



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/21/0231

Re: Property at 14 Whirlbut Crescent, Dunfermline, KY11 3AE (“the Property”)

Parties:

Mr Huw Williams, 47 Burnside Terrace, Oakley, Dunfermline, KY12 9QU (“the Applicant”)

Charlotte Duffy, 21 Castleblair Park, Dunfermline, KY12 9DW (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision :

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined to grant an order against the Respondent for payment to the Applicants of the sum of £400 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. The application was lodged by the Applicant and received by the Tribunal on 29 January 2021 in terms of Rule 103 of the Procedural Rules.
2. The Applicant had lodged with the application text messages dated 12 January 2021, a text message from mydepositscotland and an email from lettingprotect scotland as well as a screenshot of a payment of £200 from the Respondent on 12 January 2021. He was asked to provide a copy of the tenancy agreement and an end date of the tenancy in the letter of the Tribunal dated 10 February 2021 and replied the same day that he did not have a tenancy agreement and that the tenancy ended on 10 January 2021. On 24 February 2021 the Tribunal issued a direction to the Applicant to provide evidence of the deposit having been paid, the end of the tenancy and

information about the tenancy details. He replied on 2 March 2021 with further copies of text messages between the parties from 17 and 19 September 2017 and 10 January 2021. On 20 March 2021 the Applicant advised the Tribunal that the outstanding £200 from his deposit had been paid to him by the Respondent.

3. A case management discussion (CMD) was scheduled for 6 April 2021 at 2 pm and the Respondent was notified by the Tribunal of the date and time and the content of the application by service through Sheriff Officers on 4 March 2021
4. No representations from the Respondent were received prior to the CMD.

B: EVIDENCE

1. At the CMD both parties attended via telephone conference call. The Applicant was supported by a Ms Hann.
2. At the start of the next CMD the legal member set out the purpose of the CMD and both parties confirmed they did not consider that a hearing would be necessary as the factual background of the case was not in dispute.
3. The Applicant confirmed that the tenancy commenced on or about 19 September 2017 and that he had received a tenancy agreement at the time but could not find that when he moved out. The rent was to be £400 per month and the deposit was £400. There was nothing in the tenancy agreement specifying which registered scheme the deposit was to be paid into. The tenancy ended on 10 January 2021 and initially the Respondent had kept £200 of the deposit due to her stating she needed to carry out repairs and paint parts of the property. As shown in the text messages he asked for the deposit back at the end of the tenancy. This is when he realised it had not been protected. The Respondent had now paid him back the whole £400 deposit. He wished a sanction to be imposed on the Respondent as the deposit had been unprotected for the entire time of the tenancy.
4. The Respondent admitted that she had not paid the deposit into a deposit scheme at the relevant time. She stated that she rents out only this one property and has done so for about 8 years. She does not use a letting agent or solicitor to assist her in managing her property but had a friend who had helped with the lease. She had a very bad ending to the previous tenancy and found that stressful. She had read about the tenancy deposit schemes around the time the previous tenancy ended in 2017 and was aware of the duty to put the deposit into a registered scheme but at the time she did not have an account with a scheme administrator. The Applicant and a female had come to the property and paid the first rent and the deposit in cash. The Applicant had not looked at the tenancy agreement and she had actually found the tenancy agreement in a drawer in the furniture he had left after 10 January 2021. When the deposit was paid she had placed the money in the folder with the tenancy papers and then forgot about it. She thought she had paid the

money into a registered scheme but must have forgotten about it. That was why she had stated in one of the text messages that the deposit was protected. About a year later she came across the cash still in the folder but this did not alert her to checking whether she had lodged the deposit as required. She thought she would have transferred that by telephone out of her account. She kept the £200 back because the Applicant had painted the ceilings and had done some other decorating she had to then rectify before renting the property out again. She has now placed the deposit of the new tenant into a registered scheme but could not verify which of the schemes she had used although she thought it was Safe Deposits Scotland. The Respondent stated it was not a case of her wanting to keep the money but a bad oversight for which she had no explanation other than that the time was stressful for her and for which she apologises. She stated she was now not working and hoping to pay any amount ordered off in instalments because the rent paid for the mortgage. She stated she was not a bad landlord and if anything too soft as she had allowed the Applicant to pay off arrears over the period of a year.

5. The following documents were lodged in respect of this case:

- a) text messages dated 12 January 2021
- b) a text message from mydepositscotland
- c) email from lettingprotect scotland
- d) screenshot of a payment of £200 from the Respondent 12 January 2021.
- e) text messages between the parties from 17 and 19 September 2017 and 10 January 2021
- f) screenshots showing repayment of £200 each from Respondent to Applicant on 12 January 2021 and 15 March 2021

C THE LEGAL TEST:

- 1. In terms of Rule 17 (4) of the Procedural Rules the Tribunal can do anything at a CMD it can do at a hearing.
- 2. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—(a) may make a decision without a hearing if the First-tier Tribunal considers that—
 - (i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and
 - (ii) to do so will not be contrary to the interests of the parties;
- 3. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
- 4. In terms of Regulation 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.”

5. In terms of Regulation 3 (1) "A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

D: FINDINGS IN FACT

Based on the documents lodged and the discussion at the CMD the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The deposit of £400 was paid by the Applicant to the Respondent in cash on or around 22 September 2017
2. The parties entered into a tenancy agreement over the property which commenced on or around 19 September 2017 and ended on 10 January 2021
3. For the entire tenancy period from 22 September 2017 to 10 January 2021 the deposit of £400 had not been lodged with a registered scheme.
4. The deposit should have been lodged on or around 3 November 2017
5. The Respondent had been renting out the one property for about 8 years.
6. The tenancy agreement did not provide information about which registered scheme would be used.
7. The Respondent was aware of the duty to lodge the deposit with a registered scheme prior to the commencement of the tenancy agreement.
8. The previous tenancy for the property had caused some difficulties and the Respondent felt stressed trying to get the property into a condition to rent it out to the Applicant at the time.
9. The Respondent found the £400 cash in 2018 and did not check whether the deposit had been lodged at that stage.
10. The deposit was repaid in full to the Applicant after the application was made.

E: REASONS FOR DECISION:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the CMD and without a full hearing on the basis of the information provided by both parties.
2. It was admitted by the Respondent and also clear from the documents lodged, that in this case a deposit of £400 was paid to the Respondent at the start of the tenancy and that the full deposit was not lodged as required before the tenancy ended.
3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.

4. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
5. In the case *Tenzin v Russell*, of 20 December 2013, Sheriffdom of Lothian and Borders, Sheriff Principal Stephen stated at para 19 *"There are no rules as to the approach that the court should take in assessing the amount of the order. The court must make an order and it is therefore reasonable to read into the regulations that Parliament intended to leave it entirely to the court to determine the level of penalty to impose. The regulations do not enumerate any matters or criteria which the court must have regard to. Accordingly, the sheriff has complete discretion as to the level of the order and is constrained only by the amount of the deposit and a triple multiplier. The sheriff, of course, will have regard to any evidence offered by way of mitigation. In dealing with non-compliance no distinction has been drawn by the legislators between the careless or devious; the experienced or inexperienced, the culpable or inadvertent. Likewise the strict liability consequences of non-compliance allow the court to promote rigorous application of the regulations pour encourager les autres. In other words deterrence."*
6. The Tribunal considers that the discretion of the Tribunal is correctly 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 has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of *"repeated and flagrant non participation in, or non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale"*. It was held that *"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 judgement. 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..."*
7. The deposit was unprotected for the whole term of the tenancy. The deposit was thus not lodged within 30 working days as required by Regulation 3 and this was a clear breach of the Regulations.
8. As an aggravating factor to be taken into account, the Tribunal further considered that the Respondent was clearly aware of the Regulations and had 8 years experience with letting property, albeit only from renting out one property. Even when the Respondent came across the funds in cash a year after the tenancy started, this did not prompt her to check whether she had in fact lodged the deposit with a registered scheme. Although the Tribunal accepts her evidence that she has now lodged the deposit of the next tenants with a registered scheme, she was unable to check clear records as to which

scheme she had used. She was unable to provide any explanation for not lodging the deposit.

9. The Tribunal further considers it relevant that at the end of the tenancy, which is the time when decisions about the return of the funds are made, the deposit had not been protected and the Applicant did not have access to the dispute resolution scheme. Ultimately the main goal of the Regulations, that both parties have access to the dispute resolution mechanism when the tenancy ends, was not achieved in this case because of the non compliance of the Respondent with her landlord duties.
10. On the other hand, the Tribunal also recognises the Respondent admitted the breach as soon as this was brought to her attention and subsequently returned the whole deposit to the Applicant although she considered that due to the condition of the property she should have been able to retain some of the funds. Thus she herself has been unable to benefit from the dispute resolution mechanism in this case. The Respondent did not try to argue that there were any specific good reasons why the deposit was not lodged but rather explained that during the time in question she was stressed and had overlooked the matter although she had been aware of the duty to use a registered scheme. The Tribunal believed that this was a genuine oversight and that it was not a deliberate non compliance with the regulations. The Respondent is what could be described as an amateur landlord who appears not to have paid sufficient attention to dealing with the deposit and then again forgot to check if she had lodged the deposit when she subsequently found the cash still in her possession.
11. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £400 would thus be £1,200. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal does not consider that the failure to comply with the Regulations in this case warrants a penalty at the highest end of the scale. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £400 which is one time the deposit amount and which reflects the seriousness and duration of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

12. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £400 in terms of Regulation 10 (a) 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.

**Petra Hennig McFatridge
Legal Member/Chair**

**6 April 2021
Date**