

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/21/0518

Re: Property at 4/2 12 Castlebank Place, Glasgow, G11 6BW (“the Property”)

Parties:

Mr Anthony Tan, Flat 1/6 27 Broomhill Avenue, Glasgow, G11 7BF (“the Applicant”)

Mr Craig Moore and Mrs Monica Moore, 1 9/4 Meadowside Quay Square, Glasgow, G11 6BS (“the Respondents”)

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 Respondents for payment to the Applicant of the sum of £950 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. This is an application under Rule 103 of the Procedural Rules and Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations). The application was made by the Applicant on 9 March 2021 and further amended by his email of 19 March 2021 amending it to an application against the joint landlords.
2. A Case Management Discussion (CMD) was scheduled for 5 May 2021. No written representations were received from the Respondents. However at the telephone hearing on 5 May 2021 the Applicant and both Mr and Mrs Moore participated.
3. **The following documents were lodged in respect of this case by the Applicant:**

- a) Scottish Private Residential Tenancy Agreement for tenancy commencing 10 July 2020
- b) Email confirming end of tenancy between the parties dated 27 January 2020
- c) Email correspondence between Applicant and Tay Lettings from 21 and 22 September 2020 with the Applicant enquiring where the deposit had been lodged.
- d) Email correspondence between the parties from 27 January 2021 to 7 March 2021.
- e) Letting Protect Scotland confirmation email 9 March 2021 that no deposit was lodged with them for the tenancy.
- f) SafeDeposits Scotland confirmation email 8 March 2021 that no deposit was lodged with them for the tenancy.
- g) My Deposit Scotland confirmation email 8 March 2021 that no deposit was lodged with them for the tenancy.
- h) Royal Bank of Scotland extract bank statement from Applicant's account with transaction for £950 to Tay Lettings on 15 June 2020

B: EVIDENCE

- 4. At the CMD on 5 May 2021 the legal member explained the purpose and process of the CMD.
- 5. Both parties agreed that the deposit had been paid by Mr Tan to the letting agent involved in setting up the tenancy, Tay Lettings, on 15 June 2020. Both parties entered into a Private Residential Tenancy over the property commencing on 10 July 2020 and ending on 24 February 2021. Both agreed that the deposit had then be paid from the Letting Agent to the Respondents into their day to day account and that the money had remained there. Both parties agreed that the deposit had not been lodged into a registered scheme at any point during the tenancy or thereafter. Both parties agreed that no hearing would be necessary in this case.
- 6. Mr Tan stated relied on his written submissions and advised that the reason why he did not accept the offer of Mr Moore to repay the deposit to him was the advice he was given by his Union, who had supported him in writing to the landlord in March 2021. Mr Moore had demanded payment of further invoices and stated he would apply to the Tribunal for a payment order. The Applicant had been advised by the Union that it would be safer to have something formal in place rather than an informal settlement and that is why he did not accept the offer for settlement. He has to date not lodged an application for repayment of the deposit but is aware this is something he can do. He did not contact the landlord directly about the deposit until after the end of the tenancy but he had contacted Tay Lettings in September 2020 asking where the deposit had been lodged and received the answer that this would be done by the landlord.

7. Mr Moore stated he was not experienced with the way the Tribunal works and thought they would give their position at the CMD rather than in writing. Mr Moore explained that he had realised the deposit had not been lodged as required when the Applicant had asked about this after the tenancy came to an end. At this stage he had checked the account Tay Lettings paid the rental money into and realised that the deposit together with the first month's rent had been paid to the landlords' account by Tay Lettings at the start of the tenancy and that the deposit had not been lodged in a registered scheme. He had then offered Mr Tan to pay back the whole deposit and to no longer insist on any other payments. Mr Tan had refused this offer.
8. He stated that the property is jointly owned and let out with his wife and that there is one further rental property let out in joint names and two further rental properties, which are in the name of a company and in which the Respondents hold shares but are not the sole shareholders. The company held properties are not dealt with by Tay Lettings. The two other properties are currently empty but previously Tay Lettings had been dealing with the deposit for both of them. However, as the previous tenancy was of a short duration Tay Lettings had suggested to only charge a one off fee and to assist with finding a tenant and drawing up the lease and had not taken on the management of the property. For one of the company properties there had been a similar arrangement but the letting agent in that case still had dealt with the lodging of the deposit. He had only used Tay Lettings for the private properties.
9. Tay Lettings had not lodged the deposit and had instead paid it to the landlords. The landlords had not realised they were to deal with this and had not checked the payment. The Respondents had previously never dealt with lodging a deposit but there must be an account with a tenancy deposit scheme for the company rental properties, which Rettie Letting deal with. The Respondents do not know which scheme is used for these properties.
10. The Respondents are aware that the deposit requires to be lodged but through an oversight did not realise until after the end of the tenancy that the letting agent had not dealt with this for this tenancy. It was an oversight that the deposit had not been lodged.
11. The email to Mr Tan on 27 January 2021 shows that the landlords had intended to pay the deposit back in full. The position only changed after the Applicant had moved out.
12. The Respondents have been letting out rental properties for 4 years and not for the 10 years referred to in the email of 27 January 2021. The 10 year reference was given out anger and to emphasise the point.
13. Both Mr and Mrs Moore confirmed that the funds had been sitting in their account the whole time. It was a household account, not a separate property account, but there had never been a point where there would have been insufficient funds to cover the deposit.
14. Mrs Moore stated she was not involved in the rental issues and did not know about the deposit payment into the account. The Respondents stated they had not made a civil application for the costs they said they had incurred.

C THE LEGAL TEST:

1. 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;
2. 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.
3. 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.”
4. 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 and the discussion at the CMDs the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The deposit of £950 was paid by the Applicant to the Respondents' Letting Agent Tay Letting on or around 15 June 2020.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 10 July 2020
3. The tenancy ended on 24 February 2021.
4. On or around 27 January 2021 the Respondents confirmed to the Applicant that an inventory would be prepared and then the deposit repaid.
5. The request for details of the tenancy deposit made by the Applicants on or around 21 September 2020 but this was with the letting agent Tay Lettings, not with the landlords.
6. On 7 March 2021 the Applicant requested from the Respondents information about the deposit scheme used.

7. On that day the Respondents directed the Applicant to Tay Lettings about this as Tay Lettings had set up the contract.
8. The deposit had been paid by Tay Lettings to the Respondent at the start of the tenancy. This had not been noticed by the Respondents.
9. The Respondents let out 2 properties in joint names. They are also shareholders in a family company which owns a further 2 rental properties. They have been engaged in letting out properties for about 4 years.
10. The Respondents are aware of the duty to lodge a deposit under the Regulations but had never done this themselves before.
11. Until the start of this tenancy all deposits had been dealt with by the Letting Agents used.
12. The deposit was not protected for the whole duration of the tenancy.
13. There is now a dispute over the tenancy deposit which is not resolved.
14. Around the end of March 2021 the Respondents had realised the deposit had not been dealt with in accordance with the Regulations and offered to the Applicant to repay the deposit and to not insist on any further expenses.
15. The Applicant refused this offer.

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. 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.
3. 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 £950 would thus be £2,850.
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. The Tribunal considers that the discretion of the tribunal 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 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 , on 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..."

6. In the case before the Tribunal there is a clear breach of the Regulations. The deposit was not lodged within 30 working days as required by Regulation 3 and the information in terms of Regulation 42 had not been provided to the Applicant. The Tribunal is satisfied that the deposit had been unprotected for the duration of the tenancy.
7. The Respondents are engaged in letting out property for a considerable time and knew about the Regulations. They had engaged letting agents to deal with the lodging of the deposit for the other properties and had overlooked that on this occasion the agreement with the letting agent did not extend to the lodging of the deposit. They should have been clear in the management of their portfolio which duties were delegated and which they had to ensure were dealt with by themselves.
8. They should have realised that the deposit had been paid into their account but had overlooked that also. They had not become aware of this until after the tenancy had come to an end and had referred the Applicant to Tay Lettings for the necessary information as late as 7 March 2021. As experienced landlords they should have put mechanisms in place to ensure that the incoming funds are properly dealt with and that funds which were not rent but deposit payments would be lodged with a registered scheme in the time frame prescribed.
9. The funds were not held in a separate account but mixed with the Respondent's own day to day funds and thus at risk of being spent.
10. A further aggravating factor in this case was that the purpose of the Regulations, to have the deposit protected at the end of the tenancy so that disputes can be adjudicated on by the registered scheme, has not been fulfilled. The situation here is the situation the Regulations were created to avoid, namely that the deposit has been unprotected for the duration of the tenancy and remained with the landlord at the end of the tenancy. This requires a meaningful sanction and places the penalty firmly outwith the low end of the range of possible disposals.
11. On the other hand, the Tribunal accepts that the failure to lodge the deposit has not been evidenced to be a case of deliberate defiance of the Regulations. Rather the Tribunal concluded that the Respondents due to their different experiences for other tenancies overlooked that they had to deal with the deposit in this case and allowed to let the funds remain in their account through oversight rather than an intentional non compliance with the obligations of a landlord.

12. The Respondents had not used the money for other purposes and had intended to repay the deposit at the end of the tenancy as shown in their correspondence with the Applicant on 27 January 2021. The deposit had remained untouched in their account and remained available to be paid out.
13. Once they had fully realised the situation they offered the repayment of the deposit and no further claim against the Applicant, which is an offer the Applicant refused. The Respondent did not dispute the failure to lodge the deposit and accepted this immediately at the CMD.
14. 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 high 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 £ 950 which is 1x the deposit amount, which reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

- 15. The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondents for payment to the Applicant of the sum of £950 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

5 May 2021
Date