

**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/21/1741

Re: Property at Flat 2/2, 6 Lorne Street, Glasgow, G51 1DP (“the Property”)

Parties:

Mr Abdullahi Jimoh, 113A Middleton Boulevard, Nottingham, NG8 1FW (“the Applicant”)

Mr Irfan Nasim, 36 Newark Drive, Glasgow, G41 4PZ (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:- (i) the Respondent has breached his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”); (ii) an appropriate sanction for the Respondent’s breach of statutory duty is the sum of NINE HUNDRED POUNDS (£900.00) STERLING, being a sum equal to three times the tenancy deposit; and (iii) it is appropriate in the circumstances that the Respondent be ordered, under Regulation 10(b) of the 2011 Regulations, to pay the tenancy deposit to an approved scheme and provide the Applicant with the information required under Regulation 42 of the 2011 Regulations, both within 30 days of the date of intimation of the order.

STATEMENT OF REASONS

1. This Application called for its Case Management Discussion by teleconference call on 20 September 2021. The Applicant was represented by Mrs Isa. The Respondent was neither present nor represented.
2. In this Application, the Applicant alleges that the Respondent is in breach of his statutory duties under Regulation 3 of the Tenancy Deposit Schemes

(Scotland) Regulations 2011 (“the 2011 Regulations”). Those duties are set out in the 2011 Regulations as follows:-

“3.—

(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.

(1A) Paragraph (1) does not apply—

(a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and

(b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

- (a) the references to deposit were to each instalment of the deposit, and
- (b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.

(3) A “*relevant tenancy*” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

- (a) in respect of which the landlord is a relevant person; and
- (b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “*relevant person*” and “*unconnected person*” have the meanings conferred by section 83(8) of the 2004 Act.”

3. Specifically, the Applicant asserts that he made payment to the Respondent in the sum of £300 as a tenancy deposit ("the Deposit"), that the Respondent failed to lodge the tenancy deposit with an approved Tenancy Deposit Scheme, and did not provide the Applicant with the information required under Regulation 42 of the 2011 Regulations. In support of his Application, the Applicant has produced a copy of the Tenancy Agreement showing that the Deposit was due, and a copy bank statement showing the sum of £600 being paid to the Respondent, comprising the Deposit and the first month's rent.
4. The Tribunal is empowered by Rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules") to do anything at a CMD that it may do at a Hearing including make a decision. Further, the Tribunal is required by Rule 2 of the Rules to have regard to the overriding objective to deal with proceedings justly, including by avoiding unnecessary delay.
5. The Respondent has been afforded an opportunity to attend the CMD and dispute the allegations made by the Applicant in this Application. He has chosen not to do so. I am therefore satisfied that the allegations made against the Respondent in the Application are not in dispute.
6. I am satisfied that the Respondent has breached his statutory duties under Regulation 3. As such, 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."

7. Turning first to the question of sanction, I have had regard to the unreported case of *Jenson v Fappiano*, 2015 SCEDIN 6. At paragraphs 11 and 12, Sheriff Welsh sets out his analysis of Regulation 10(a) and the purpose of judicial discretion, with which I agree:-

"11... I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

1. *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 judgment.*
2. *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 of the case and a value attached thereto which sounds in sanction.*
3. *A decision based on judicial discretion must be fair and just (‘The Discretion of the Judge’ , Lord Justice Bingham, 5 Denning L.J. 27 1990).*

12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf Tenzin v Russell 2014 Hous. L.R. 17). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case.”

8. In this case, it appears that the breach in question is wilful and flagrant. The tenancy deposit was not, and has never been, paid to an approved scheme. No attempt was made to supply information as specified in Regulation 42 of the 2011 Regulations. The Applicant has not recovered the Deposit. The Applicant has been deprived of the right to utilise the dispute resolution service provided by the approved schemes. The Deposit was unprotected for the whole duration of the Tenancy. The Respondent has not offered any mitigating factors for the Tribunal to consider. He has chosen not to appear at the CMD to answer for his breach. Having regard to all of the circumstances, I am satisfied that the Respondent’s non-compliance with his statutory duties falls at the more serious end of the non-compliance spectrum. Accordingly, I have determined that an appropriate sanction to both reflect his breach of duty and to act as an appropriate deterrent for future non-compliance is the maximum sum of three times the tenancy deposit. The Tribunal will therefore make an order for payment by the Respondent to the Applicant in the sum of £900.
9. Separately, in terms of Regulation 10(b), the Tribunal is entitled to order a landlord to pay a tenancy deposit into an approved scheme although late, and to provide the required information to the tenant. I am satisfied that it is appropriate to make such an order here. The Tribunal will allow the Respondent thirty days from the date of intimation of the order to lodge the Deposit with the administrator of an approved scheme, and to provide the information specified in Regulation 42 of the 2011 Regulations to the Applicant. For completeness, the information specified in Regulation 42 is as follows:-
 - (a) confirmation of the amount of the tenancy deposit paid by the Applicant and the date on which it was received by the Respondent;
 - (b) the date on which the tenancy deposit was paid to the scheme administrator;

- (c) the address of the property to which the tenancy deposit relates;
- (d) a statement that the Respondent is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the Anti-Social Behaviour etc. (Scotland) Act 2004;
- (e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and
- (f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

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.

Andrew Upton

20 September 2021

Legal Member/Chair

Date