

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/22/0907

Re: Property at 3 Oak Vale, Cupar, Fife, KY15 5BD (“the Property”)

Parties:

Mr Anthony Oliva, Mrs Marlene Oliva, 60 Crossgate, Cupar, Fife, KY15 5HS; 60 Crossgate, Cupar, Fife, KY15 5HS (“the Applicants”)

Mr Gary Hall, 5 Charles Court, Cupar, Fife, KY15 5EJ (“the Respondent”)

Tribunal Members:

Nairn Young (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

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

- **Background**

This is an application for an order for payment of a sanction for an alleged failure to comply with the duties incumbent on a landlord under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (‘the Regulations’). It called for hearing at 10am on 12 September 2022, by teleconference. The first-named Applicant was on the call and spoke on behalf of both Applicants. The Respondent was on the call in person and was represented by Ms Heggarty of Rollos, solicitors.

- Findings in Fact

1. The Applicants rented the Property from the Respondent in terms of an assured tenancy commencing on 1 February 2014.
2. The Applicants paid the Respondent a deposit of £550 in relation to that tenancy in instalments of £100, £100, £100, £100, £50 and £100, on 3 February, 28 February, 28 March, 25 April, 27 June and 28 July 2014, respectively.
3. The Respondent did not pay any of these payments into an approved tenancy deposit scheme.
4. The assured tenancy was brought to an end by agreement of the parties on 18 March 2019 and replaced by a private residential tenancy agreement ('PRT') commencing that date.
5. On 18 March 2019, the Applicants were in arrears of rent under the assured tenancy agreement of £400.
6. The PRT specified that a deposit of £550 should be paid by the Applicants at the start date or before.
7. No further payment of a deposit was made by the Applicants.
8. The deposit relating to the assured tenancy was not returned by the Respondent.
9. The Respondent did not apply any of the deposit relating to the assured tenancy to the arrears.
10. The deposit originally paid in relation to the assured tenancy was held by the Respondent at the start of the PRT as the deposit due under that tenancy, with the agreement of the Applicants.

11. The Respondent did not pay the deposit into an approved tenancy scheme at any point subsequent to the commencement of the PRT.

12. The PRT came to an end on 30 December 2021.

13. This application was made on 29 March 2021.

- Reasons for Decision

14. Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the Regulations') states (so far as is relevant):

"Duties in relation to tenancy deposits

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.

...

(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. ...”

15. Regulations 9 & 10 of the Regulations state:

“First-tier Tribunal orders

9.—

(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

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.”

16. This application concerns a fairly discrete aspect of reg.3. It was agreed by the parties that both the assured tenancy and the PRT were 'relevant tenancies'; and, therefore, that the receipt of a tenancy deposit in connection with them would trigger the duty to pay it into an approved scheme. It was further accepted that, while there was a failure on the part of the Respondent to comply with the duty under reg.3 in regard to the assured tenancy, any right the Applicants had had to raise an application of this type in regard to that failure had expired. This application therefore concerns only the issue of whether there was any such failure on the part of the Respondent in regard to the PRT. Consequently, the question that required consideration was, given the facts of the case, was there any deposit received in connection with the PRT?

17. In order to answer that question, it was necessary for the Tribunal to hear evidence on various points. The first-named Applicant spoke to the Applicants' position. In essence, he stated that the Applicants had paid a deposit by instalments at the start of the assured tenancy. The Respondent had approached them to agree to terminate that tenancy and replace it with a PRT. There was discussion across some months between the parties about the practicalities of executing the agreement; but little discussion about either rent arrears or the deposit. The Respondent told the Applicants that the tenancy would effectively continue uninterrupted and there would be no need for further payment of either the deposit or any other fees mentioned in the PRT agreement. At no time was it suggested by the Respondent that the deposit for the assured tenancy was being used to offset the arrears from that tenancy.

18. The Respondent's position in his written submission was, firstly: that the £550 paid at the commencement of the assured tenancy was not actually a deposit, but was rather payment of arrears that had arisen at the start of that tenancy. Secondly: that the deposit referred to in the PRT was not received within 30 days of the start of the tenancy, so there was no duty to pay it into a scheme. Thirdly (and related to the second point): that a payment of £550 was made by the Applicants on 1 December 2021. This was the deposit referred to in the

PRT; but was received too late before the termination of the tenancy for the landlord's duty to have been breached by a failure to pay it into an approved scheme.

19. The Tribunal was also presented by the Respondent with an account covering the assured tenancy and the PRT.

20. The Tribunal has in large part accepted the Applicants' position on the factual background to this case. It seems that much of the discussion between the parties at the end of the assured tenancy and the commencement of the PRT was marred by mutual misunderstanding of the relevant law and a consequent lack of clarity around treatment of the arrears of rent from the assured tenancy, the deposit that had been paid, and the requirement to pay a deposit under the PRT agreement. That having been said, the Applicants' account of events is both coherent and consistent with the Respondent's record of the payments made.

21. The Respondent's position, on the other hand, is fatally undermined by the documentary evidence: in particular the clear requirement contained in the PRT for a £550 deposit to be paid; the separate recording in his own account of the payment of the deposit at the beginning of the assured tenancy as a deposit; and the failure to apply that deposit at any point in the account to reduce the outstanding arrears balance. In the course of his evidence he was further incoherent with the position he had set out in writing; for example stating that he had not received the full £550 deposit at the commencement of the assured tenancy. He seemed further to undermine his position as to the payment of the deposit at the beginning of that tenancy, by suggesting that he held the deposit against arrears at the end of the tenancy and beginning of the PRT. He obviously could not have done this, if no deposit was paid. There is also the further observation that the account shows only £400 of outstanding arrears under the assured tenancy its termination; so the whole of the deposit could not have been 'eaten up' by the arrears at that point.

22. The Tribunal having made its findings in fact, there is then the question of how the relevant law should be applied to them. The Respondent appears to argue that, since the deposit was not paid within 30 days of the start of the tenancy, the duties under regulation 3 do not apply. That is an incorrect reading of the terms of regulation 3. There is nothing said in the regulation about when the deposit should be received for it to be engaged; rather it states only that a landlord should have, "received a tenancy deposit in connection with a relevant tenancy," in order to have the duties which follow placed upon him.

23. In this case, it is particularly important that the regulation does not require the deposit to have been 'paid in connection with' the tenancy: but rather that the landlord merely has, "received a tenancy deposit in connection with a relevant tenancy." The deposit in this case was originally paid to the Respondent under the assured tenancy; but, when the Respondent retained it as payment of the deposit under the PRT, he was then holding it as received in connection with that latter tenancy. That triggered the duty to pay it into an approved scheme within 30 days of the commencement of that tenancy; which he did not do. That is a breach of the regulations that requires the Tribunal to make an order under regulation 10. The fact it had originally been paid in instalments does not change that position. There was no agreement that the deposit regarding the PRT be paid in instalments, so reg.3(2A) cannot apply.

24. In terms of assessing the appropriate level of payment to order in this case, the Tribunal noted that the payment of a deposit into a scheme is the most important duty under regulation 3 that might give rise to an order (given that all of the other duties flow from it); and that the Respondent admitted having disregarded that duty at the outset of the assured tenancy that preceded the PRT. Indeed, the Respondent showed a distinct lack of remorse for that original failing, as well as any subsequent failing the Tribunal might have found, stating at one point that if he had felt he had received a deposit he would have held it back against alleged damage. That betrays a fundamental disregard to how tenancy deposits work under the Regulations. It is never now a unilateral decision of a landlord to hold on to a deposit. The whole process of moving the Applicants from the assured tenancy to the PRT also

evidenced a distinct lack of attention to the details of the relevant law that is not an acceptable way of doing business for a landlord anymore (if it ever was). These points suggested a sanction at the middle to high end of the scale.

25. On the other hand, the Tribunal took into account that the breach of obligation did appear to come from ignorance, rather than wilful disobedience, of the law. While that is never an excuse, it does offer some mitigation.

26. The Tribunal therefore felt that an award of twice the deposit (£1,100) was therefore appropriate.

- Decision

Order made for payment by the Respondent to the Applicants of the sum of £1,100 (ONE THOUSAND, ONE HUNDRED POUNDS STERLING).

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. Young

Legal Member: Nairn Young

2 November 2022
Date