



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy
Deposit Schemes (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/21/0591

Re: Property at 50c Eskside West, Musselburgh, EH21 6RB (“the Property”)

Parties:

Mx Michelle Dunphy, Care of, 48 Eskside West, Musselburgh, EH21 6RB (“the Applicant”)

Mrs Morna Dawson, 19 Hercus Loan, Musselburgh, EH21 6AU (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that

Background

This is an application dated 15th March 2021 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* (“the 2011 Regulations”).

The Applicant seeks payment of compensation in respect of an alleged failure by the Respondent to pay the deposit the Applicant provided of £650.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

The Applicant provided with the application copies of a tenancy agreement and various supporting documentation.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 29th April 2021, and the Tribunal confirmed execution of service.

The Respondent's representative helpfully e-mailed written submissions to the Tribunal in advance of the Case Management Discussion.

The Case Management Discussion

A Case Management Discussion was held on 1st June 2021 by Tele-Conference. The Applicant participated, and was not represented. The Respondent did not participate, but was represented by Mr Runciman, solicitor.

Mr Runciman confirmed that the Respondent accepted that she was in breach of the 2011 Regulations. The Respondent had been unaware of her obligations to lodge the deposit in an approved scheme until she had taken legal advice on her situation with regard to another matter from Mr Runciman on 11th March 2021.

Upon becoming aware of her obligations, the Respondent had lodged the deposit into an approved scheme, and a copy certificate was provided to the Tribunal.

Mr Runciman explained that the Respondent was relatively inexperienced in letting property, and simply did not realise that she needed to lodge the deposit in an approved scheme.

The Respondent owns three properties. One of those she resides at, and another is a former home which she initially let to a family member, but later leased to a third party. The third is the Property.

Once she became aware of her obligations, she lodged both the deposit for this Property and the deposit for her other let property in an approved scheme. The deposit for this Property was lodged on 11th March 2021, and repaid in full to the Applicant on 16th March 2021 when the Applicant left the Property. The Respondent has lodged the deposit for the new tenant at the Property.

Mr Runciman submitted that though ignorance of the law is not a defence, it is mitigation in determining the level of compensation which the Tribunal must award. Mr Runciman suggested to the Tribunal that an appropriate sum might be between one third and one times the deposit.

The Applicant submitted that this was a serious breach, as the deposit was paid to the Respondent on 27th April 2013, and so it had been unprotected for nearly eight years. The Respondent worked in a bank, and should have been aware of financial obligations. She had derived commercial rent on which she would have paid tax for eight years both from the lease of the Property and from her other Property. The Applicant suggested to the Tribunal that an appropriate sum might be three times the deposit.

Reasons for Decision

This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

- “(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.”

The Respondent as landlord was required to pay the deposit into an approved scheme. She accepted that she failed to do so.

Regulation 10 of the 2011 Regulations provides as follows:

- “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.”

The Tribunal is satisfied that the Respondent did not comply with her duty under regulation 3, and accordingly it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the facts that the Respondent had no specialised knowledge of housing law or regulations, that she did not engage in the

letting of property as her full-time occupation, was ignorant of the need for the deposit to be placed with an approved scheme, had immediately upon realising that the deposit needed to be lodged in an approved scheme arranged to do so, and accepted at the first opportunity before the Tribunal that she was at fault and had contravened Regulation 3 of the 2011 Regulations.

In these circumstances, the Tribunal considers that albeit ignorance of the terms of the 2011 Regulations is no excuse or defence to not complying with them, the foregoing factors do represent mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

However, balanced against these mitigating factors, are the fact that the Respondent received payment of the deposit in April 2013 and did not comply with her legal obligations as a landlord with respect to the 2011 Regulations, which regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease, and the fact that the period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (approximately eight years).

Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £975.00 (one and a half times the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

For the foregoing reasons, the Tribunal orders the Respondent in respect of her breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £975.00 in terms of Regulation 10(a) of the 2011 Regulations.

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.^N

N.K.

Legal Member/Chair

01 June 2021

Date