



**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/19/4109

**Re: Property at 16 Spey Drive, Coatbridge, North Lanarkshire, ML5 5LZ (“the
Property”)**

Parties:

Mr David Pollock, 24 Fendoch Street, Glasgow, G32 7TH (“the Applicant”)

**Mrs Myra Mitchell, 11 Meagy Road, Castlederg, Northern Ireland, BT81 7NX
 (“the Respondent”)**

Tribunal Members:

Andrew Upton (Legal Member) and Angus Lamont (Ordinary Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the Respondent failed to comply with her duty
under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland)
Regulations 2011 and should make payment to the Applicant in the sum of
ONE THOUSAND ONE HUNDRED POUNDS (£1,100.00) STERLING**

FINDINGS IN FACT

1. The Applicant was the tenant of the Respondent of the Property.
2. The Respondent instructed Location Lettings as her letting agents.
3. The Applicant paid a tenancy deposit of £550 to Location Lettings.
4. The Applicant’s tenancy deposit was not paid into an approved tenancy deposit scheme at any time prior to the commencement of the tenancy, during the tenancy, or after the termination of the tenancy.

5. The Respondent relied upon Location Lettings to provide a professional service, which included compliance with all legislative requirements, including the Tenancy Deposit Schemes (Scotland) Regulations 2011.
6. By text message on 5 November 2018, the Applicant advised the Respondent that his tenancy deposit had not been paid into Deposits Scotland, being an approved scheme that the Respondent's letting agent used.
7. Since this application was raised, the Respondent has taken steps to ensure that she has complied with her duty under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in respect of other tenancies in which she is a landlord and in respect of which her tenants have paid a tenancy deposit.

FINDINGS IN FACT AND LAW

1. By failing to lodge the Applicant's tenancy deposit within an approved tenancy deposit scheme, the Respondent breached her duty in terms of Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
2. In all of the circumstances, the sum of £1,100.00 is an appropriate sanction for the purposes of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

STATEMENT OF REASONS

1. This application initially called for a Hearing by teleconference on 30 July 2020 at 10am, together with the related application CV/20/0726. Both parties were present for the Hearing by teleconference. The Respondent was assisted by Mrs Judith Stewart, a friend and lay representative.
2. Following that Hearing, a Decision with Statement of Reasons was issued. In terms thereof. The Applicant subsequently sought leave to appeal that Decision on the basis that the Tribunal had failed to take into account relevant evidence which had been submitted to the Tribunal. Following a careful search, the Tribunal identified that a previous written submission had been submitted by the Applicant with evidence, but that submission had not been made available to the members of the Tribunal considering the Application at the Hearing. In light of that discovery, the Tribunal reviewed its Decision, recalled it, and fixed a further Hearing.
3. The further Hearing called on 8 October 2020 to consider and address the evidence and submissions previously overlooked.

Background

4. In this application, the applicant seeks an order under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011

Regulations”), on the basis that the Respondent had failed to pay the deposit into an approved tenancy deposit scheme.

5. In terms of the 2011 Regulations:-

“3.—

(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy—

- (a) pay the deposit to the scheme administrator of an approved scheme; and
- (b) provide the tenant with the information required under regulation 42.

(1A) Paragraph (1) does not apply—

- (a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
- (b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

- (a) the references to deposit were to each instalment of the deposit, and
- (b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.

(3) A “*relevant tenancy*” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

- (a) in respect of which the landlord is a relevant person; and
- (b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

- (4) In this regulation, the expressions “*relevant person*” and “*unconnected person*” have the meanings conferred by section 83(8) of the 2004 Act.

...

9.—

- (1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.
- (2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

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.”

6. At the start of the original hearing, it was determined that the following facts were agreed:-

- a. In November 2017, the Applicant made payment of the sum of £550 to Location Lettings, the agents of the Respondent, as a tenancy deposit; and
- b. The tenancy deposit was not paid into an approved tenancy deposit scheme.

7. In light of those agreed facts, it was clear that the Respondent had breached her duty under Regulation 3 of the 2011 Regulations. That being so, in terms of Regulation 10, the Tribunal must grant an order for payment by the Respondent to the Applicant in a sum not exceeding three times the tenancy deposit. Regulation 10 creates strict liability for matters of this nature. The only discretion afforded to the Tribunal relates to the question of sanction. The evidence led and submissions made in relation to this application focused on what level of sanction was appropriate.

Evidence

David Pollock

8. The Applicant's evidence was that he had paid a deposit of £550 to Location Lettings, and that deposit had not been paid into an approved scheme. The Applicant said that he had highlighted to the Respondent in a text message on 5 November 2018 that his deposit was not held in an approved scheme. A copy of that text message, and the messages that follow it, was produced. The messages were in the following terms:-

“David Pollock Hi Myra, did you ever get a hold of location? I have just had a horrible thought do you have any idea what has happened to my deposit as I just checked my emails there and it doesn't seem like it was lodged with deposits Scotland

Myra Mitchell No I didn't David and have heard that there is an order against him trading from Oct 1st.. so that's his excuse for not paying them..don't worry about your deposit if nothing comes from him I am liable.. Myra

David Pollock Thanks Myra I have just called deposits Scotland there. They have registration of the property but location have sent them no funds. Apologies for the extra added bad news. But it's maybe better chasing them now while there is still a small Hope of getting it back

David Pollock It's lodged under dpc192478 they recommended calling citizens advice”

9. Mr Pollock confirmed that, notwithstanding this text message exchange, his deposit was not lodged in an approved scheme.

Myra Mitchell

10. The Respondent adopted her written statement, submitted with a bundle of productions provided to the Tribunal. She accepted that the deposit had been paid to Location Lettings. Her position was that she had relied on Location Lettings, as professional letting agents, to properly manage her let properties and to ensure compliance with all legislation, including the 2011 Regulations. That the deposit had not been lodged in an approved scheme was due to the breach by Location Lettings of their obligations to her. She was unaware of the requirement to lodge tenancy deposits with an approved scheme, and assumed that the deposit continued to be held by Location Lettings together with other sums owed by them to her. She did not accept that she had been advised of the need to lodge the deposit in an approved scheme. Her position was that she had behaved reasonably to the tenant throughout the tenancy by

affording him additional time to make payment of rent when he was persistently in arrears, and had confirmed to the Applicant that she would pay whatever part of the deposit was properly due to him, notwithstanding it having been retained by Location. Since the raising of this application, she has taken steps to ensure that deposits paid by her other tenants had been placed into approved tenancy deposit schemes, notwithstanding Location Lettings having also retained those deposits. The Respondent produced copies of the relevant certificates showing that.

11. When asked about the text message exchange in November 2018, the Respondent advised that she was unaware of her legal duty to lodge the deposit with an approved scheme. She had relied on Location to meet her duties. Had she known that she had a legal duty to lodge the deposit in an approved scheme, she would have taken pro-active steps to secure the deposit in a scheme earlier. She had assumed that if the deposit was not made over by Location then she would be liable for it only. For that reason, she chased Location for payment of sums due to her (including rent and the deposit) by email and telephone through to August 2019. She spoke of an individual called Joanne at Location who had said that she would try to get the Respondent's money to her.

Submissions

12. The Applicant submitted that his tenancy deposit had been unprotected throughout his tenancy. He had told the Respondent in 2018 that his deposit was not in an approved scheme, and that it required to be lodged in one. He highlighted that the Respondent managed several properties in Scotland at the time and called into question why the Respondent had not done more to satisfy herself of her legal obligations. He submitted that the appropriate sanction would be the maximum: three times the tenancy deposit.
13. The Respondent accepted liability for her breach of duty. Her position was simply that she had been very badly let down by the professional agents that she had instructed to avoid this very situation. She had been very accommodating to the tenant throughout the tenancy. Had she known about her duties under the Regulations, she would have ensured that the deposit was lodged in a Scheme. She was resident in Northern Ireland, who did not have tenancy deposit schemes until very recently.

Discussion

14. When considering what order to make under the 2011 Regulations, the Tribunal is required to exercise judicial discretion. In *Jenson v Fappiano*, unreported, Sheriff Welsh set out his views on the requirements of Regulation 10:-
 - “11. I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is

implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

1. 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 judgment.
 2. 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 of the case and a value attached thereto which sounds in sanction.
 3. A decision based on judicial discretion must be fair and just ('*The Discretion of the Judge*' , Lord Justice Bingham, 5 Denning L.J. 27 1990)."
15. The Tribunal accepts Sheriff Welsh's analysis. This is the basis upon which the Tribunal has approached the question of sanction.
16. In this case, the Applicant's deposit was unprotected for the duration of his tenancy. However, we do not believe that this was due to the deliberate disregard by the Respondent of her obligations, but rather a reckless assumption made by her that her obligations extended only to liability for the deposit itself. In fact, the Respondent had engaged a professional letting agent for the purposes of ensuring compliance with all legal requirements. It is regrettable that the Respondent's letting agent failed to lodge the Applicant's deposit in an approved scheme and ensure the Respondent's compliance with the Regulations, but it is our view that there was nothing that ought to have suggested to her that Location Lettings had failed to lodge the Applicant's deposit in an approved scheme until 5 November 2018.
17. On 5 November 2018, the Respondent received a text message from the Applicant highlighting that the deposit had not been paid into an approved scheme. This was the first indication that the Respondent received that all was not well with the Applicant's deposit. She ought to have taken immediate pro-active steps to ascertain where the Applicant's deposit was, and to ensure that it was paid into an approved scheme. In fact, the Respondent's evidence was that she had sought to have the deposit paid to her, as part of a series of chaser correspondence sent to Location to recover payments due to her.
18. What flows from that evidence is that the Respondent lost confidence in her letting agent and determined to take over the management of her properties herself. It is the Tribunal's view that she ought to have taken steps to understand her legal obligations at the point that she decided to undertake the management of those properties personally. Ignorance of the law is never a defence, nor is it a compelling mitigating factor. The simple fact of the matter

is that it is the duty of a landlord to pay tenancy deposits into approved schemes, and the onus is on a landlord to know and understand their obligations.

19. The Respondent has invited the Tribunal to take into consideration her treatment of the Applicant during the tenancy. That evidence is irrelevant to the current application. The sanction in this case ought to relate to the Respondent's actions to comply with her duty, and it would be inappropriate to accept that her breach of that duty could be mitigated by her leniency towards the Applicant in respect of his accepted persistent late payment of rent. That being so, the Tribunal has disregarded that evidence and related submission.
20. That all being said, the Tribunal has some sympathy with the situation that the Respondent has found herself in as a consequence of her agent's actions. We do not consider this case to be an example of serial non-compliance, or of deliberate disregard for the Regulations. We do consider the Respondent's actions to be reckless, particularly where the Applicant had made the Respondent aware that the deposit had not been paid into Deposits Scotland in November 2018. That in itself ought to have prompted the Respondent to investigate what Deposits Scotland was, which in turn would have directed her to her obligations. Insofar as sanction in this case ought to act as a deterrent, it seems clear that the Respondent is not only now aware of her obligations but has embraced the duties incumbent upon her in respect of her other tenancies. As such, the deterrent factor is not of considerable importance, in our view.
21. Therefore, having regard to all of the circumstances, the Tribunal considers that the sum of £1,100, being a sum equal to twice the tenancy deposit, is a reasonable sanction in this case. It reflects the fact that the Respondent breached her duty as a consequence of her professional agent's failure, having instructed a professional agent specifically to avoid this sort of situation, but took no steps to understand her or comply with her legal duties despite the Applicant drawing her attention to the failure to lodge the deposit in an approved scheme and her own failing confidence in her agent. Accordingly, the Tribunal will grant an order that the Respondent makes payment to the Applicant in that sum.

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.

A. Upton

Legal Member/Chair

8 October 2020

Date