



**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/20/1826**

**Re: Property at 16 Raeburn Crescent, Hamilton, ML3 9QB (“the Property”)**

**Parties:**

**Louise Gardner, Mr Kenneth Gardner, 13 Raymond Place, Westwood, East  
Kilbride, G75 8LD (“the Applicant”)**

**Mr Johnathan Barie, 16 Raeburn Crescent, Hamilton, ML3 9QB (“the  
Respondent”)**

**Tribunal Members:**

**Andrew Upton (Legal Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that (i) the Respondent is in breach of his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011; (ii) an appropriate sanction in respect of that breach is ONE THOUSAND SEVEN HUNDRED AND TWENTY FIVE POUNDS (£1,725.00) STERLING; (iii) the Respondent should make payment of the tenancy deposit of FIVE HUNDRED AND SEVENTY FIVE POUNDS (£575.00) STERLING into an approved tenancy deposit scheme 28 days; and (iv) the Respondent should provide the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid within 30 business days of payment.**

**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 Agreement which commenced on 12 July 2019.

2. At the commencement of the tenancy, the Applicants paid a tenancy deposit of £575 to the Respondent ("the Deposit").
3. In terms of the Tenancy Agreement, the Respondent gave notice that the Deposit would be made over to Safe Deposit Scotland, an approved Tenancy Deposit Scheme set up under the Regulations.
4. The Respondent did not pay the Deposit to any approved Tenancy Deposit Scheme.
5. On or around 3 March 2020, the Applicants wrote to the Respondent by text message asking if the Deposit had been paid into an approved Tenancy Deposit Scheme.
6. On or around 18 May 2020, the Respondent indicated to the Applicants in a text message that he intended to retain a portion of the Deposit. That same day, the Applicants replied to the Respondent by text message indicating that the decision on the Deposit would be made by "safety [sic] deposit Scotland" and requesting details for the Scheme. The Respondent replied confirming that he was personally holding the Deposit.
7. The Respondent has retained all of the Deposit, having indicated that he believed that he was entitled to retain the Deposit.
8. The Applicants have been deprived of the opportunity to seek to recover the Deposit through the dispute resolution service provided by an approved tenancy deposit scheme.

## **FINDINGS IN FACT AND LAW**

1. By failing to lodge the Applicant's tenancy deposit within an approved tenancy deposit scheme, the Respondent breached his 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 £1,725.00 is an appropriate sanction for the purposes of Regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
3. In all of the circumstances, it is reasonable to order that the Respondent pays the tenancy deposit to an approved tenancy deposit scheme within 28 days, and provides the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid within 30 business days of payment thereafter.

## **STATEMENT OF REASONS**

1. This Application called for its Case Management Discussion by teleconference on 26 October 2020. The Applicants both participated in the CMD. The Respondent was neither present nor represented at the CMD.

2. This is an Application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, in terms of which the Applicants seek sanction for an alleged breach of the Regulations by the Respondent.

3. In terms of the 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.

**42.— *Landlord's duty to provide information to the tenant***

- (1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).
- (2) The information is—
- (a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;
- (b) the date on which the tenancy deposit was paid to the scheme administrator;
- (c) the address of the property to which the tenancy deposit relates;
- (d) a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;

- (e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and
    - (f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.
  - (3) The information in paragraph (2) must be provided—
    - (a) where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or
    - (b) in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme.
  - (4) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments—
    - (a) paragraphs (2) and (3) apply as if the references to deposit were to each instalment of the deposit, and
    - (b) in relation to the information provided under paragraph (2)(a), confirmation of the cumulative amount of the tenancy deposit paid by the tenant in respect of each instalment after the first instalment.”
4. The Applicants have completed an Application and provided (i) excerpts of the Tenancy Agreement, and (ii) copies of text messages passing between Mrs Gardner and the Respondent, in support of their Application. At the CMD, based on that material, they made the following submissions:-
- a. The Applicants were the tenants and the Respondent the landlord of the Property under and in terms of a Private Residential Tenancy Agreement which commenced on 12 July 2019.
  - b. At the commencement of the tenancy, the Applicants paid a tenancy deposit of £575 to the Respondent (“the Deposit”).
  - c. In terms of the Tenancy Agreement, the Respondent gave notice that the Deposit would be made over to Safe Deposit Scotland, an approved Tenancy Deposit Scheme set up under the Regulations.
  - d. The Respondent did not pay the Deposit to any approved Tenancy Deposit Scheme.
  - e. On or around 3 March 2020, the Applicants wrote to the Respondent by text message asking if the Deposit had been paid into an approved Tenancy Deposit Scheme.
  - f. On or around 18 May 2020, the Respondent indicated to the Applicants in a text message that he intended to retain a portion of the Deposit. That same day, the Applicants replied to the Respondent by text

message indicating that the decision on the Deposit would be made by “safety [sic] deposit Scotland” and requesting details for the Scheme. The Respondent replied confirming that he was personally holding the Deposit.

- g. The Respondent has retained all of the Deposit, having indicated that he believed that he was entitled to retain the Deposit.
  - h. The Applicants have been deprived of the opportunity to seek to recover the Deposit through the dispute resolution service provided by an approved tenancy deposit scheme.
5. These are all matters which were asserted in the Application and supporting information. The Respondent has been afforded an opportunity to dispute these matters by opposing the Application, but he has chosen not to. I am therefore satisfied that these matters are not in dispute.
6. In terms of Rule 17 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure, the Tribunal can do anything at a Case Management Discussion that it may do at a Hearing, including make a decision. In terms of Rule 2, the Tribunal must have regard to the overriding objection to deal with proceedings justly when making a decision, including the need to deal with proceedings without delay.
7. Having considered the material available to me and heard from the Applicants, I am satisfied that the Respondent has breached his duty in terms of Regulation 3(1)(a) by failing to pay the Deposit into an approved tenancy deposit scheme within thirty business days of receipt. That being said, Regulation 10 imposes strict liability. Being satisfied that the Respondent is in breach of Regulation 3(1)(a), I must now order the Respondent to make payment to the Applicants of an amount not exceeding three times the amount of the Deposit. It follows that I must now determine what an appropriate sanction would be.
8. 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)."
9. In this case, the Deposit was unprotected for the whole duration of the tenancy, which was just under 12 months. The Respondent knew or ought to have known about his duty to lodge the Deposit at an approved tenancy deposit scheme because it was expressly referred to in the tenancy agreement that he signed. He was then reminded of the need to lodge the Deposit at an approved scheme on at least two further occasions by the Applicants in March and May 2020. Instead of lodging the Deposit at a scheme late, he instead chose to enter into discussions with the Applicants directly regarding what level of retention would be appropriate from the Deposit. He knowingly and deliberately deprived the Applicants of their right to make use of a dispute resolution service provided by an approved scheme. When given an opportunity to appear before the Tribunal and provide an explanation for his breach in mitigation of the sanction to be imposed, he chose not to. I consider that failure to demonstrate a lack of regard for the Regulations and a lack of awareness as to the seriousness of his breach.
10. In all of the circumstances, I am satisfied that the Respondent's flagrant breach of the Regulations lies towards the most serious end of the spectrum of non-compliance. I am satisfied that an appropriate sanction is the maximum sum equivalent to three times the tenancy deposit. I will order that he makes payment to the Applicants in the sum of £1,725.
11. The matter of the Respondent's right to retain the Deposit remains undetermined. The Applicants consider that they are entitled to full repayment of the Deposit, and wish to have the matter determined by the dispute resolution service of an approved tenancy deposit scheme. In terms of Regulation 10(b), the Tribunal may order that a landlord pays a tenancy deposit into an approved scheme and provides the information specified in Regulation 42. I am satisfied that it is appropriate to make that order in this case, and I will do so. That will allow both parties to make appropriate submissions on their entitlement to the deposit. Such an order does not affect the award of sanction under Regulation 10(a). Therefore, the Respondent is ordered to pay the sum of £575 into an approved tenancy deposit scheme, and to provide the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid within 30 business days of payment of the Deposit to the approved scheme.

## **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.**

Andrew Upton

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**Legal Member/Chair**

**26.10.2020**  
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**Date**