



**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/20/0383**

**Re: Property at 98 St Leonards Road, Ayr, KA7 2PU (“the Property”)**

**Parties:**

**Mrs Melissa Jane Currie, 26 Mount Charles Crescent, Ayr, KA7 4NY (“the Applicant”)**

**Mrs Una Fyfe, 98 St Leonards Road, Ayr, KA7 2PU (“the Respondent”)**

**Tribunal Members:**

**Graham Harding (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicant was entitled to an order for payment in the sum of £600.00.**

**Background**

1. By application dated 5 February 2020 the Applicant’s representatives Blackadders LLP Solicitors, Glasgow applied to the Tribunal for an order for payment in respect of an alleged breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicant’s representatives submitted copies of emails between Letting Protection Service Scotland and a copy of the tenancy agreement in support of the application as well as proof of payment of the deposit and confirmation of the date the tenancy ended.
2. By Notice of Acceptance dated 6 March 2020 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion was assigned.

3. The Respondent's representatives Donald Ross Residential, Ayr submitted written representations by email dated 3 July 2020.
4. A Case Management discussion was held on 10 August 2020 and adjourned to allow the parties time to provide further information.
5. The Respondent's representatives submitted further written representations by email dated 24 August 2020.
6. The Applicant's representative submitted further written representations by email dated 22 September 2020.

### **The Case Management Discussion**

7. A Case Management Discussion was held by teleconference on 23 September 2020. The Applicant was represented by Ms S Currie of the Applicant's representatives. The Respondent was represented by Ms F Hunter of the Respondent's representatives.
8. The parties were agreed that the Respondent's representatives had sent the tenancy deposit to the Letting Protection Service Scotland ("LPSS") by bank transfer and it had reached LPSS bank account by 31 July 2019. Ms Hunter referred the Tribunal to the bank entry showing the Deposit ID number and submitted that LPSS ought to have allocated the deposit to the appropriate client account as all the information had been supplied the day before the deposit had been paid. Ms Hunter submitted the fault lay with LPSS and not with the Respondent or her representatives. Ms Hunter said that normally once the funds were allocated that would generate an email from LPSS confirming the deposit had been paid and this would be sent to the landlord and the tenant. Ms Hunter confirmed her firm would normally receive confirmation but this had not happened on this occasion as the funds had not been allocated. Ms Hunter submitted that her firm had complied with Regulation 3 of the 2011 Regulations as the deposit had been sent to the Scheme administrators although she accepted that there had not been full compliance with Regulation 42 as the date of payment of the deposit to the scheme administrators had not been sent to the Applicant. Ms Hunter explained that she had never come across this issue previously and it had been assumed that the deposit had been properly paid into the scheme. Ms Hunter went on to say that at some point someone in her office had noticed that there were unallocated funds and had taken steps to have these allocated in November shortly before the tenancy ended. The Applicant then had her deposit returned to her at the end of the tenancy.
9. Ms Currie suggested it had become apparent to the Applicant's representatives around 4 November as that was when the Applicant indicated she was leaving the property. Ms Currie went on to say that the deposit should have been protected from the commencement of the tenancy and it had not been until 4 November 2019 and therefore the Applicant had suffered prejudice. Ms Currie referred the Tribunal to the decision in *Elliott v Advance Properties FTS/HPC/PR19/2482* which she said was in point. She said that in that case it

appeared the letting agents had paid the deposit to My Deposits Scotland timeously but it had not been allocated. Subsequently the Respondents had some 20 months after the commencement of the tenancy lodged funds for the deposit with My Deposit Scotland on being made aware that apparently no funds had been lodged. After notice of an application to the Tribunal had been made the letting agents had discovered the unallocated funds. Ms Currie suggested that as in that case the Tribunal should find there had been a breach of Regulation 3 and 42 and sanction the Respondent. She also said that the Respondent had not complied with Regulation 21. Ms Currie suggested that there had been nothing to tie up the payment with the parties possibly because the Tenancy ID had been created on a different day from the funds being transferred. Furthermore, the Respondent's representatives should have done more when they did not receive a follow up response from LPSS.

10. For her part Ms Hunter said that there was a big difference between the case referred to by Ms Currie and the current application. There was some doubt as to whether the deposit in Elliott had been paid to the scheme administrators at the commencement of the tenancy and that funds had been paid in May 2018. The Respondent in that case could not say if the information required in terms of Regulation 42 had been provided at all. She said her firm had not held the funds they had definitely been lodged but not allocated.
11. The Tribunal sought to ascertain what information had been provided to LPSS when the Deposit ID was generated by LPSS. Ms Hunter emailed a copy of the deposit ID but this showed the Deposit status as closed and it was not possible to provide a copy of the original application. However, Ms Hunter did email a copy of an email from LPSS that confirmed that the deposit details were submitted on 29 July 2019 and the deposit funds were allocated to the account on 4 November 2019 and the deposit was protected from that date.
12. The Tribunal queried whether if the funds were not allocated could they have been returned to the Applicant's representatives. Ms Hunter said she did not know as she had never come across the situation before but thought it was possible. The Tribunal also queried whether the funds could have been allocated to a different account at the request of the Applicant's representatives. Again, Ms Hunter said she did not know but again thought it may have been possible.
13. Ms Hunter confirmed that the Regulation 42 information was provided to tenants as part of the documents provided prior to a tenancy commencing and the only information that would be missing would be the date of sending the deposit to LPSS.

## **Findings in Fact and Law**

14. The parties entered into a Private Rented Tenancy Agreement that commenced on 3 July 2019 and ended on 6 November 2019.
15. The Applicant paid a deposit of £1200.00 at the commencement of her tenancy.
16. The Respondent's representatives set up a Deposit ID with LPSS on 29 July 2019.
17. The Respondent's representatives transferred £1200.00 from its Royal Bank of Scotland Account to LPSS on 30 July 2019.
18. LPSS were unable to allocate the funds to the tenancy.
19. The funds remained unallocated until 4 November 2020 at which point the deposit became protected.
20. The Applicant's respondents did not intimate the date on which the deposit was paid to LPSS as required in terms of Regulation 42.
21. The Respondent breached the 2011 Regulations in connection with the property namely Regulations 3 and 42.

### **Reasons for the Decision**

22. The Tribunal was satisfied it had sufficient information before it to make a decision without the need for a hearing.
23. The application was brought timeously the tenancy having ended on 6 November 2020 and the application having been submitted on 5 February 2020.
24. Although the Respondent's representatives did not retain the Applicant's deposit beyond the 30-working day period permitted in terms of Regulation 3 of the 2011 Regulations and transferred the funds to LPSS they then did not follow that up to ensure that the funds had been received and allocated to the tenancy. As a result, the funds remained unallocated for a period of over 4 months during which time the Applicant's deposit was unprotected. During that time, it is possible that the funds could have been returned to the Applicant's representatives or allocated to a different tenancy.
25. It is a requirement of Regulation 42 that the landlord advises the tenant of the date the deposit is paid into a scheme. It was admitted that this had not been done and this therefore constitutes a breach of Regulation 42 and Regulation 3.
26. The Tribunal accepts that the breach of Regulation 3 did not come about as a result of a wilful disregard for the 2011 regulations but rather as a result of a defect in the Applicant's representative's systems. It appeared to the Tribunal that it would be important for there to be a check to ensure that once a deposit

had been sent to a Tenancy Deposit Scheme that confirmation that it had been received and allocated by the scheme administrators was in place. By not having such a check in place the Respondent's representatives have found themselves in difficulty.

27. Regulation 42(3) requires the information to be sent by the landlord to the tenant either within the timescale provided within Regulation 3(1) or within 30 days of the deposit being paid into a scheme. It does not make provision for the information to be provided prior to the commencement of the tenancy or in stages. Even although the Respondent's representatives had supplied some of the information required it was admitted they had not advised the Respondent of the date on which they had paid the deposit to LPSS. This was a breach of Regulation 3(1)(b).
28. Any award under Regulation 10 requires to reflect a sanction which is fair and proportionate and just given the circumstances (*Jensen v Fappiano* 2015 GWD 4-89). In *Tenzin v Russell* 2015 Hous. L.R. 11 it was held that any payment in terms of Regulation 10 is the subject of judicial discretion after careful consideration of all the circumstances of the case.
29. The Tribunal can in terms of Regulation 10 make an award of up to 3 times the deposit. Such an award should in the Tribunal's view be reserved for the worst cases where there has been a wilful disregard for the regulations and where the tenant's deposit has been unsecured over a long period of time. In this case the deposit was unsecured for just over four months and it came about more as a result of an oversight than anything else. In these circumstances it is therefore appropriate that any sanction should be at the lower end of the scale. Therefore, having found that the Respondent was in breach of Regulation 3, the Tribunal being obliged to make an award in terms of Regulation 10 and having taken account of the mitigating factors put forward on behalf of the Respondent finds the Applicant entitled to an amount equivalent to 50% of the deposit namely £600.00.

### **Decision**

30. The Tribunal finds the Applicant entitled to a payment by the Respondent in the sum of £600.00

### **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.**

**Graham Harding**  
**Legal Member/Chair**

**23 September 2020**  
**Date**