



**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/20/1244

**Re: Property at 87A Causewayend, City Mount, Aberdeen, AB25 3TQ (“the
Property”)**

Parties:

**Miss Ellie Crozier, Miss Molly Pickford, Woodneuk, Castlecary, Glasgow, G68
0HG (“the Applicants”)**

Mr Donal Butler, 28 Harlaw Road, Aberdeen, AB15 4YY (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the Respondent be ordered to pay the sum of
SEVEN HUNDRED AND FORTY FIVE POUNDS (£745.00) STERLING to the
Applicants**

FINDINGS IN FACT

1. The Applicants were the tenants, and the Respondent the landlord, of the Property under and in terms of a Private Residential tenancy which commenced on 1 May 2019.
2. At the commencement of the tenancy, the Applicants paid a tenancy deposit to the Respondent in the sum of £745 (“the Deposit”).
3. Due to his own error and oversight, the Respondent did not lodge the Deposit in an approved Tenancy Deposit Scheme or supply the prescribed information within 30 working days of 1 May 2019.

4. The Respondent was aware of his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 when the Deposit was paid, and had an account with Safe Deposit Scotland.
5. On receipt of the Deposit, the Respondent intended to lodge it with Safe Deposit Scotland, but forgot to do so.
6. The tenancy terminated on 30 April 2020.
7. On or around 14 April 2020, the Respondent wrote to the Applicants to intimate that he was claiming £460 from the Deposit for cleaning and partial redecoration of the Property.
8. On or around 14 April 2020, the Applicants asked the Respondent which Tenancy Deposit Scheme the Deposit was lodged with. The Respondent replied that it was held at Safe Deposit Scotland.
9. When stating that the deposit was held at Safe Deposit Scotland, the Respondent was acting under the genuinely held but erroneous belief that he had lodged the Deposit with Safe Deposit Scotland.
10. On or around 14 April 2020, the Respondent contacted Safe Deposit Scotland to check the procedure for return of Deposits. At that time, he realised his error and immediately lodged the Deposit with Safe Deposit Scotland.
11. The Deposit was unprotected for the period 1 May 2019 until 14 April 2020, which is a period of just under one year and almost the entirety of the tenancy.

FINDINGS IN FACT AND LAW

1. By failing to lodge the tenancy deposit with an approved Tenancy Deposit Scheme or supply the prescribed information within 30 business days of 1 May 2019, the Respondent was in breach of Regulations 3(1)(a) and (b).
2. In all of the circumstances, an appropriate sanction under Regulation 10 is the sum of £745, being a sum equal to the tenancy deposit.

STATEMENT OF REASONS

1. This application called for its Case Management Discussion by teleconference call on 30 September 2020. The Applicants were represented by Mr Butler of the Citizen's Advice Bureau, and Miss Crozier was also present on the call. The Respondent was personally present on the call and represented himself.
2. This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") for sanction pursuant to a breach by the Respondent of his duties under Regulation 3. The relevant parts of the Regulations are as follows:-

“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.”

3. Regulation 10 imposes strict liability. Where a landlord has breached its duties under Regulation 3, the Tribunal must make an order for payment. The only discretion afforded to the Tribunal relates to the imposition of a sanction. Determining sanction is an exercise of judicial discretion.

Agreed Facts

4. I am grateful to both parties for the concise but detailed written representations that were submitted in advance of the Case Management Discussion, as well as their targeted submissions during the call.
5. From the representations submitted, and the submissions made, I consider that the following facts were agreed by the parties:-
 - a. The Applicants were the tenants, and the Respondent the landlord, of the Property under and in terms of a Private Residential tenancy which commenced on 1 May 2019.
 - b. At the commencement of the tenancy, the Applicants paid a tenancy deposit to the Respondent in the sum of £745 (“the Deposit”).
 - c. Due to his own error and oversight, the Respondent did not lodge the Deposit in an approved Tenancy Deposit Scheme within 30 working days of 1 May 2019.

- d. The Respondent was aware of his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 when the Deposit was paid, and had an account with Safe Deposit Scotland.
 - e. On receipt of the Deposit, the Respondent intended to lodge it with Safe Deposit Scotland, but forgot to do so.
 - f. The tenancy terminated on 30 April 2020.
 - g. On or around 14 April 2020, the Respondent wrote to the Applicants to intimate that he was claiming £460 from the Deposit for cleaning and partial redecoration of the Property.
 - h. On or around 14 April 2020, the Applicants asked the Respondent which Tenancy Deposit Scheme the Deposit was lodged with. The Respondent replied that it was held at Safe Deposit Scotland.
 - i. When stating that the deposit was held at Safe Deposit Scotland, the Respondent was acting under the genuinely held but erroneous belief that he had lodged the Deposit with Safe Deposit Scotland.
 - j. On or around 14 April 2020, the Respondent contacted Safe Deposit Scotland to check the procedure for return of Deposits. At that time, he realised his error and immediately lodged the Deposit with Safe Deposit Scotland.
 - k. The Deposit was unprotected for the period 1 May 2019 until 14 April 2020, which is a period of just under one year and almost the entirety of the tenancy.
6. In addition, the Respondent accepted that he had breached Regulation 3 of the Regulations.

Further Procedure

- 7. In terms of Rule 17 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Procedure Rules, the Tribunal may do anything at a Case Management Discussion that it may do at a Hearing, including make a decision.
- 8. The parties were in agreement as to the facts in this case. The Respondent accepted that he was in breach of Regulation 3 and that sanction must follow. The only question that remained to be answered was what level of sanction ought to be applied in the circumstances. That being so, I decided to exercise my discretion under Rule 17 and make a decision on this application at the Case Management Discussion.

Applicants' Submissions

9. The Applicants accepted that the Respondent had not acted deliberately. Their position was that his conduct was reckless. He accepted that he knew of his duties under the Regulations, but have overlooked it. The Deposit had been unprotected for approximately one year, and would likely have remained so had the Applicants not made enquiries about the return of the Deposit when they did.
10. The Applicants submitted that an inference could be drawn from the Respondent's admitted conduct, where he sought to agree with the Applicants what they should recover from the Deposit, that he was trying to conceal his breach. This was a deception designed to avoid financial liability.
11. In addition, the Applicants submitted that a sanction under Regulation 10 ought not only to reflect the wrongdoing, but also act as a deterrent.

Respondent's Submissions

12. The Respondent submitted that this was an isolated genuine error on his part. This was the first time that he had let out a property. He was aware of his duties, but had been overtaken by work commitments and had overlooked the Deposit. Throughout the tenancy he proceeded in the genuinely held but erroneous belief that he had actually lodged the Deposit. When he discovered his error, he immediately lodged the Deposit with Safe Deposit Scotland. He also authorised the full release of the Deposit to the Applicants.
13. The Respondent submitted that he had learned his lesson, and would take greater care in future to ensure that his duties under the Regulations were met. He said that he took full responsibility for his mistake.

Decision

14. I consider that the correct approach to matters of this nature is that set out by Sheriff Welsh in *Jenson v Fappiano*, 2015 EDIN 6 at paragraphs 11 and 12, where he says:-

"11. Non-compliance is admitted in this case, therefore the regulation is engaged. 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).
12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf *Tenzin v Russell* 2014 Hous. L.R. 17). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case."
15. In this case, the Deposit was unprotected for a significant period of time. I cannot overlook that fact, which is in my view the most important one. That being said, I accept in mitigation that the Respondent was inexperienced as a landlord, and that he made a genuine mistake. The Applicants described that as reckless. I agree with that summation. However, the Respondent was contrite in his responses, and evidently willing to accept responsibility for his error. I believed him when he said that he had learned his lesson, and that he would take care to avoid a repeat of this situation in the future. I therefore considered that the need for the sanction to operate as a deterrent was minimal. I also accept that his interactions with the Applicants towards the end of the tenancy were designed to agree a partial retention of the Deposit without the need for dispute resolution, and were not indicative of any attempt at deception.
 16. Taking all of those factors into account, I consider that an appropriate sanction in this case is a sum equal to the tenancy deposit. In my view, the Respondent's breach is towards the lower end of the scale. Accordingly, I will grant an order for payment by the Respondent to the Applicants in the sum of £745.

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.



30/09/2020

Legal Member/Chair

Date