



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/22/0029

Re: Property at Wester Calcots Farm, Elgin, IV30 5PH (“the Property”)

Parties:

Mr Kevin Lynch, Mrs Kelly Lynch, Wester Calcots Farm, Elgin, IV30 5PH (“the Applicants”)

Mr Alistair Mackay, Nairnside Lodge, Cawdor, IV12 5XS (“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 4th January 2022 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 Applicants sought payment of compensation in respect of an alleged failure by the Respondent to pay the deposit the Applicant provided of £625.00 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 3rd February 2022, 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, to which submissions the Applicants responded in writing.

The Case Management Discussion

A Case Management Discussion was held on 15th March 2022 by Tele-Conference. The Applicants participated, and were not represented. The Respondent participated, but was represented by Mr Monteith, solicitor.

Mr Monteith confirmed that the Respondent accepted that he was in breach of the 2011 Regulations. The Respondent had been unaware of his obligations to lodge the deposit in an approved scheme until the Applicants had drawn that to his attention and he had taken advice on his situation.

Upon becoming aware of his obligations, the Respondent had immediately lodged the deposit into an approved scheme in March 2021, and a copy certificate was provided to the Tribunal.

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

The Respondent is a farmer, and he lets out certain residential properties which are located on his farm. He took advice from a local firm of solicitors in 2010 about letting the properties, but thereafter managed the tenancies himself. He was unaware of the 2011 Regulations, which came into force after he last took legal advice, until the Applicants drew them to his attention. On realising his error, he immediately lodged the deposit in an approved scheme.

The Respondent also applied for registration on the register of landlords at about the same time as lodging the deposit. He had previously been advised that as he rented his farm from his landlord, it was his landlord that required to be registered rather than him. After taking further advice, he now realised that was incorrect, and that he needed to be registered, and he had now done so.

Mr Monteith 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 Monteith submitted to the Tribunal that the level of compensation in this application should fall at the lower end of the scale.

The Applicants submitted that this was a serious breach, as the deposit was paid to the Respondent on 18th March 2010, and so it had been unprotected for nearly nine

years, from July 2012 when the 2011 Regulations came into effect to the date when the deposit was lodged in March 2021.

The Respondent should have been aware of his obligations as a landlord, as he rented out a number of other properties on his farm. He had also failed to register on the Register of Landlords until November 2021. The Applicants had confirmed with the local authority in October 2021 that the Respondent was not registered and that he had no pending application. The Applicants suspected the Respondent had fraudulently used another landlord's registration number to lodge the deposit, and feared that this would invalidate the lodging process.

The Applicants accepted that they could not confirm that their fears regarding the eventual repayment of the deposit were well-founded, in circumstances where they had received a certificate from an approved scheme confirming that their deposit was protected, and which provided an identification number and the correct details of themselves as tenant, the Respondent as Landlord and the Property address.

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. He accepted that he 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 his 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 he did not engage in the letting of property as his 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 he 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 March 2010 and did not comply with his 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 (nearly nine years).

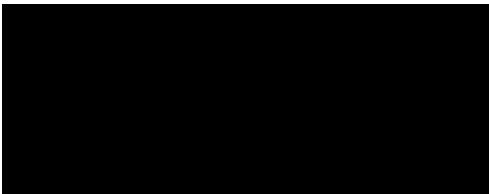
Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £1,000.00 is an appropriate sanction to impose.

Decision

For the foregoing reasons, the Tribunal orders the Respondent in respect of his breach of Regulation 3 of the 2011 Regulations to make payment to the Applicants of the sum of £1,000.00 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.



15th March 2022

Legal Member/Chair

Date