



**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/21/0581**

**Re: Property at Flat 2, Invergowrie House, George Pirie Way, Dundee, DD2 1UA (“the Property”)**

**Parties:**

**Cindy Wigginton, Mr Don Mills, 4 St Luke's Rd, Dundee, DD3 0LD; 4 St Lukes Rd, Dundee, DD3 0LD (“the Applicants”)**

**Mrs Carole Arrenberg, Flat 2, Invergowrie House, George Pirie Way, Dundee, DD2 1UA (“the Respondent”)**

**Tribunal Members:**

**Ms H Forbes (Legal Member)**

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

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted in favour of the Applicants in the sum of £900.**

**Background**

1. This is an application received on 14<sup>th</sup> March 2021, 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 Applicants are seeking an order in terms of Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) in respect of a deposit that was not registered in terms of the Regulations. The Applicants lodged a copy of the tenancy agreement between the parties that commenced on 13<sup>th</sup> February 2020 and ended on 17<sup>th</sup> January 2021, and a copy bank statement showing the payment of the tenancy deposit of £600 on 22<sup>nd</sup> January 2020.
2. By email dated 26<sup>th</sup> April 2021, the Respondent made written representations. By email dated 29<sup>th</sup> April 2021, the Applicants made written representations and lodged productions. By email dated 30<sup>th</sup> April 2021, the Respondent’s representative lodged written representations.

3. A Case Management Discussion (“CMD”) took place on 7<sup>th</sup> May 2021 by teleconference call. The Applicants were in attendance. The Respondent was not in attendance and was represented by Mr John Boyle, Solicitor. There was a further conjoined case between the same parties before the Tribunal – FTS/HPC/CV/21/0846.
4. The CMD was continued to a further CMD to take place on 2<sup>nd</sup> June 2021 at 10am by teleconference. The reason for continuation of the CMD on 7<sup>th</sup> May 2021 was to allow Mr Boyle to take instructions and make investigations. Attendees were informed orally on 7<sup>th</sup> May 2021 of the date and time of the next CMD. The date and time of the next CMD was included within the Tribunal’s CMD note, which was issued to parties. Notification letters were sent to attendees by email on 11<sup>th</sup> May 2021, informing them of the date and time of the next CMD.
5. A CMD took place on 2<sup>nd</sup> June 2021 by teleconference call. The Applicants were in attendance. The Respondent was not in attendance and was not represented. The hearing clerk communicated with the Respondent’s representative’s office and found that Mr Boyle was not available, as he was appearing in court. The Tribunal decided to continue matters to a further CMD, to allow participation by or on behalf of the Respondent.
6. The CMD note, which included the date of the next CMD, was issued to the Respondent’s representative on 2<sup>nd</sup> June 2021. The Tribunal included within its CMD note a reminder to the Respondent that they should be aware that, if they chose not to appear or be represented at any further CMD, matters may be decided in their absence.
7. The Tribunal issued a Direction to the Respondent on 2<sup>nd</sup> June 2021 in the following terms:

*The Respondent is required to provide written representations as to:*

1. *Whether the Property is exempt from the Regulations, including a legal basis for any such exemption; and*
2. *Whether the late lodging of the tenancy deposit with any of the three approved tenancy deposit schemes is a possibility.*

*The said written representations should be lodged ... no later than close of business on **11<sup>th</sup> June 2021**.*

8. A notification letter intimating the date of the next CMD was issued to the Respondent’s representative on 4<sup>th</sup> June 2021.
9. No response to the Direction was received by the Tribunal.

## The Case Management Discussion

10. A Case Management Discussion (“CMD”) took place on 17<sup>th</sup> June 2021 by teleconference call. The Applicants were in attendance. The Respondent was not in attendance and was not represented.
11. 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 CMD and that the requirements of Rule 17(2) had been satisfied and it was appropriate to proceed with the application in the absence of the Respondent upon the representations of the Applicants and all the material before it.
12. The Applicants said they were opposed to any further delay or further procedure. It was their position that the Respondent had ample opportunity to meet the requirements of the Tribunal, and that the Respondent was not taking the matter seriously. It was six months since the tenancy ended. Ms Wigginton said she had to take time off work to attend CMDs and the matter was causing stress to the Applicants. They wished to resolve the matter and move on.
13. The Tribunal 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 concerned at the continuing failure of the Respondent to appear or be represented, despite the significant number of notifications of this and the previous CMD that had been made by the Housing and Property Chamber (“HPC”). The Tribunal was concerned there may be no appearance by or on behalf of the Respondent if a further CMD or hearing was fixed. The Tribunal considered the representations from the Applicants regarding delay and the consequent stress and inconvenience. The Tribunal decided it would not be in the interests of justice to delay consideration of the application further.
14. The Tribunal took into account that Rule 17 provides that a Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.
15. The Tribunal had regard to the fact that there was agreement between the parties that the tenancy deposit had not been lodged in an approved tenancy deposit scheme for the duration of the tenancy. Representations made on behalf of the Respondent stated this was because the Property was exempt in terms of the Regulations. There had been discussion at the first CMD regarding a layout plan of the Property, lodged by the Applicants, the content of which was agreed.
16. Referring to the layout plan, the Applicants confirmed that the Property was a flat with its own locked door and a shared common entrance with the Landlord. There were no shared kitchen or bathroom facilities. The Applicants

said they were aware that a relative of the Respondent had lived in the Property 10 or 15 years ago, and that may be where the original idea that the Property was exempt from the Regulations arose. However, there had been several tenants in the Property since then. During the tenancy, the Respondent had contracted Covid-19 and had informed the Applicants that there was no need for them to self-isolate, as the parties lived in separate properties.

17. The Applicants submitted that the Respondent knew about the Regulations and chose not to lodge the deposit with an approved tenancy deposit scheme. The Respondent did no more than collect the rent. No rent receipts were issued, no electrical or other certification provided, and no inventory was provided. Clause 11 of the tenancy agreement, which agreement was signed by both parties, stated that the deposit must be lodged.

18. It was the Applicants' position that an award should be made that would reflect the seriousness of the situation. They felt aggrieved that the Respondent had flouted the Regulations put in place by the Scottish Government.

### **Findings in Fact**

- 19.
- (i) The Property is a self-contained flat within the same building as the flat in which the Respondent lives.
  - (ii) Access to the Property and the Respondent's flat is through a common entrance corridor used by both properties within the larger subjects.
  - (iii) The tenancy agreement is a private residential tenancy agreement in terms of the Private Housing (Tenancies) (Scotland) Act 2016.
  - (iv) The tenancy agreement is a relevant tenancy for the purposes of the Regulations.
  - (v) Parties entered into a private residential tenancy agreement that commenced on 13<sup>th</sup> February 2020 and ended on 17<sup>th</sup> January 2021.
  - (vi) A tenancy deposit of £600 was paid by the Applicants on 22<sup>nd</sup> January 2020.
  - (vii) The deposit was not lodged with an approved tenancy deposit scheme and remained unprotected throughout the duration of the tenancy.
  - (viii) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

## Reasons for Decision

20. Regulation 3(b) provides for exemptions to the requirement to lodge a deposit, as set out within Section 83(6) of the Antisocial Behaviour Etc. (Scotland) Act 2004 (“the 2004 Act”). In terms of Section 83(6)(e) such an exemption is created where *‘the house is the only or main residence of the relevant person’*.
21. Section 101(1) of the 2004 Act defines a house as *‘a building or part of a building occupied or intended to be occupied as a dwelling’*. Section 101(2) states, *‘if two or more dwellings within a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part.’*
22. For the purposes of the Regulations, the Tribunal found that the Property was ‘the house’. The Property was not the only or main residence of the Respondent. Both parties occupied individual dwellings within the larger subjects.
23. The Applicants’ 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 throughout the duration of the tenancy, which was a little short of one year. The Applicants were denied the opportunity for adjudication in respect of return of the deposit at the end of the tenancy.
24. 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.
25. 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.’*
26. The Tribunal considered this to be a serious matter, with the deposit unprotected throughout the duration of the tenancy; however, the Tribunal did not consider it to be a case at the most serious end of the scale, attracting an award of the full penalty of three times the tenancy deposit.

27. The Tribunal felt there had been a failure by the Respondent to recognise her responsibilities as a landlord, particularly given that she was not a new landlord and was aware of the Regulations, as set out in clause 11 of the tenancy agreement.

28. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £900 to the Applicants, which is one and a half times the tenancy deposit.

### **Decision**

29. An order for payment is granted in favour of the Applicants in the sum of £900.

### **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.**



**Helen Forbes**  
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**Legal Member/Chair**

**17<sup>th</sup> June 2021**  
\_\_\_\_\_  
**Date**