

**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/21/1808

**Re: Property at Flat C, 117 North Deeside Road, Peterculter, Aberdeen, AB14
0RR (“the Property”)**

Parties:

**Mr Sourabh Majumdar, 238 Berberis House, High Street, Feltham, TW13 4GT
 (“the Applicant”)**

Mrs Jane Smit, 12 Condor Drive, Arbroath (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that (i) the Respondent has failed to comply with her duty under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and (ii) the Respondent should make payment to the Applicant in the sum of ONE HUNDRED POUNDS (£100.00) STERLING.

STATEMENT OF REASONS

1. This Application called for its Case Management Discussion by teleconference call on 20 September 2021. Both the Applicant and the Respondent were personally present.
2. This Application is made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). In it, the Applicant asserts that the Respondent failed to pay his tenancy deposit of £620 to the administrator of an approved Tenancy Deposit Scheme within 30 working days of the commencement of the Tenancy.

3. In advance of the CMD, the Respondent instructed a solicitor to lodge written representations, which the Respondent adopted at the CMD. In those representations, the Respondent accepts that she was late in lodging the deposit by six working days. The tenancy commenced on 2 November 2020, and thus the deposit ought to have been lodged by 14 December 2020. It was, in fact, lodged on 21 December 2020. In mitigation, it is said that she was struggling with personal family matters at that time. She was providing additional assistance to her parents, and in particular to her father who was recovering from surgery. Her parents' situation also meant that she could not rely on them for childcare. The Respondent is self-employed, and responsible for managing her own accounts. Her husband works off-shore on rotation, meaning that the Respondent was largely without support to attend to assisting her parents, caring for her then two year old son, as well as her own business matters. She accepts that this matter did not receive the attention that it required, but the oversight was a genuine error that left the tenancy deposit unprotected for a very short period of time. She contended that the issue was exacerbated by the vacating tenant (immediately preceding the Applicant) having failed to leave the Property in a tenantable condition, and the Applicant's entry date having been moved up from 6 November 2020 to 2 November 2020. The failure to lodge the deposit was an error that had not occurred previously and would not be repeated.
4. The Applicant did not challenge the Respondent's representations. However, he highlighted that the Respondent had still failed to comply with the 2011 Regulations. The Applicant also asserted that he had paid his tenancy deposit to Easthaven Property Lettings, the Respondent's letting agent, on 7 October 2020. The Applicant submitted that this meant that the Respondent had longer to deal with the lodging of the deposit properly.
5. The Respondent was prepared to accept that the Applicant had made payment of the deposit to Easthaven Property Lettings on 7 October 2020, but explained that Easthaven Property Lettings would not have paid the deposit to her until later. The Respondent also asserted her belief that the Applicant's Application had been made as a consequence of a sum having been deducted from his deposit to cover cleaning costs.
6. 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.
7. Having heard from the parties, it was clear that there was no substantive dispute between them regarding the facts of this case. It was accepted that there had been a breach of Regulation 3(1)(a) of the 2011 Regulations, and that the Tribunal must award a sanction in terms of Regulation 10. The only matter for the Tribunal to determine was what an appropriate sanction would be in all of the circumstances. There was no need to fix a hearing on evidence given that the parties' respective assertions of fact were not challenged.

8. 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.”

9. The phrasing of Regulation 10 is such that it specifies a maximum possible sanction, and wide discretion to the Tribunal to determine what an appropriate sanction is in all of the circumstances of a particular case. The proper approach to that exercise was described by Sheriff Welsh in 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.”*

10. In this case, I accept all of the Respondent's submissions in mitigation. This was evidently an unfortunate perfect storm of competing interests that resulted in the Respondent overlooking her statutory obligations for a very

short space of time. However, she did take steps to lodge the deposit in an approved scheme. The deposit was unprotected for a very short space of time before the deposit was lodged with an approved scheme. I accept that this was a genuine error by the Respondent as opposed to wilful or flagrant non-compliance. Whilst the Applicant was correct to highlight that the Respondent had possession through her agent of the deposit well in advance of the commencement of the tenancy, I do not consider that to be a material consideration when the statute fixes the timescale for lodging the deposit from the beginning of the tenancy as opposed to receipt of the deposit itself. I accept that this was an isolated incident and that this was not the case of serial non-compliance. I do not consider that there is a pressing need for sanction to operate as a deterrent.

11. Separately, and for completeness, I have disregarded the Respondent's assertions regarding the Applicant's motive for bringing this Application. These proceedings have as their subject the non-compliance by the Respondent with her statutory duties and the reasons therefor. The Applicant's reasons for bringing the application are simply irrelevant to the question of what an appropriate sanction would be.
12. In all of the circumstances of this case, the Tribunal found that this was a case at the lowest end of the scale of severity. Against that background, the Tribunal found that an appropriate sanction was £100. An order for payment of that sum will be issued in due course.

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