



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/22/0392

Re: Property at 3 Malthouse, 58 Nethergate, Dundee, DD1 4EN (“the Property”)

Parties:

Miss Suji Evangelin Jasmin Soosai, Ms Vaishali Govindarajan, 9 2/2 Bank Street, Dundee, DD1 1RL (“the Applicant”)

Mr Chattarpal Singh, 65 Peasehill Gait, Rosyth, Dunfermline, KY11 2BD (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatrige (Legal Member) and Ahsan Khan (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined to grant an order against the Respondent for payment to the Applicants of the sum of £1,100 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. This is an application under Rule 103 of the Procedural Rules and Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations). The application was made by the Applicants on 8.2.22..
2. A Case Management Discussion (CMD) was scheduled for 26.4.22. This was intimated to the Respondent by Sheriff Officers on 8.3.22. No representations from the Respondent were received. The tribunal was satisfied that the Respondent had received the necessary notification for the CMD.
3. **The following documents were lodged in respect of this case by the Applicant:**

- a) Scottish Private Residential Tenancy Agreement between the parties for the property commencing 12.9.21
- b) Payment detail screenshots from Ms Soosai to the Respondent for the following payments: £800 on 13.9.21, £1 on 19.10.21, £399 on 19.10.21, £400 on 11.11.21 and £400 on 13.12.21
- c) Text correspondence between the Applicants and the Respondent after the tenancy end date.
- d) Text correspondence between the parties showing end date of tenancy as 7.1.22
- e) Screenshots from mydeposits Scotland and LPS showing no deposit lodged for that property

B: EVIDENCE

1. At the CMD on 26.4.22 the legal member explained the purpose and process of the CMD.
2. Only the Applicants took part in the teleconference. The Respondent did not participate.
3. The Applicants explained that they had been looking for a room in the Dundee area and could not find anywhere. They then found the property, which is a studio apartment. Ms Soosai spoke to the landlord who stated that they had to pay the rent in advance and a deposit of £400 which would be returned to them when they moved out. They made that payment as shown in the payment transaction screenshots. The landlord had definitely described this as a deposit and not advance rent. The text messages show that he did not put it into a deposit scheme. He also used it like a deposit as described in the text messages lodged. They had also enquired with SDS but had not received a reply and stated at the CMD that the Respondent's replies in the text message exchange shows clearly he had not put the funds into a registered scheme. They had paid a total of 4 x £400 rent up to the end date of the tenancy on 7.1.22 and the additional £400 deposit, which the Respondent then had not given them back as shown in the text messages. He treated the amount as a deposit. Given the problems they had had finding a place they did not read the tenancy agreement through carefully and did not notice at the time that there was not entry regarding a deposit amount or scheme details. However, it had been made clear to them that the additional £400 requested was a deposit.

C: THE LEGAL TEST:

1. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—(a) may make a decision without a hearing if the First-tier Tribunal considers that—
 - (i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and
 - (ii) to do so will not be contrary to the interests of the parties;

2. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
3. 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.”
4. In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme”.
5. S 120 of the Housing (Scotland) Act 2006 defines Tenancy deposits: preliminary
 - (1)A tenancy deposit is a sum of money held as security for—
 - (a)the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or
 - (b)the discharge of any of the occupant's liabilities which so arise.
 - (2)A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

D: FINDINGS IN FACT

Based on the documents and the information received at the CMD the tribunal makes the following findings in facts:

1. The parties entered into a Private Residential Tenancy (PRT) over the property which commenced on 12.9.21.
2. The rent as per Clause 7 of the PRT is £400 per calendar month payable in advance.
3. In terms of Clause 10 the landlord is obliged to lodge the deposit with a registered scheme.
4. Clause 10 sets out what amounts can be deducted from the deposit.
5. The box meant to provide details of the registered scheme to be used was scored out.
6. The PRT does not state that a payment of two months advance rent will be required.
7. The tenancy ended on 7.1.22.
8. On 13.9.21 the Applicants paid to the Respondent a sum of £800.
9. This represented £400 rent and a further sum of £400 which was a deposit in terms of S 120 of the Housing (Scotland) Act 2006
10. The Applicants paid the full rent for a total of 4 months as shown in the payment transaction screenshots.

11. The deposit was not lodged with a registered scheme.
12. The deposit was unprotected for the whole duration of the tenancy.
13. There was a dispute over amounts due at the end of the tenancy with regard to cleaning costs and the Respondent refused to release the funds.
14. A series of three text messages from the Respondent to the Applicants read, "Towards 600 mess u made.", "U ow me 200 still". "My brother a lawyer I can revoke Ur student visa do u know this"
15. The Applicants did not have access to the dispute resolution mechanism of a registered scheme at the end of the tenancy.

E: REASONS FOR DECISION:

1. The documents lodged are referred to for their terms and held to be incorporated herein.
2. The Tribunal did not consider that there was any need for a hearing as there had been no representations from the Respondent opposing the application and disputing any of the facts stated in the application. The Respondent had been served with the relevant documents and notification and had not taken part in the CMD.
3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not formally disputed by the landlord.
4. The Respondent had requested payment of £800 at the start of the tenancy. This had been paid by the Applicants on 13.9.21. The text message exchange lodged with the application on 8.2.22 shows that the Respondent had retained the £400 deposit funds and that he intended to use the funds for sums he considered were due from the tenants for cleaning. The upfront additional payment was not advance rent. There was nothing in the PRT which suggested an upfront payment of two months' rent would be required and the Applicants confirmed that the payment of £800 had been agreed as a deposit and one month's rent. This is entirely consistent with the rest of the payments shown. Had an upfront payment of 2 months' rent been agreed, the last month's rent would not have been payable in December.
5. The additional payment request for £400 meets the definition of a deposit as stated in S 120 of the Housing (Scotland) Act 2006. The Applicants had expected the funds to be returned at the end of the tenancy. They had clearly paid full rent for the duration and there were no rent arrears for the PRT. Had the amount been advance rent, this would have had to be returned and the purpose of that payment amount would have had to be stated in the PRT.
6. The Respondent was treating the funds as a deposit in terms of Clause 10 of the PRT and wished to retain it for purposes which in terms of the legislation should specifically be open to the adjudication mechanisms of the registered

schemes, such as disagreements about cleaning costs claimed by landlords at the end of a tenancy. By not lodging the deposit in a registered scheme that option of adjudication over any disputed amounts by the impartial experts in the registered schemes was not made available to the Applicants.

7. Given the lack of details entered into the PRT regarding the deposit but the request for a payment of rent in advance and an additional £400 at the start of the PRT, the tribunal considered it likely on balance of probability that this was a deliberate defiance of the Regulations and not an oversight, because the deposit scheme details were specifically scored out. There was clearly no intention of the Respondent to pay that sum to a registered scheme.
8. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £400 would thus be £1,200.
9. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in deposit cases, which the schemes provide.
10. The Tribunal considers that the discretion of the tribunal 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 has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "*repeated and flagrant non participation in , on non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale*". It was held that "*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 judgement. 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...*"
11. In the case before the Tribunal there is a clear breach of the Regulations. The deposit was not lodged within 30 working days as required by Regulation 3 and the information in terms of Regulation 42 had not been provided to the Applicant. The Tribunal is satisfied that the deposit had been unprotected for the duration of the tenancy.
12. The Respondent then refused to pay back the funds and used them in his words "Towards 600 mess u made". This is precisely the kind of dispute which the legislator wished to avoid by putting in place the regulations.

13. The Tribunal was also concerned by the apparent threat contained in the text message which stated, “My brother a lawyer I can revoke Ur student visa do u know this”
14. All the above requires a meaningful sanction and places the penalty firmly at the higher end of the range of possible disposals.
15. Applying the considerations in the approach to exercising discretion as set out above in all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 1,100 which is at the high end of the available disposals. This reflects the seriousness of the breach, the duration of the breach, the fact that the actions of the Respondent prevented any third party dispute resolution at the end of the tenancy as envisaged by the Regulations and constitutes a meaningful sanction for non-compliance with the Regulations.

Decision:

1. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £1,100 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**

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.

etra Hennig McFatridge

26 April 2022

Legal Member/Chair

Date