



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/22/3099

Re: Property at 0/2 101 Yorkhill Street, Glasgow, Lanarkshire, G3 8NS (“the Property”)

Parties:

Mr Philip Graemer, 2/1 3 Dowanside Road, Glasgow, Lanarkshire, G12 9YB (“the Applicant”)

Mr Gavin Lindsay, 0/2 101 Yorkhill Street, Glasgow, Lanarkshire, G3 8NS (“the Respondent”)

Tribunal Members:

Valerie Bremner (Legal Member) and Sandra Brydon (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent should pay to the Applicant the sum of £1200 having found that the Respondent has breached the duties set out in Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Background

1.This application in terms of Rule 103 of the Tribunal rules of procedure for sanction of a landlord for alleged failure to comply with the duties imposed in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 was first lodged with the tribunal on 28 August 2022.A related application for a payment order in terms of the deposit was also lodged with the Tribunal with reference number CV/22/3101.

2.The application was accepted by the Tribunal on 5th September 2022 and a case management discussion was fixed for both applications for 18th November 2022 at 10am.

Case Management Discussions

3.At the case management discussion on 18th November 2022 both the Applicant and Respondent appeared and represented themselves.

4.The Tribunal had sight of the application a tenancy agreement, information from the three approved deposit Scheme providers, bank statements and text messages.

5.The Applicant explained that he had paid a deposit of £600 in January 2022 when he agreed a tenancy at the Respondent's home from the 5th of January to 5th June 2022.The Respondent had not lived at the address during the tenancy. They did not know each other before the tenancy commenced. The Applicant had lived at the property as his only home. Another tenant under a separate tenancy agreement occupied a second bedroom at the property during the Applicant's tenancy. The details of his separate tenancy were not known to the Applicant and he remained in the property after the Applicant's tenancy ended.

6.After he left the property the Applicant enquired with the Respondent landlord as to his deposit but did not receive a reply. He had never received his deposit back. He discovered around the time he was leaving the property that the deposit should have been protected and made enquiries with the three deposit scheme providers who all confirmed that the deposit was not held by them. The Applicant also confirmed that he had not received any information regarding the deposit and where it was held at any time during the tenancy.

7.The Respondent accepted that he had not protected the deposit and had not understood that he was required to do this. He was not aware of the deposit schemes. He had not given any information to the tenant. He was not a landlord but had simply rented out his property for a short term let to two tenants whilst he had required to stay with a relative.

8.The Tribunal legal member explained the law to the Respondent in terms of the maximum sanction (up to three times the deposit) that could be imposed by the Tribunal if it found that this was a "relevant tenancy" requiring certain duties to be complied with by a landlord in terms of the Regulations and if it found that the duties on the landlord had been breached. The Tribunal Legal Member explained the meaning of a relevant tenancy in terms of section 83 of the Anti-Social Behaviour (Scotland) Act 2004. The Respondent believed this was a short term let.

9.The Tribunal Legal member also advised the Respondent as to the duties of the Tribunal in terms of section 72 of the Private Housing (Tenancies)(Scotland) Act 2016 to report to the local authority should the Tribunal become aware of an unregistered landlord in terms of relevant proceedings before the Tribunal arising from a private residential tenancy.

10.The Respondent advised that he had not understood the possible consequences to him and understood the Tribunal would be dealing only with the issue of whether the Applicant should receive his deposit back. After discussion he asked for time to take advice on his position.

11.The Applicant opposed any continuation for the Respondent to seek legal advice as he said that he had plenty of time to do this before the case management discussion. The Respondent said that he had not understood that this matter would arise and thought it was only the deposit being considered.

12.The Tribunal Legal Member considered the request and allowed an adjournment of the case management discussion to a later date for the Respondent to take legal advice and a new case management discussion was set down for 10th March 2023.

13.On that date the Applicant attended but there was no appearance by or on behalf of the Respondent and it was noted that a recorded delivery letter sent to the Respondent giving him the date had been returned to the Tribunal. Given that it appeared that the Respondent did not know of the date the Tribunal adjourned the case management discussion to a later date and the application called again on 26th May 2023.On that date there was no appearance by either party and the date had been intimated to the Respondent. The tribunal adjourned matters to a new case management discussion and issued a direction to the Applicant to require him to confirm if he was proceeding with his applications and to explain his non-attendance.

15.A further case management discussion was fixed for 1st September 2023.On that date the Applicant attended and represented himself. The Respondent did not attend and the date had been served on him by Sheriff Officers. The Applicant requested that the Tribunal proceed in his absence and the Tribunal was satisfied that this was appropriate given that the Respondent had received fair notice of this date and had for whatever reason had not attended. The Respondent did not engage with or make representations to the Tribunal after the first case management discussion on 18th November 2022.

16.On 1st September 2023 the Applicant advised the Tribunal that he had had a separate tenancy from the other person whom he named as Peter who had occupied the other bedroom at the property. He was not aware of the terms of Peter's tenancy but the Respondent had advised the Tribunal on 18th November 2022 at the first case management discussion that he had rented out the property to two tenants whilst he stayed with family. The Applicant also advised the Tribunal that he left before Peter and that the Respondent had not lived with him at any point during the tenancy, moving back in when the tenancy ended.

17.The Tribunal was satisfied that it had sufficient information upon which to make a decision and that the proceedings had been fair.

18.The Tribunal considered that the Respondent was in breach of the Regulations and that a sanction required to be imposed.

19.The Applicant was given the opportunity to make representations on the level of any sanction to be imposed. He asked that the tribunal consider a relatively high sanction in terms of the maximum permitted, being some £1800.The Applicant had

required to apply to the Tribunal to seek the return of his deposit and he considered that the Respondent must have thought that he could ignore the Regulations and that tenants had to be protected from circumstances like this. Whilst the Respondent had admitted that he had not protected the deposit or given required information to the Applicant he had considered the tenancy to be a short term let and he had not engaged with the Tribunal after the first case management discussion which was adjourned to allow him to seek advice on his position. The Tribunal did not therefore hear his position on the level of any sanction to be imposed as he was no longer taking part in the Tribunal proceedings at the stage the Tribunal considered there to be a breach of the Regulations.

Applicable Law

The Tribunal considered the terms of section 1 and Schedule 1 of the Private Housing Tenancies Scotland Act 2016 which state :

Section 1 Meaning of private residential tenancy.

(1)A tenancy is a private residential tenancy where—

(a)the tenancy is one under which a property is let to an individual (“the tenant”) as a separate dwelling,

(b)the tenant occupies the property (or any part of it) as the tenant’s only or principal home, and

(c)the tenancy is not one which schedule 1 states cannot be a private residential tenancy.

(2)A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied.

Schedule 1

A tenancy cannot be a private residential tenancy if

(1) A tenancy cannot be a private residential tenancy if the purpose of it is to confer on the tenant the right to occupy the let property for a holiday.

(2)A tenancy cannot be a private residential tenancy if it is a short-term let within the meaning of article 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022

.....

(8).This paragraph applies to a tenancy if—

(a)the let property would not be regarded as a separate dwelling were it not for the terms of the tenancy entitling the tenant to use property in common with another person (“shared accommodation”), and

(b)from the time the tenancy was granted, the person (or one of the persons) in common with whom the tenant has a right to use the shared accommodation is a person who—

- (i) has the interest of the landlord under the tenancy, and
- (ii) has a right to use the shared accommodation in the course of occupying that person's home.

The Tribunal also considered terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 which states:-

1. Duties in relation to tenancy deposits

Regulation 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.

(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.

(3) A “relevant tenancy” for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

- (a) in respect of which the landlord is a relevant person; and
- (b) by virtue of which a house is occupied by an unconnected person, unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions “relevant person” and “unconnected person” have the meanings conferred by section 83(8) of the 2004 Act.

The Tribunal also considered section 83 of the Anti Social Behaviour (Scotland) Act 2004 which states in relation to landlord registration :-

Section 83 (6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—

- (a) the house is being used for the provision of
.....
 - (d) the house is being used for holiday purposes.
 - (e) the house is the only or main residence of the relevant person;
.....
 - (n) the house is being used for a short-term let as defined in article 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022
- S83(8) In this Part—

“relevant person” means a person who is not—

- (a) a local authority.
- (b) a registered social landlord; or
- (c) Scottish Homes; and

“unconnected person”, in relation to a relevant person, means a person who is not a member of the family of the relevant person.

Findings in Fact and Law

20. The parties entered into a private residential tenancy at the property between 5th January and 5th June 2022.

21. The Respondent owned the property and had previously lived there but was moving out to stay with family for several months.

22. The Applicant and Respondent did not know each other before the tenancy started and the Applicant took on the tenancy as his only home.

23. During the tenancy of the Applicant the Respondent did not live at the property at any time.

24. Another tenant was in occupation at the property during the Applicant’s tenancy in terms of a separate tenancy agreement the details of which are not known and he remained at the property after the Applicant’s tenancy ended.

25. The monthly rent payable in terms of the tenancy was £600 and the parties agreed that a deposit of £600 was paid by the Applicant before the start of the tenancy.

26. The tenancy was a relevant tenancy within the meaning in Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

27. The deposit paid by the Applicant was not returned to him at the end of the tenancy and attempts by him to contact the Respondent regarding the deposit were unanswered and he required to apply to the First Tribunal to seek that the deposit be returned to him.

28. The Deposit paid by the Applicant was not secured by or on behalf of the Respondent in any of the approved tenancy deposit schemes at any time during the tenancy of the Applicant.

29. The information required to be given to the Applicant by the Respondent to the Applicant in terms of Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 was not given to him at any time during the tenancy.

30. The requirement to protect the deposit in an approved scheme and to comply with the obligation to provide required information in terms of Regulations 3 and 42 of the 2011 Regulations should have been complied with in respect of this tenancy within 30 working days of 5th January 2022.

Reasons for Decision

31. The tribunal having found there was a breach of the 2011 Regulations it then fell to the tribunal to consider what sanction should be made in respect of the failure to protect the deposit and give the information required in terms of regulations 3 and 42 of the 2011 regulations within the required timeframe. The tribunal had regard to the case of ***Russell Smith and others against Uchegbu, [2016] SC Edinburgh 64***. In particular the tribunal required to consider what was a fair proportionate and just sanction in all the circumstances of the case always having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend on its own facts and in the end of the day the exercise by the tribunal of its judicial discretion is a balancing exercise.

32. The tribunal considered all of the information before it and found there were a number of factors to be weighed in the balance in this application. The first was that the deposit had been unprotected for the entire period of the Applicant's tenancy, a period of five months. The deposit was not returned to the Applicant at the end of the tenancy and the Applicant required to apply to the First Tier Tribunal to seek return of his deposit. It appeared to the tribunal that the failure of the Respondent to adhere to the duties required of him in terms of protection of the deposit had prevented the Applicant from having recourse to the alternative dispute resolution mechanisms available in the approved tenancy deposit schemes. Instead, the Respondent had not communicated and the Applicant had required to raise an application to the first-tier tribunal in order that the return of the deposit was considered. In these circumstances the failure to protect the deposit appeared to have completely frustrated the ability of the Applicant to have the matter of the deposit resolved quickly by an independent process. The tribunal noted that the Respondent did not dispute that he had not protected the deposit nor that he had not given the Applicant the required information in terms of the 2011 Regulations. His position was that this was not a private residential tenancy but a short term let. The tribunal considered this in the absence of the Respondent who had raised the point and then failed to engage further with the tribunal. The Applicant's position was clear that he had taken on the tenancy to be his only home during the period of the tenancy, the Respondent did not live at the address during the tenancy and the parties were unconnected. The tribunal was satisfied that this was a private residential tenancy and not a holiday or short term let. It was clear that the tenancy was taken on by the Applicant as his home and that the landlord did not reside at the property during the tenancy. Whether or not the Respondent had intended to create a tenancy or not such a tenancy existed and the tribunal was satisfied that this was a relevant tenancy, and that the Respondent was a relevant person in terms of the Anti-Social Behaviour (Scotland) Act 2004. The Tribunal noted that the Civic Government (Scotland) Act (Licencing of Short Term Lets) Order 2022 did not come into force until first March 2022 after the start of this tenancy and in any event the tenancy could not be a short term let as the Applicant had moved into the

property as his only or principal home. The tribunal was therefore satisfied that this was a tenancy which the 2011 Regulations applied.

33. Having regard to the amount of sanction to be imposed the tribunal considered all of the circumstances including the Respondent's position that he was not a landlord and that he had simply rented out his property while he went to stay with family for a number of months. The tribunal also took into account that the Applicant's deposit had been unprotected for the entire period of the tenancy and the failure to adhere to the duties had frustrated to the Applicant's ability to have regard to the independent dispute resolution services offered by the tenancy deposit scheme providers. Having regard to all of these factors the tribunal took the view that this was a breach of the Regulations requiring a sanction at the higher end of the range of possible sanctions given the circumstances and considered that a sanction of £1200, twice the amount of the deposit paid by the Applicant was appropriate. The tribunal took no account of the tenancy of the other party referred to who appeared to be living at the property in terms of a completely separate tenancy agreement, the terms of which were unknown and which continued after the Applicant left the property.

34. On the facts before it in this application the Tribunal had cause to suspect that that landlord in relation to this private residential tenancy is not registered and in terms of section 72 of the Private Housing (Tenancies) (Scotland) Act 2016 will report this to the relevant local authority.

Decision

The tribunal determined that the Respondent should pay to the Applicant the sum of £1200 having found that the Respondent has breached the duties set out in Regulations 3 and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in respect of the tenancy at the property between the parties.

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.

Valerie Bremner

1st September 2023

Legal Member/Chair

Date