



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

Chamber Ref: FTS/HPC/PR/23/2859

Re: Property at 10/2 Hermand Terrace, Edinburgh, EH11 1QZ (“the Property”)

Parties:

Mrs Hana Elasifer, Mr Sean McMahon, 45 Avontoun Crescent, Whitecross, Linlithgow, EH49 6JR (“the Applicant”)

Mrs Hannah Stewart, 5A St Colme Street, Edinburgh, EH3 6AA (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatriidge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to grant an order against the Respondent for payment to the Applicant of the sum of £900 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 12.08.2023
- 2.** The following documents were lodged in support of the application:
 - a)** Tenancy agreements for Private Residential Tenancies (PRT) starting 29.11.2019 for Mrs Elasifer only as tenant, replaced with further PRT starting 1.10.2022 with both Applicants as tenants.
 - b)** Notice given by tenants dated 16.6.2023
 - c)** emails between parties 3.7.2023 to 12.7.2023
 - d)** Deposit scheme reply My Deposits Scotland
 - e)** bank statement showing return of deposit on 12.7.2023
- 3.** The application was accepted on 23.08.2023 A Case Management Discussion (CMD) was scheduled for 13.10.2023 by teleconference. The application and

CMD notification was served on the Respondent by Sheriff Officers. The Tribunal was satisfied that the Respondents had the required notice of the CMD as set out in Rules 17 (2) and 24 (2) of the Procedural Rules.

4. The Respondent sent a letter explaining the situation and attaching photographs on 26.9.2023
5. The Applicants sent a further email in reply on 28.9.2023 with text exchange 1.7.2022 to 22.9.2022 between landlord and tenants regarding a changes to payments.

B: THE CMD

1. The Applicants and the Respondent took part in the teleconference CMD.
2. The legal member explained the purpose and process of the CMD.
3. Both parties agreed that no hearing would be necessary. Both parties agreed the facts of the case. Ms Stewart acknowledged again that she had not paid the deposit into a scheme. She re-iterated her explanation that she had been unaware of that obligation and stated she had simply taken the lease document off the internet and not really made herself aware of her landlord obligations at the time, which was a chaotic time for her due to her personal circumstances. She did not recall when she registered as a landlord having to confirm anything about the deposit regulations and also stated that she had repaid the money in full to the tenants very quickly after they left the property. She advised that she has now engaged DJ Alexander to deal with the property as this had been a lesson to her. She also advised that this was the first time she had let out a flat. She fully accepted her responsibility for not acting as she should have but emphasised this was not for financial gain or deliberate but a failure to inform herself properly. She asked the penalty should thus be kept to the lower scale of the range.
4. The Applicants confirmed the deposit had been returned in full but also that the Respondent should have known at the very least once she registered as a landlord that there were obligations relating to the deposit. Both referred to issues regarding the increase of the amount they had to pay when the Respondent had made changes to payments for utilities during lockdown, which was a time when there was no realistic chance to move elsewhere, which had annoyed the Applicants. they stated they would like a payment order for about the middle of the available range, around £1200.

C: THE LEGAL TEST

1. 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.
2. 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.”
3. 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; (b) provide the tenant with the information required under regulation 42.

4. Relevant procedural legislation:

In terms of Rule 17 of the Rules of Procedure:

Case management discussion

17.—(1) The First-tier Tribunal may order a case management discussion to be held—

- (a) in any place where a hearing may be held;
- (b) by videoconference; or
- (c) by conference call.

(2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.

(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties’ dispute may be efficiently resolved, including by—

- (a) identifying the issues to be resolved;
- (b) identifying what facts are agreed between the parties;
- (c) raising with parties any issues it requires to be addressed;
- (d) discussing what witnesses, documents and other evidence will be required;
- (e) discussing whether or not a hearing is required; and
- (f) discussing an application to recall a decision.

(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.

Power to determine the proceedings without a hearing

However, in terms of Rule 18 of the Rules of Procedure:

18.—(1) Subject to paragraph (2), 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; and

(b) must make a decision without a hearing where the decision relates to—

- (i) correcting; or
- (ii) reviewing on a point of law, a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties

D: FINDINGS IN FACT

Based on the documents and the discussion at the CMD the Tribunal makes the following findings in facts:

1. The deposit of £800 was paid by the Applicants to the Respondent prior to the tenancy starting in November 2019.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 29.11.2022 with the first named Applicant and was replaced with a further Private Residential Tenancy with both Applicants as tenants on 1.10.2022..
3. In terms of Clause 14 of the original lease and clause 13 of the further lease document, a deposit of £800 was due and the lease documents did not make reference to this being paid into a deposit scheme.
4. The tenancy ended on 1.7.2023 after the tenants had given notice on 16.6.2023. .
5. Initially the Respondent had advised the Applicants she was retaining the whole deposit due to the state of the property on return.
6. The Applicants then asked her on 12.7.2023 about the deposit scheme applicable
7. In reply the Respondent returned the entire deposit to the Applicants on 12.7.2023.
8. The deposit was not lodged with a tenancy deposit scheme for the entire duration of the tenancy.
9. None of the information required in terms of Regulation 42 was provided to the Applicants by the Respondent.
10. The dispute resolution service of a deposit scheme was not available to the Applicants at the end of the tenancy.
11. The Respondent was unaware of the duty to put the deposit funds into a registered scheme.
12. She had not made herself familiar with the duties of a landlord in that regard when the first tenancy started.
13. She had remained unaware of the obligation until the end of the tenancy.
14. The Respondent has now taken steps to ensure she complies with the obligations in any further tenancy over the property and has now engaged letting agents.

E: REASONS FOR DECISION:

1. The Tribunal did not consider that there was any need for a hearing as both parties agreed the material facts of the case and thus they are not in dispute.
2. The Tribunal makes the decision on the basis of the documents lodged by both parties and the information provided by the parties at 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 disputed by the landlord.

4. 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 £800 would thus be £2,400.
5. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
6. 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..."
7. The approach the Tribunal has to take in making a decision was further clarified in the decision UTS/AP/0006 by Sheriff Jamieson, which set out that the Tribunal first has to identify the relevant matters to be taken into account and then in a second step apply weight to these individual relevant factors. The decision set out the correct approach in para 23 to 29 as follows: "[23] The FTS or UTS would be bound to take into account as an aggravating factor any deliberate intention on the part of a landlord to ignore the tenancy deposit scheme, when that landlord had knowledge of the scheme, but had deliberately chosen to flout the Regulations. I do not find that to be the situation in this case. [24] The relevant factors identified by the FTS in this case are the fact the deposit was exposed to risk for the duration of the tenancy and, as a mitigating factor, that the deposit was repaid immediately after the end of the tenancy. [25] A landlord's past failures with previous tenants' deposits may be a relevant factor in assessing the appropriate amount of sanction, but as the payment thereof goes to the tenant directly affected by the breach of the Regulations, care has to be taken about the weight to be given to that factor in any given case. [26] Having identified the relevant factors for consideration, the FTS or UTS on appeal ought then secondly to determine the weight to be attached to each factor. [27] The FTS did not do that in this case. While it is true the deposit was at risk throughout the duration of the tenancy, the FTS did not assess how real that risk was. Although the appellant was non-compliant with the Regulations at the time, his evidence before the UTS showed he regularly repaid his tenants' deposits. Accordingly, the actual risk in this case was relatively insignificant, but as one purpose of the Regulations is to guard against any level of risk, moderate weight ought to be attached to this factor in the circumstances of this case. [28] In my opinion, significant weight ought to be attached to the appellant's ignorance of the scheme over the prolonged period of five years as a landlord. On the other hand, significant weight falls to be attached to the mitigating factors that the

respondents' deposit was repaid in full immediately after the termination of the tenancy and that the respondents suffered no loss or inconvenience as a consequence of the appellant's failure to comply with the Regulations. [29] Having regard therefore to the foregoing factors and the weight to be attached to each of them, and the maximum sanction of £6,000 (three times the deposit of £2,000), I assess a fair and proportionate sanction in the sum of £2,500. [30] This in my opinion is a sufficient sanction to punish the appellant for his serious failures to make himself aware of the regulations over five years as a landlord and to protect the respondents' deposit for the five month duration of their tenancy with him by paying the deposit into an approved scheme, but taking into account the significant mitigating factors of the immediate return to the respondents of the full amount of their deposit and the absence of any loss or inconvenience to them as a result of the appellant's breach of the Regulations."

8. In the case before the Tribunal today 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 entire period of the tenancy. During this time the deposit was held by the Respondent herself, not by a letting agent.
9. The Applicant had queried the lodging of the deposit and the Respondent had then returned the deposit in full.
10. Matters identified by the Tribunal as relevant aggravating factors were the duration of the period of the deposit not being protected, the fact that the landlord was unaware of the requirement to lodge the deposit for a period of almost 4 years, having acted as a landlord during that period. Matters identified as relevant mitigating factors were that the deposit was repaid in full and that the Respondent clearly had not deliberately disregarded the obligations as a landlord. She accepted her failure to do so immediately once this was raised and has since taken steps to avoid any future problems.
11. The Respondent has fully engaged with the Tribunal process and had admitted the breach of the Regulations even prior to the CMD.
12. Weighing these matters, the Tribunal considers that the failure to comply with the Regulations in this case appears to be a matter of oversight rather than deliberate flouting of the landlord's obligations and a deliberate deprivation of the tenant of the benefits of the deposit protection mechanism. Although the situation arising at the end of the tenancy, when the Respondent initially had intended to keep the entire deposit, which is exactly the issue the Regulations seek to prevent, the actual risk to the Respondents was not as significant as the full deposit has been returned. I attach moderate weight to this factor.
13. The duration of the period when the deposit was unprotected was a significant failure to comply with the obligations of the landlord to lodge the deposit and it was only remedied after active intervention from the Applicants. I attach significant weight to that factor.
14. Ultimately the amount was repaid in full and on the same day as the matter was raised by the Applicants. I attach significant weight to that factor.

15. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 900. This is slightly lower than requested by the Applicants but is a substantial penalty for the landlord, who is not a professional and experienced landlord and who clearly made a mistake and not a deliberate attempt to ignore her obligations. I consider this reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

F: DECISION:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondents for payment to the Applicant of the sum of £900 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.


Legal Member/Chair

Date 13 October 2023