



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 & 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/22/1490

Re: Property at 40 Upper Wellheads, Limekilns, Fife, KY11 3JQ (“the Property”)

Parties:

Ms Karen Mackenzie, 16a Couston Street, Dunfermline, Fife, KY12 7QW (“the Applicant”)

Mr David Blyth, 26 West Harbour Road, Charlestown, Dunfermline, Fife, KY11 3ET (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member) and Angus Lamont (Ordinary Member)

1. This Hearing was a Case Management Discussion (hereinafter referred to as a “CMD”) fixed in terms of Rule 17 of the Procedure Rules and concerned an Application under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (hereinafter referred to as “the Deposit Regulations”). The purpose of the Hearing being to explore how the parties dispute may be efficiently resolved. The purpose of the hearing was explained and it was understood a final decision could be made.
2. The Tribunal discussed the procedure and rule of procedure relevant.
3. The hearing took place by teleconference due to the covid-19 pandemic.

4. Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £1250 in terms of Regulation 10(a) of the Regulations should be made.

5. Attendance and Representation

The Applicant was not present but was represented by Shona Morrison, Frontline Fife. Grace Walker was in attendance from Frontline Fife but did not take part.

The Respondent was present and unrepresented.

6. Preliminary Matters/Procedural Issues.

- a) The Tribunal asked the Applicant's representative whether the Applicant wished to be in attendance. The Applicant's representative set out that she did not wish to do so due to the anxiety and stress caused.
- b) The Tribunal asked the Respondent about the written representations he had lodged with the Tribunal in regards this application and an application for return of the tenancy deposit under Reference HPC/PR/22/1590. The Respondent confirmed they should be considered by the Tribunal in respect to both applications. He said the main point was that he had allowed a cat in the premises on the basis the Applicant would pay for any damage. He thereafter narrated what he considered was the damage by the cat caused. He refuted that the Applicant would be anxious or stressed on the basis she had come to his home prior to the end of April 2022 to request an extension at the end of the tenancy to clear her belongings.
- c) The Tribunal asked the Respondent if he wished the opportunity for legal advice and he confirmed he did not wish this and wanted to proceed for matters to be determined if possible at this CMD.
- d) There were no other relevant preliminary matters raised. Parties were in agreement the CMD could then progress.

7. The Case Management Discussion

- The Applicant's representative set the position for the purpose of the CMD summarised as follows;
 1. The initial deposit was £625 made on 1st May 2017. This was not in dispute.
 2. The landlord had not followed the procedures in regards the deposit and it should have been put in a deposit scheme and it had not.
 3. The Applicant's representative said the issues referred to by the Respondent in his representations were to do with the alleged damage he says to be relevant was not relevant to this application and is separate from the issues here.
 4. The Applicant's representative said that the issues raised by the Respondent form part of the distribution of deposit and that decision ought to have been held with a 3rd party who is independent and this was the purpose of the deposit scheme.
 5. The Applicant's representative set out that the Applicant in any event does not accept liability for what the Respondent says she owes. She said that when the Applicant raised the issue of the return of the deposit in May 2022 this was when the Respondent raised the issues he had with the property.

6. The Applicant's representative said the Respondent could not find her original tenancy agreement and the Respondent each year had reproduced a new tenancy annually and they each signed a new tenancy annually. The Applicant had resided in the property since May 2017.
 7. The Applicant's representative submitted that she considered the tenancy was an assured tenancy and it was not competent that the new tenancies issued be anything other than a Private Residential Tenancy. She questioned the fact whether an AT5 had ever been served by the Respondent and other matters appear to have been overlooked.
 8. The Applicant's representative submitted that the Applicant seeks compensation from the respondent for not following the legislation and due process and not submitting the deposit in an approved scheme.
 9. The Applicant's representative said it was very relevant the Respondent had not followed the process and whilst matters can be overlooked the Respondent had professional duties as a landlord that had not been fulfilled.
 10. The Applicant's representative said the Respondent had also made in his written representations reference to a washing line in the garden and plugs not present but he had never issued an inventory on these matters. He also seeks to place responsibility on the Respondent for not raising the deposit issue earlier.
 11. The Applicant's representative said the matter had affected the Applicant as she had not had the deposit to financially move forward and that £625 is a large amount of money to find again. The deposit was still outstanding and she had not been aware there would be an issue of it being returned until after she left the property.
 12. The Applicant's representative had only seen 2 tenancy agreements lodged but she had noted discrepancies and additional terms. She reiterated she thought the tenancy was an assured tenancy.
 13. The Applicant's representative said the Respondent was not understanding of the legislation or the seriousness of the role or the actual responsibility the landlord needs to take. The Respondent she said was not understanding of the scheme and is referring to tenancy notes of the wrong legislation showing a lack of understanding in the role of a landlord.
- The Respondent set out his position as summarised:
14. The Respondent set out that he considered he had a good relationship with the Respondent and that the current issues all after he asked about the wallpaper damage he considered was due to the Applicant's cats.
 15. The Respondent wanted to set out that that when the Applicant requested various things like a new kitchen sink he had it fitted in a few days and he agreed to taking the living room fire out.
 16. The Respondent said the Applicant had not obtained permission for wallpaper changes, a sky dish or smart meters.

17. The Respondent said the deposit was paid on 1st May 2017 of £625 at the start of the tenancy and it was he said never raised by the Applicant until the end of the tenancy. He confirmed he had not paid the deposit into an approved scheme and it remains in his bank account.
18. The Respondent said the tenancy ended on 8th May 2022 and on the 18th and 23rd May 2022 he asked to meet the Respondent to he said iron things out. He said he was asking to talk and had not been concealing the deposit. He told the Tribunal that it was his It mistake not to lodge the deposit. He only become aware of this responsibility to do that after the Applicant asked for it to be returned.
19. The Respondent said the tenant was a short term tenancy assured tenancy and he was unsure what an AT5 was. He said he issued a new tenancy every year and had continued to issued what he thought was a short assured tenancy.
20. The Respondent said that with his new tenant in the property he had deposited the deposit in the proper procedures and he carried out an inspection report and had done various other things such as legionnaires disease and taking videos and photographs of the property. He has also changed the tenancy as per current legislation.
21. The Respondent said that he considered it was relevant that the Applicant did not notify of her concern on the deposit until the end of the tenancy and he felt that may have been her responsibility as part of the statutory terms.

8. Findings in Fact and Reasons for Decision

1. Rule 17 of the Procedure Rules provides that a Tribunal can do anything at a CMD which it may do at a Hearing, including making a decision. The Legal Member was satisfied that the Tribunal had everything before it that it would require in order to make a decision having regard to the Overriding Objective. The sufficiency of facts and evidence lodged allowed a decision to be made. No further evidence not already before the Tribunal was referred to by the Applicant or the Respondent. Both parties agreed they did not have any further evidence to provide the Tribunal on this application and both sought the Tribunal determine the application. The Respondent did not wish further time or to seek legal advice.
2. The Application was brought timeously in terms of regulations 9(2) of the Deposit Regulations.
3. In terms of Deposit Regulation 10 if the FTT is satisfied that the landlord did not comply with any duty detailed in Regulation 3 then the FTT must order a landlord to pay the tenant or tenants an amount not exceeding three times the amount of the tenancy deposit.
4. The FTT was satisfied that the Respondent did not register the deposit with a deposit protection scheme as required by Regulation 3. The Respondent

accepted this. The deposit he agreed was paid on 1st May 2017 and never lodged with an approved scheme contrary to the Regulations.

5. The Tribunal considered that the tenancy was a relevant tenancy in terms of Regulation 3(3) and that given same the Respondent was under a duty to lodge the deposit within the required 30 days. Both parties accepted the existence of a relevant tenancy although there was disagreement to whether the tenancy was a short assured tenancy or an assured tenancy this was not relevant to the Tribunal for the purposes of this Application.
6. The FTT was also satisfied that a deposit had been paid by the Applicant to the Respondent due to the various evidence lodged by the Applicant and the acceptance of this by the Respondent. This was all agreed by the Respondent. This deposit was never secured. The tenancy ended on 8th May 2022. If the FTT was satisfied a breach of the regulations had occurred the FTT had to make an order in terms of Regulation 10.
7. In terms of Regulation 10 the FTT is obliged to make an order up to 3 times the deposit of the applicants to the respondent.
8. When considering the Order and level of sanction the FTT must have regard to the severity of the breach and any mitigating factors.
9. The deposit was unsecured for a period of over 5 years and at the date of the Hearing had not been returned to the Applicant. She had also lodged a separate application under reference HPC/PR/22/1590 seeking that.
10. In the case of *Jenson v Fappiano* 2015 G.W.D 4-89 in relation to the amount of such an Award under regulation 10 of the Regulations it was noted that a judicial analysis of the nature of the non-compliance was required and a value attached to reflect a sanction which was fair and proportionate and just given the circumstances.
11. It was further noted that the Sheriff said in said case that the value was not the starting point of three times the deposit minus the mitigating factors it was what was fair and proportionate in the exercise of balanced judicial discretion.
12. The Court of Session in *Tenzin v Russell* 2015 Hous. L.R 11 held that any payment in terms of Regulation 10 of the Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
13. The FTT was therefore of the view that an Award should be made in the middle to higher end of the scale as the deposit had never been lodged for over 5 years. This was the entirety of the tenancy and the Respondent had not undertaken his statutory responsibility to secure the deposit. The Applicant had only become aware of the failure after the tenancy when she sought return of the deposit. She has had to separately lodge another application for return of the deposit and has been denied the ability to arbitrate to an independent third party on the matter of return of the deposit and alleged damage to the

property. The Respondent showed little to no understanding of the tenancy in questions, the Private Housing (Tenancies) (Scotland) Act 2016, the Housing (Scotland) Act 1988 and the Regulations. The 2016 Act came into force on the 1st December 2017 but since then he has on a yearly basis issues what he thought was a short assured tenancy under the 1988 Act which is not competent. Whilst it is not relevant to this matter as any tenancy is a relevant tenancy including a common law tenancy his lack of understanding was considered relevant to the discretion of the Tribunal. Accordingly in balancing the circumstances of both parties having heard submissions and in its discretion the Tribunal found the Applicants entitled to an award of two times the initial deposit to the sum of £1250.

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.

Legal Member/Chair

Date: 08 September 2022