy deposit with a tenancy deposit scheme in accordance with the 2011 regulations, but that this had not been done. She said that it was clear that neither the late Mr Scott nor the respondent had acted according to their legal obligations. While the respondent may not have been the landlord at the start of the tenancy, she had still decided to retain part of the applicant's deposit, even though she had known, or ought to have known, that the deposit should have been paid into an approved scheme. The applicant had also been illegally evicted by the respondent, which showed a clear disregard for her legal responsibilities as landlord.
37. In considering the appropriate level of payment order to be made in the circumstances, the tribunal considered the need to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach (Sheriff Welsh in *Jenson v Fappiano* 2015 GWD 4-89).
38. The applicant's tenancy deposit had been left unprotected for the entire length of her tenancy, a total of just over four months. Miss Munro pointed out, however, that the applicant had intended to stay longer than this, had she not been illegally evicted. She had also been denied the opportunity to dispute that any money should be retained from her deposit at the end of her tenancy. She disputed that she owed the sum of £148.43 (the balance of the deposit after the deduction of £126.57) which had been retained by the respondent but was unable to challenge this through an approved tenancy deposit scheme.
39. The tribunal noted the view expressed by Sheriff Ross in *Rollet v Mackie* ([2019] UT 45) that the level of penalty should reflect the level of culpability involved. Some of the aggravating factors noted by Sheriff Ross in that case which might result in an award at the more serious end of the scale were present in this case. It appeared from the tenancy agreement that the original landlord had been aware of the duty to protect the deposit. It also appeared that there was an intention to hold on to the deposit, given the terms of paragraph 17 of the tenancy agreement. There had been no admission of

fault by the respondent. The tribunal also noted that it appeared that both the original landlord and the respondent had failed to observe their responsibilities as landlord.

40. On the other hand, the tribunal noted that the deposit sum involved was relatively low. There was no clear evidence of any fraudulent intention, as opposed to a failure to observe the landlord's responsibilities. Neither was there any evidence before the tribunal that there had been repeated breaches against a number of tenants.
41. There was a difficult balance to be struck here, as the tribunal was clearly unable to hear evidence from the original landlord, and the respondent had not appeared at any of the CMDs and had provided only very limited written representations. It appeared that the respondent had taken over as landlord unexpectedly at short notice and in very difficult circumstances. The original failure to place the deposit in a scheme had been Mr Scott's, although it did appear that the respondent had also failed to comply with her responsibilities while she was the landlord.
42. Taking all of the above considerations into account, the tribunal determined that an order for £550, representing twice the amount of the tenancy deposit paid, would be appropriate in this 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.

Sarah O'Neill

Legal Member/Chair

1 April 2022
Date
