



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Tribunal for Scotland (Housing and Property Chamber) under the Housing (Scotland) Act 2006 section 121 and Regulation 9 the Tenancy Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/20/1442**

**Re: Property at 48a Sighthill Crescent, Edinburgh, EH11 4QD (“the Property”)**

**Parties:**

**Ms Kerriann Kerr, 48a Sighthill Crescent, Edinburgh, EH11 4QD (“the Applicant”)**

**Kemp and Kimbell, 50A Sighthill Crescent, Edinburgh, EH11 4QD (“the Respondent”)**

**Tribunal Members:**

**Gabrielle Miller (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent is in breach of the obligations in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“Regulation 3”). The Respondent shall make payment to the Applicant in the sum of TWO THOUSAND AND SEVEN HUNDRED POUNDS (£2700) STIRLING**

**Background**

1. The Tribunal received an application from the Applicant in terms of Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Rules 2017 dated 1<sup>st</sup> July 2020.
2. The Applicant advised in the application that the parties had entered into a short assured tenancy. The Respondent received a deposit but did not place the deposit in any scheme.
3. The deposit of £1350 was paid on 23<sup>rd</sup> December 2016.

## The Case Management Discussion

4. A Case Management Discussion ("CMD") was held on 20<sup>th</sup> August 2020 at 11.30am by teleconferencing due to Covid 19 restrictions. The Applicant was not present but represented by Mr Andrew Wilson, Depute Service Manager, Edinburgh Housing Advice Partnership ("EHAP"). The Respondent was not present but represented by Ms Catherine McQuarrie, solicitor, TC Young & Co. Ms McQuarrie accepted the position within the paperwork and was instructed not to oppose the 2 times penalty. Her client's position was that he had not lodged the deposit in a deposit scheme in ignorance. He accepts that he has not met the legal requirements in that he did not lodge the deposit in an approved deposit scheme in terms of the Regulations. He sought legal advice on this point and then lodged the deposit in an appropriate scheme in April 2020. Ms McQuarrie could not inform the Tribunal as to how many other properties the Respondent has or if he has now ensured that this will not occur again. Mr Wilson informed the Tribunal that he believes that the Respondent owns at least two properties.
5. The Tribunal noted that the Respondent had tried to remedy the situation once he was aware of it. However, this was a substantial time after the start of the tenancy. As such a two times penalty was awarded. Neither party objected to this.
6. Ms McQuarrie raised a point that she would like the amount sought not to be awarded but to be offset against rent arrears due by the Applicant to the Respondent. The outstanding arrears totalled £3400 which offset by the penalty would mean that the Applicant would be left to pay the Respondent £750. She had put this in writing to the Tribunal the day before the hearing. Mr Wilson had put this to his client. She had refused this as she disputes the arrears. He stated that his client would consider further negotiations once the Order was in place. Ms McQuarrie disputed the fairness of this as it could affect her client's credit rating. The Tribunal was of the view that the parties had not raised objections to the substantive matter of the case. She noted that the Supreme Court case of *Inveresk plc (Respondent) v. Tullis Russell Papermakers Limited (Appellant) (Scotland) [2010] UKSC 19* stated that like for like debts could be off set against each other essentially leave the remaining amounts due. She motioned to continue the matter before the Order was made to allow the cases to be conjoined. No date was known for a hearing on the case. The Tribunal enquired further after the hearing to find that there has not been a date set for this hearing.
7. Ms McQuarrie referred to *Inveresk plc (Respondent) v. Tullis Russell Papermakers Limited (Appellant) (Scotland) [2010] UKSC 19*. She stated that the case summarised that in the situation where there was an equitable debt being owed by both parties to each other that the debts could be off set thus leaving the remaining outstanding amount to be paid.

8. The Tribunal took the view that in this case the Order does not deal with payment of a debt. It deals with a penalty that has arisen from a failure to comply with a statutory requirement. The Tribunal took the term penalty to be a punitive measure that is imposed by law for the failure to perform an act. It entails the concept of punishment, in this instance pecuniary. A debt would be a sum of money that is owed or due to be paid because of an express agreement. It is a specified amount of money that one person is obliged to pay and the other has a legal right to collect or receive. It is therefore that the penalty is not equitable to rent arrears which have arisen over time due to a contractual term in a lease being broken. The repayment of the arrear is for sums outstanding and not as means of a penalty for failing to pay her rent. *Inveresk plc v. Tullis Russell* considered two contracts and concluded that there was reciprocity with the contracts. This is not the case here. The failure for the Respondent to lodge the deposit within an approved deposit scheme was not connected to the arrears.
9. The motion to allow for this case to be conjoined with the Respondent's rent arrears case was refused.
10. Accordingly the Tribunal finds in fact:
  - a. The Applicant paid a deposit of £1350 on 23<sup>rd</sup> December 2016 in respect of a tenancy in the property owned by the Respondent.
  - b. The parties signed a Short Assured Tenancy on 23<sup>rd</sup> December 2016 with the commencement of the tenancy on 9<sup>th</sup> January 2017 for a 6 months period until 9<sup>th</sup> July 2017 and on a month to month basis thereafter. An AT5 was signed by both parties on the same date as the lease.
  - c. The Applicant did not receive notice from the Respondent of details of the rent deposit scheme into which the deposit has been paid.
  - d. The Representative accepts that the duties in terms of Regulation 3 were not met.
  - e. The Deposit was lodged in an approved deposit scheme on 9<sup>th</sup> April 2020 with the deposit being protected from 10<sup>th</sup> April 2020.

## **Reasons for Decision**

11. The Tribunal did not deem the penalty awarded in this order to be equitable to disputed rent arrears that had arisen while the Applicant was in the Respondent's property. The Tribunal did not grant the motion to conjoin the cases or off set the amounts in the two different cases.
12. The Respondent's solicitor confirmed to the Tribunal that the deposit had not been paid into a Tenancy Deposit Scheme. She confirmed that he had erred in doing so. The Tribunal considered all the facts and circumstances before it and noted that the Respondent had confirmed his position and that when he had sought legal advice on the matter he lodged the deposit in an approved deposit scheme. The Tribunal decided that a fair, just and proportionate sanction would be to order the Respondent to pay the Applicant the amount of two times the amount of the deposit (£2700).

## **Decision**

13. The Tribunal awards payment to the Applicant by the Respondent in the sum of £2700.

## **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.

  
Gabrielle Miller

20<sup>th</sup> October 2020

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Legal Member/Chair

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Date