



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 14 of the Housing (Scotland)
Act 2014**

Chamber Ref: FTS/HPC/PR/22/2399

Re: Property at 5 Sounds of Kintyre, Machrihanish, PA28 6NZ (“the Property”)

Parties:

**Mr Richard Thomas and Mrs Lucinda Thomas, 49 Parliament Place,
Campbeltown, PA28 6GY (“the Applicants”)**

**Mr William McNish, 14 Balforn Crescent, Hamilton, ML3 9UH (“the
Respondent”)**

Tribunal Members:

Shirley Evans (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent failed to comply with his duty as a Landlord in terms of Regulations 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”) as amended by The Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 by failing to pay the Applicants’ Tenancy Deposit to the scheme administrator of an Approved Tenancy Deposit Scheme and grants an Order against the Respondent for payment to the Applicants of the sum of TWO THOUSAND FOUR HUNDRED POUNDS (£2400) Sterling.

Background

1. This is an Application dated 28 July 2022 for an order for payment for where it is alleged the Respondent has not paid a deposit into an approved scheme under the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Application is made under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”).

2. The Application was accompanied by a copy of a Short Assured Tenancy Agreement between the Applicants and the Respondent commencing on 1 September 2010, email correspondence between the parties dated 21 and 25 October 2010, 21 April 2022, 6 and 13 July 2022 and a Renewal Summary of Details Form dated 23 November 2016.
3. On 1 August 2022, the Tribunal accepted the Application under Rule 9 of the Regulations 2017.
4. On 17 August 2022 by letter the Tribunal enclosed a copy of the Application to the Respondent and advised parties that a Case Management Discussion ("CMD") under Rule 17 of the Regulations would proceed on 5 October 2022. The Respondent required to lodge written submissions by 7 September 2022. This paperwork was served on the Respondent by Andrew McLean, Sheriff Officer, Glasgow on 18 August 2022 and the Execution of Service was received by the Tribunal administration.
5. The Respondent did not lodge written representations.

Case Management Discussion

6. The Tribunal proceeded with the CMD on 5 October 2022 by way of teleconference. The Applicants both appeared with Mr Thomas speaking on behalf of both Applicants. Mr McNish the Respondent appeared on his own behalf.
7. The Tribunal had before it the Short Assured Agreement between the parties commencing on 1 September 2010, email correspondence between the parties dated 21 and 25 October 2010, 21 April 2022, 6 and 13 July 2022 and a Renewal Summary of Details Form dated 23 November 2016. The Tribunal noted the content of these documents.
8. The Tribunal stated that it had read through the Application, but noted there were no written submissions from the Respondent setting out his position. The Tribunal asked the Respondent why he had not lodged any written submissions. He advised he did not think it was necessary. The Tribunal accordingly asked him to explain what his position was in relation to the Applicants' application seeking three times the deposit due to his alleged failure to comply with the 2011 Regulations.
9. Mr McNish explained that the Applicants had not paid the full deposit of £900 as required by the tenancy agreement. The Tribunal noted that in terms of the tenancy agreement which commenced on 1 September 2010 the Applicants had agreed to pay £900 deposit. Mr McNish went onto explain that as he was a reasonable person and as the Applicants were struggling to pay the full £900 he agreed that the Applicants only pay £800. The Tribunal noted the terms of the emails between the parties on 21 and 25 October 2010 where

parties agreed that only £800 need be paid by way of a deposit and was in fact paid.

10. Mr McNish explained that when the tenancy commenced in September 2010 the three scheme administrators were not up and running. He therefore did not pay the deposit into an approved scheme. He accepted when questioned by the Tribunal that that did not exonerate him from his absolute duty as a Landlord to pay the deposit into an approved scheme when the 2011 Regulations came into force. When further questioned as to why he did not therefore comply with that duty when the 2011 Regulations came into force and simply pay the deposit into one of the three scheme administrators he explained that A, he was a busy person and B, he did not trust the schemes. The Tribunal queried what the Respondent meant by his lack of trust in the schemes and how he could have formed that impression by the time he ought to have paid the deposit into a scheme. Mr McNish answered that his mistrust was for exactly the reason the application was before the Tribunal. He had not repaid the deposit to the Applicants as they were due to pay him rent arrears, damages and cleaning costs and suggested to the Tribunal that the Tribunal should have a calculator ready. The Tribunal noted the terms of the Applicants' email of 6 July 2022 in which they asked for the deposit to be returned and Mr McNish's response of 6 July 2022 which stated "*As previously discussed should you pay the three outstanding rent payments, damages and cleaning costs I will happily return your deposit*". The Tribunal explained to Mr McNish that the application proceeded under Rule 103 of the Regulations in terms of which the Applicants were seeking an order against him for his failure to comply with the 2011 Regulations and that if he felt the Applicants owed him any arrears, damages or cleaning costs he would require to raise his own action against them; these were not matters which were before the Tribunal under this application and were irrelevant to the current application.
11. Mr McNish went onto explain that no-one ever told him that he had to pay the deposit into a scheme administrator. When questioned by the Tribunal Mr McNish accepted it was his obligation as a Landlord to keep on top of legislation which affected the tenancy. The Tribunal enquired as to whether he had ever been a member of the Scottish Association of Landlords. He explained he had not as he never saw the need for it. He also advised he had not been a registered Landlord so would not have received updates from the Local Authority. The Tribunal pointed out to him that it was illegal to rent out a property without being a registered landlord. Mr McNish advised that the tenancy agreement was a private agreement and stated in any event he was no longer a Landlord.
12. Mr McNish explained he had not become aware of the 2011 Regulations until recently when the Applicants had threatened action in the Tribunal against him. He had only ever leased out the Property which he had now sold after the Applicants had vacated it. Mr McNish had nothing further to say.

13. The Tribunal asked Mr Thomas to state what his position was noting that the Applicants were seeking three times the amount of the deposit. He accepted they had only paid £800 deposit in 2010. At the end of the tenancy on 19 May 2022 they moved to another property and had to carpet and furnish it which impacted on them financially when Mr McNish refused to return the deposit. They had had to borrow money from his in-laws. The Tribunal noted the terms of the Applicant's email dated 21 April 2022 giving the Respondent notice that they would move out on 19 May 2022. Mr Thomas stated that Mr McNish rang them on 2 March 2022 to say he wanted to sell the property but that they had not received any formal notice from him. They had started to look for another property and when they found one they emailed Mr McNish to let him know they were moving out. The Tribunal also noted the terms of their email to the Applicant on 6 July 2022 seeking the return of the deposit. He advised that had the £800 deposit been repaid to them they would have not brought the current application to the Tribunal seeking three times that amount. They were not aware of any arrears and had never had any prior correspondence from Mr McNish about arrears, damages or cleaning costs before they asked for the return of their deposit.
14. Mr Thomas then referred the Tribunal to a form headed "*Renewal Summary of Details Form*" signed by the Respondent and dated 23 November 2016. Mr Thomas explained they had come across this form when they were moving out of the Property. It was also headed "*Application for registration in the register of private landlords*". He explained there was an Electrical Installation Inspection Report attached to the form and that it had been given to them by Mr McNish he thought in 2016. He pointed out to the Tribunal that on page 2 of that form there was a section headed "*Tenancy Deposits*". There was a question "*Have you taken a deposit for your property ?*". The answer was shown as "*no*". The form then went on to ask what one of the three approved schemes any deposit was placed. Mr Thomas pointed out that this form was signed and dated by the Respondent and showed that Mr McNish had not answered the deposit question correctly and would have been aware of the 2011 Regulations when he signed the form on 23 November 2016..
15. The Tribunal questioned Mr McNish about this form and pointed out that that tended to show that he was aware of the 2011 Regulations in November 2016 and that he had applied to be a registered Landlord in 2016 contrary to him advising the Tribunal he had never been a registered Landlord. Mr McNish explained that he could not recall signing such a form and stated that he had not seen this form but if it was before the Tribunal and it appeared to be signed by him, it must have been signed by him. He had nothing further to add.

Findings in Fact

16. The Applicants entered into a Short Assured Tenancy Agreement with the Respondent enduring from 1 September 2010 to 28 February 2011 and

monthly thereafter to rent the Property. In terms of the tenancy agreement the Applicants agreed to pay £900 deposit.

17. The Applicants paid the Respondent £800 deposit. By email correspondence dated 21 and 25 October 2010 parties agreed that only £800 be paid by way of the deposit.
18. The 2011 Regulations were not in force when the tenancy commenced on 1 September 2022. The Respondent did not lodge the deposit into an approved scheme once the 2011 Regulations came into force. The Respondent had an absolute duty in terms of the 2011 Regulations to do so.
19. The Respondent signed a form dated 23 November 2016 headed "*Renewal Summary of Details Form*" which contained a section on tenancy deposits.
20. The tenancy terminated on 19 May 2022. The £800 deposit was not protected in accordance with the 2011 Regulations for the period of the whole tenancy.
21. By email dated 6 July 2022 the Applicants requested the deposit be repaid to them. By email dated 6 July 2022 the Respondent advised that he would do so if they paid rent arrears, damages and cleaning costs. The Respondent has retained the deposit. The Respondent had not written to the Applicants about any arrears, damages or cleaning costs prior to this.
22. At the tenancy termination the Applicants moved to another property which they required to carpet and furnish. They were put to financial hardship by the failure of the Respondent not placing the deposit into an approved scheme and by his refusal to repay the deposit to them. They required to borrow money to carpet and furnish their new tenancy.

Reasons for decision

23. For the purpose of Regulation 9(2) of the 2011 Regulations an application where a landlord has not paid a deposit into a scheme administrator must be made within three months of the tenancy ending. The Tribunal found that the application was made in time, as the tenancy terminated on 19 May 2022.
24. Regulation 3 (1) and (2) of the 2011 Regulations provides –

“(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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

Regulation 4 of the 2011 Regulations provides-

“Subject to regulations 47 and 48, the duties in regulation 3 apply from the date which falls on the expiry of a period of 3 months beginning with the first date on which an approved scheme becomes operational.”

Regulation 47 of the 2011 Regulations provides-

“Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force, regulation 3 applies with the modification that the tenancy deposit must be paid, and the information provided, within 30 working days of the date determined under paragraph (a) or (b)—

(a) where the tenancy is renewed, by express agreement or by the operation of tacit relocation, on a day that falls three months or more, but less than nine months, after the first day on which an approved scheme becomes operational, the date of that renewal;

(b) in any other case, the date which falls nine months after the first day on which an approved scheme becomes operational.

25. It was a matter of agreement that the Short Assured Tenancy before the Tribunal was the tenancy agreement which governed the parties agreement in relation to the Property. It provided that it endured from 1 September 2010 until 28 February 2011 continuing monthly thereafter. It was a matter of agreement that despite the tenancy providing that £900 deposit be paid parties subsequently agreed by email correspondence of 21 and 25 October 2010 that £800 only be paid. The deposit was accordingly paid prior to the 2011 Regulations being made 7 March 2011 and coming into force on 2 July 2012. The tenancy agreement was by then running on a monthly basis, Under Regulation 47 of the 2011 Regulations the deposit should have been paid within 30 working days of the first period of renewal after 2 October 2012. The deposit should have been paid therefore within 30 working days of 28 October 2012 into an approved scheme. The Respondent accepts the deposit was not paid into a scheme for the duration of the tenancy.

26. The 2011 Regulations were intended, amongst other things to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit to the landlord or tenant or divided between both, at the termination of a tenancy.

27. The amount to be paid to the Applicants is not said to refer to any loss suffered by the Applicants. Accordingly, any amount awarded by the Tribunal

in such an application cannot be said to be compensatory. The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach. The Regulations do not distinguish between a professional and non-professional landlord such as the Respondent. The obligation is absolute on the landlord to pay the deposit into an Approved Scheme.

28. In assessing the amount awarded, the Tribunal has discretion to make an award of up to three times the amount of the deposit, in terms of Regulation 10 of the 2011 Regulations.

29. The Respondent's failure to comply with the 2011 Regulations placed him in a position of an unfair advantage to determine what would happen to the deposit at the termination of the tenancy. It is no defence to such an application that he was in ignorance of the 2011 Regulations.

30. The Tribunal however questioned the Respondent's credibility of his statement that he was unaware of the 2011 Regulations until recently when the Applicants had threatened to raise this application. It appeared to the Tribunal that the Respondent had knowledge of the 2011 Regulations by 23 November 2016 when he signed a form that appeared to relate to landlord registration despite his denial he had ever been a registered landlord. His submissions were contradictory concerning his state of knowledge of the 2011 Regulations. He initially stated he was too busy to place the deposit into a scheme and that he did not trust the schemes. Those statements suggest that he did have some knowledge of the Regulations but chose to ignore them. He then contradicted himself by stating no one told him about the 2011 Regulations and his duty to place the deposit in an approved scheme. He presented as arrogant. He showed no regret about his actions. He was unapologetic. The actions of the Respondent struck the Tribunal as demonstrating that the Respondent had either disregarded or ignored his duties under the 2011 Regulations. It was of concern that the deposit had been unprotected for the full duration of the tenancy and for a period of nearly 10 years.

31. The Tribunal was satisfied the purpose of the 2011 Regulations had been wholly defeated. The Respondent refused to pay the deposit back to the Applicants at the termination of the tenancy citing alleged arrears, damages and cleaning costs as a reason for not doing so. Had the deposit been protected these matters would have been before the scheme administrator to determine and ultimately decide how and to whom the deposit should be divided or returned. The Respondent's actions had deprived the Applicants any opportunity to state their case. He had total control of the deposit. That was unacceptable and demonstrated the perceived mischief and imbalance of power the 2011 Regulations were intended to defeat. The Applicants had been inconvenienced by his actions and had been put to the necessity of borrowing money from relatives to help them set up their new home.

32. In all the circumstances, the Tribunal considered that a fair, proportionate and just amount to be paid to the Applicants was three times the amount of the deposit.

Decision

33. The Tribunal accordingly made an Order for Payment by the Respondent to the Applicants of £2400.

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.

S. Evans

5 October 2022

Legal Member

Date