



**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/20/2199

Re: Property at 12 Caley Brae, Uddingston, G71 7TA (“the Property”)

Parties:

Mr Juan Martin Bailo, 0/2, 159 Wellshot Road, Glasgow, G32 7AU (“the Applicant”)

Mr Graham Devine, 4 Gailes Park, Bothwell, G71 8TS (“the Respondent”)

Tribunal Members:

Helen Forbes (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted against the Respondent and in favour of the Applicant in the sum of £700, and the Respondent is ordered to pay the tenancy deposit of £350 to an approved tenancy deposit scheme

Background

1. This is an application received on 17th October 2020, made in terms of Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended (“the Rules”). The Applicant is seeking an order for payment in respect of the Respondent’s alleged failure to lodge a tenancy deposit of £350 in an approved tenancy deposit scheme. The Applicant seeks an order for three times the amount of the tenancy deposit. A tenancy between the parties commenced on 20th November 2018. The end date of the tenancy is in dispute. The Applicant lodged copy correspondence between the parties, copy tenancy agreement, and copy pages of his new tenancy agreement, signed on 15th July 2020.

2. At the time of acceptance of the application on 16th November 2020, the Applicant's partner, Ms Fernandez, had been included as a joint applicant.
3. By email dated 30th November 2020, the Respondent raised an issue in relation to the end date of the tenancy. It was his submission that the tenancy ended on 15th July 2020, as the Applicant called him on that date and said he had posted the keys through the door of the Property. The Respondent lodged an email from his wife alleging that she was a witness to a phone call from the Applicants to the Respondent on 15th July 2020, stating that they had left the Property. If this was correct, the application had not been made timeously, as it was received by the Housing and Property Chamber ("HPC") on 17th October 2020. The Applicant denied contacting the Respondent on 15th July 2020, as claimed. He lodged evidence alleging that they left the Property on 18th July 2020, informing the Respondent on 19th July 2020 that they had left.
4. By email dated 10th December 2020, the Respondent raised the issue that his wife ought to have been included as a joint Respondent as she was the joint owner and joint landlord of the Property.
5. By email dated 31st December 2020, the Respondent was informed that it would be open to his wife to make an application in terms of the Rules to become a party to the case.
6. A Case Management Discussion ("CMD") for this and the case FTS/HPC/CV/20/2084 took place by telephone conference on 5th January 2021. The Applicant and Ms Fernandez were in attendance. The Respondent was not in attendance, having informed the HPC that he would not be attending. The Applicant confirmed that the landlord in respect of the tenancy agreement was the Respondent, and not his wife. This was clear from the tenancy agreement. The case was continued to a hearing on the evidence, the issues in dispute being as follows:
 - (i) On what date did the tenancy end?
 - (ii) Was the application made timeously?
 - (iii) Was the deposit lodged with an approved tenancy deposit scheme?
 - (iv) If the deposit was not so lodged, what level of payment are the Applicants entitled to in terms of the Regulations
7. Parties were notified on 7th January 2021 that a hearing had been set down for 12th February 2021.
8. By email dated 8th January 2021 the Respondent wrote:

I am now of the view that the hearing should not take place and therefore request that this matter is resolved prior to the proposed hearing date. I have been cited by the Tribunal in respect of a party with whom I did not

have a contractual relationship. I believe that you have been misled by Mr Bailo, who advised you that Ms Fernandez was included on the lease. He has submitted pages from a lease agreement which includes Ms Fernandez. This is not my lease agreement. If you check, you will see that the agreement is dated 15/7/20. I can only assume that this relates to the lease he agreed after he left my property. If you look at the copy of my lease agreement, dated 20/11/18, you will ascertain that it is solely in the name of Juan Martin Bailo. Once again, I remind you that my wife was not cited and should have been. I believe that the citation I received is not competent as it has included an applicant who has no legal basis to make a claim. I further believe that my wife should be cited, rather than her making an application to be included. I now request that this case be dismissed.

9. By email dated 14th January 2012, parties were informed as follows:

1. The Tribunal does not intend, at this stage, to postpone the combined hearing set down for 12th February 2021. The case management issues that have arisen may be capable of being resolved prior to the hearing, or as preliminary matters on the day of the hearing.

2. The issue of whether or not Ms Fernandez is entitled to be an Applicant/party appears to have arisen as a result of the inclusion of pages from another lease with the Application. This led to a question being asked of Mr Bailo as to whether Ms Fernandez should be included, and he responded positively. Following the recent challenge by the Respondent, Mr Bailo has alleged that, in early September 2019, verbal agreement was reached between the parties that Ms Fernandez was to be considered a joint tenant of the property. If this is correct, she is entitled to be an Applicant. This would appear to be disputed, although the Respondent has not fully answered this point - hence the need for a Direction, and the requirement now for the Respondent to provide the required information. Following upon the Respondent's response, and any further representations from the Applicants, the Tribunal will consider the position in regard to further procedure in respect of the case FTS/HPC/CV/20/2084.

3. The Tribunal has also issued a Direction to the Applicants regarding the case FTS/HPC/PR/20/2199 as it would seem unlikely that Ms Fernandez is entitled to be an Applicant in that case, given it concerns a deposit paid by Mr Bailo at the start of the tenancy, when there was no prospect of Ms Fernandez being a joint tenant. The Applicants must now answer this point. If the Applicants are no longer insisting that Ms Fernandez is a party in this case (or, indeed, in either case), an order will be made by the Tribunal to remove her as a party. Mr Bailo is entitled to appoint Ms Fernandez as a representative for the hearing, should he so wish.

4. The Tribunal does not consider that it has any requirement to check any registration details for the Property. The tenancy agreement lodged (unless any other agreement exists - this will be answered by the Respondent in his response to the Direction) provides that the Respondent is the landlord. The Applicant is entitled to rely on the information in the tenancy agreement in deciding the identity of a respondent in any application. Whether or not Mrs Devine is registered as a joint landlord would appear to be immaterial. The Respondent may wish to put forward further arguments on this point, however, the Tribunal is currently satisfied that the Respondent is the correct respondent. As previously explained, Mrs Devine is entitled to apply to become a party, provided that she has a legal basis to make such an application. The Tribunal would also point out that, if she is not included as a party, as the result of an application, the Respondent is entitled to call Mrs Devine as a witness, and/or lodge any relevant correspondence or statement from Mrs Devine that would support his case. He is also entitled to appoint Mrs Devine as a representative for the hearing, should he so wish.'

10. By email dated 14th January 2021 Directions dated 13th January 2021 were issued. The Applicants were required to provide to the Tribunal the following information:

An explanation as to the legal basis for the inclusion of Ms Fernandez as an Applicant, given that she was not an occupant or a tenant of the Property at the time that the lease was entered into and the deposit paid to the Respondent.

The Respondent was required to provide information to the Tribunal in respect of case FTS/HPC/CV/20/2084, including whether the three page lease lodged by the Applicant that showed only one landlord was the correct lease.

11. By email dated 20th January 2021, the Respondent replied to the Direction, and confirmed that the three page lease was the correct lease. He stated that there had been a lack of impartiality in handling the case, that the Applicant had misled the Tribunal by including Ms Fernandez, that the HPC had assisted in the inclusion of a joint applicant but required a formal application to include a joint respondent, and that his wife ought to have been involved as a joint respondent. It was his position that the Applicant had not completed his application properly.
12. By email dated 21st January 2021, the Applicant responded that Ms Fernandez was also a tenant of the Property following a verbal agreement between the parties in early September 2019. When asked by the HPC whether he wished to include her as a party, he had assumed this was the correct thing to do. He understood that she may not properly be a party to this case, and that he would wish her to be his representative for the purposes of the forthcoming hearing.

13. By email dated 21st January 2021, the Applicant lodged notifications from the three approved tenancy deposit schemes confirming that the deposit had not been lodged with any of the approved schemes.

14. By Order of the Tribunal dated 22nd January 2021, Ms Fernandez was removed as a party to the application and the following information was provided to parties:

FTS/HPC/PR/20/2199

The Tribunal will hear this case on 12th February 2021, as set out in the Note of Case Management Discussion dated 5th January 2021. In addition to the matters set out in the Note, the Tribunal will expect to be addressed on the matter of whether or not it ought to make an order to have the deposit lodged in an approved tenancy deposit scheme in terms of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, in order to allow adjudication on the deposit to take place.

15. By email dated 8th February 2021, the Respondent stated that the application was lodged late and should be rejected.

16. By further email dated 8th February 2021, the Respondent requested that the case be dealt with by a face-to-face hearing.

17. By email dated 9th February 2021, the Respondent stated that the application should be dismissed due to the incorrect inclusion of Ms Fernandez as a party.

18. By email dated 9th February 2021, the HPC responded to the Respondent to inform him that due to the Covid-19 pandemic, case management discussions and hearings are being conducted by teleconference only. None are being held face to face at this time.

19. By further email dated 9th February 2021, the Respondent requested again that the case be dealt with by an actual hearing, stating that the body language of the Applicant and his representative could prove to be extremely important.

20. By further email dated 9th February 2021, the Respondent stated that he was of the view that the case should be dismissed and he would be seeking further legal advice before deciding as to, if, or how he would proceed.

21. By email dated 10th February 2021, the HPC informed the Respondent as follows: *Due to the current pandemic, no case management discussions or hearings are being heard face to face. They are all being held by conference call.*

22. By email dated 10th February 2021, the Respondent stated the following: *I am aware of your rules regarding public meetings and should the Tribunal decide not to abandon this case, then I look forward to presenting my responses at an actual meeting when Covid restrictions have ended.*

23. By email dated 11th February 2021, sent at 20.50, and passed to Tribunal members and the Applicant on the morning of the Hearing, the Respondent made the following submission, which includes matters relating to the other case between the same parties (FTS/HPC/CV/20/2084), calling on the same date:

I am extremely disappointed and concerned to advise you that, despite requesting several times to have either the case dismissed or to have the hearing reconvened as a face to face meeting, I have not received a response from you. I have taken advice and have decided that I will not take part in the teleconference hearing scheduled for 12/2/21. If the case continues, then it is my view that natural justice cannot be achieved on the basis of a decision taken after a telephone conversation. I will reiterate to you that I would do myself a disservice if I subjected myself to responding to spurious and inaccurate portrayal of events by the Applicant and his representative via a telephone conversation. Again, as previously intimated to you, I believe that the body language of the Applicant could be significant. A flawed decision could potentially cost me in excess of £3000. Should the Tribunal decide not to dismiss the case, then I will appear at any future actual meeting.

I have provided sufficient information to the Tribunal to satisfy, in my view, that the case should be dismissed. I will gladly comply with any future Direction from the Tribunal, but I will no longer respond to any further submissions by the Applicant or his representative in respect of cases 2084 and 2199.

It is my view that the process has been compromised by a lack of objectivity and by flaws in the handling of said process. I trust that, by raising these issues, this would not cause me detriment in the disposal of these cases.

You have never asked me about the whereabouts of the deposit paid by Mr Bailo, but you have stated that you may decide to issue me with an Order to deposit it within an Approved Deposit Scheme. Should you choose to issue such an Order, then I will of course respond.

To conclude the following are the additional points I would have chosen to make had I decided to take part in the teleconference hearing. Please do not construe this as my tacit approval for it to go ahead:

The Applicant is an unreliable witness.

- 1. He falsely claimed that Ms Fernandez was included in the contract and submitted misleading evidence to support this claim.*
- 2. He claimed that our sole means of communication was by email. He later falsely claimed that I had verbally refused to include Ms Fernandez on the lease.*
- 3. He falsely claimed that he always paid his rent on time.*
- 4. In written submissions, he gave 3 dates for ending the contract.*

5. *He claimed I had failed to carry out repairs and ignored him. This is totally refuted by some of his own submissions*
6. *He made false claims of an on- going noise problem with the boiler.*
7. *He falsely claimed that I refused to provide a reference.*
8. *He claimed that I made no contact regarding return of deposit.*
9. *He accused me of rudeness, intimidation and racism.*
10. *He accused me of illegal eviction.*
11. *He failed to demonstrate how excessive energy bill came about. I have proved that I was very responsive to any problems that arose. He did not respond to my request to provide me with further bills in order that the matter could be properly investigated at the time.*
12. *He falsely claimed that I offered him the house for sale at an inflated price.*

The Tribunal should not uphold his application.

1. *Application was late*
2. *Has not proved his case regarding energy bill.*
3. *There are several procedural and impartiality issues that I have previously raised.*

The Hearing

24. A Hearing took place by telephone conference on 12th February 2021. The Applicant was in attendance and represented by Ms Fernandez. A Spanish interpreter was in attendance. The Respondent was not in attendance.
25. The Tribunal considered the terms of Rule 29 of the Rules. The Tribunal determined that the Respondent had been given reasonable notice of the time and date of the Hearing, together with details on joining the telephone conference. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Respondent upon the representations of the Applicant and the material before the Tribunal, which included representations from the Respondent.

Preliminary Matters

26. The Tribunal adjourned to consider the points made by the Respondent. The Tribunal considered that the inclusion of Ms Fernandez as a party in the first instance had arisen through error and that there was no intention to deceive the Tribunal by the Applicant. The Applicant clearly stated in his application that he was including a copy of his new lease signed on 15th July 2020. Any confusion that arose thereafter was not of the Applicant's making. The Tribunal could not see any prejudice to the Respondent in relation to the fact that Ms Fernandez had been included as an applicant initially. Ms Fernandez was properly removed as a party as soon as matters became clear, in terms of Rule 32, which provides that a party may be removed if, for instance, the wrong person has been named as a party. The only way in which the Respondent's wife could be added as a party was also in terms of Rule 32.

The Respondent's wife chose not to make any such application, despite the Respondent being clearly informed of the correct procedure. It would not have been open to the Tribunal to have added her as a party in any other way. No impartiality had been shown in the handling of the case.

27. The Tribunal considered that the Respondent had been informed on two occasions by HPC staff that the hearing could not take place face-to-face at this time, due to the Covid-19 restrictions, as well as receiving several notifications that the hearing would take place as scheduled.
28. The Tribunal considered the Rules, and noted that Rule 1 provides that *"hearing" includes an oral hearing, any hearing conducted in whole or in part by video link, telephone or other means of instantaneous communication and any resumed hearing.* While appreciating that a face-to-face hearing would be preferable under normal circumstances, the Tribunal was satisfied that a hearing by telephone was provided for in the Rules and was appropriate in the circumstances of an ongoing pandemic. The Tribunal also had regard to the overriding objective contained in Rule 2 and 3, and the requirement to avoid delay, so far as compatible with the proper consideration of the issues. The Tribunal was aware that any delay before a face-to-face hearing could take place could be excessive, as no date has yet been set for such hearings to commence. The Tribunal considered it would not be in the interests of justice to delay consideration of the application to an unidentified date. The Tribunal considered that the Applicant may be more likely to be inconvenienced than the Respondent by a telephone conference given that English is not his first language, and an interpreter was involved. The Tribunal decided to ask the Applicant for his views on matter.
29. The Applicant stated that he was happy to proceed with a telephone conference and did not wish to delay matters further.
30. The Tribunal decided to proceed with the hearing in the absence of the Respondent.

End date of the tenancy and the competency of the Application

31. Ms Fernandez accepted on behalf of the Applicant that different dates had been stated in different communications, however, she said that she and the Applicant left the Property on 18th July 2020. The tenancy did not end until 19th July 2020. This was the date that the rent was paid up to and the keys returned. Responding to questions from the Tribunal regarding the alleged phone call to the Respondent by the Applicant on 15th July 2021, the Applicant said this did not happen, referring to the telephone bills lodged that showed no such telephone call took place. Ms Fernandez pointed out that the photographs of the condition of the Property at the end of the tenancy would indicate that they were taken on 18th July 2021, if one looked at 'properties'.
32. The Tribunal adjourned to consider its decision on this point. The Tribunal considered the arguments put forward by the Respondent in writing, including

the email from his wife dated 9th December 2020 stating that she had witnessed a call from the Applicant to the Respondent on 15th July 2020, whereby the Applicant had said he had left the Property and was demanding the return of his deposit. The witness was clear about the date as there was a family celebration at the time. The Respondent had also made the point that the new tenancy agreement was signed on 15th July 2020.

33. The Tribunal found the Applicant to be credible and reliable in his evidence, notwithstanding that he had stated in different emails that he had left the Property on the 18th and on the 19th July. The Tribunal accepted the evidence that the Applicant signed the new tenancy agreement on 15th July, that he physically left the Property on 18th July, and that he considered the tenancy ended on 19th July 2020. The Tribunal took into account that rent was paid to 19th July 2020, and that the local authority had stated that the Applicant's liability for Council Tax ended on 19th July 2020. In all the circumstances, the Tribunal found that the contract between the parties ended on 19th July 2020. Consequently, the application was timeous and competent.

Was the deposit lodged with an approved tenancy deposit scheme?

34. Ms Fernandez said that the deposit was not lodged with an approved tenancy deposit scheme ("TDS"). It was the Applicant's understanding that the Respondent had never lodged a tenancy deposit for this property, based on the responses from the three TDS.
35. Responding to questions from the Tribunal, the Applicant said there had been no discussion with the Respondent concerning the deposit until the end of the tenancy. It was first raised in July 2020, during a discussion about the return of the keys for the Property. There had been no final inspection of the Property.

Level of payment

36. Ms Fernandez submitted on behalf of the Applicant that the level of payment ought to be three times that of the deposit because of the amount of time spent on the case by the Applicant.
37. Ms Fernandez submitted that the Respondent was not a responsible landlord. He had not provided a gas safety certificate during the tenancy. He did not provide an EPC. The tenancy agreement was not legal. He did not provide an inventory. He did not carry out repairs. There regulations regarding smoke alarms were not complied with.
38. Responding to questions from the Tribunal regarding their awareness of whether or not the Respondent was an experienced landlord, with other properties to let, Ms Fernandez said that the Applicant believed the Respondent was letting at least one other property, and that he may have been letting up to five properties in total. This belief was based on conversations between the parties.

Late lodging of the deposit

39. The Tribunal heard from the Applicant's representative on whether or not an order should be made to the Respondent to lodge the tenancy deposit now in a TDS. Ms Fernandez said the Applicant did not believe this would be worthwhile. The Respondent has been manipulating the scheme. The situation has been very stressful and the Applicant would not wish to have to continue discussions with the Respondent.
40. The Tribunal noted that the Respondent had alluded to the deposit being lodged somewhere but had not been forthcoming as to its whereabouts.

Findings in Fact

- 41.
- (i) The parties entered into a tenancy agreement in respect of the Property that commenced on 20th July 2018.
 - (ii) A tenancy deposit of £350 was paid to the Respondent by the Applicant at the start of the tenancy.
 - (iii) The deposit was not lodged with an approved tenancy deposit scheme within the 30 days required by the Regulations.
 - (iv) The tenancy agreement between the parties ended on 19th July 2020.
 - (v) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

Reasons for Decision

42. The Applicant's deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy as required by Regulation 3. The deposit remained unprotected for the duration of the tenancy.
43. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised in the manner set out in the case *Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015)* by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal must consider the facts of each case appropriately.
44. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020 which states: '*Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent*

intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals.'

45. The Tribunal considered this to be a serious matter, with the deposit unprotected throughout the duration of the tenancy, and the Applicant deprived of the benefit of adjudication at the end of the tenancy.
46. The Tribunal noted that no mitigating circumstances were put forward by the Respondent. The Tribunal felt that the Respondent had shown a disregard for his responsibilities as a landlord. The Tribunal did not find that the Respondent had never lodged a tenancy deposit in respect of the Property, as careful reading of the notifications from the TDSs showed that no tenancy deposit had been lodged for the Applicant at that address.
47. The Tribunal did not find that this was a case at the most serious end of the scale that would justify an award of three times the tenancy deposit. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £700 to the Applicant, which is two times the tenancy deposit.
48. The Tribunal decided to make an order in terms of Regulation 10(b) to the effect that the Respondent, if he has not already done so, must now pay the tenancy deposit to an approved scheme. The reason for the decision was that there would appear to be a disagreement over the condition of the Property at the end of the tenancy. The correct forum in which to have such a dispute adjudicated is an approved TDS. This will provide impartial adjudication for both parties, and is in the interests of both parties.

Decision

49. The Tribunal grants an order against the Respondent for payment to the Applicant of the sum of £700 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.
50. The Tribunal orders the Respondent to pay the tenancy deposit to an approved tenancy deposit scheme, if he has not already done so, in terms of Regulation 10 (b) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

H Forbes

Legal Member/Chair

12th February 2021
Date