



**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/22/0378**

**Re: Property at 0/1 41 Tobago Place, Calton, Glasgow, G40 2RT (“the Property”)**

**Parties:**

**Mr Murray McKinstry, Mr Wolfgang Tzaferis, PO Box 12595, Boness, EH51 1AQ (“the Applicants”)**

**Mr Frank Donaldson, UNKNOWN, UNKNOWN (“the Respondent”)**

**Tribunal Members:**

**Andrew Upton (Legal Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent did not comply with his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2022, and that he is required to make payment to the Applicants in the sum of NINE HUNDRED AND FIFTY POUNDS (£950.00) STERLING as sanction.**

**STATEMENT OF REASONS**

1. This Application called for its Case Management Discussion by teleconference on 12 May 2022. The Applicants participated in the CMD. The Respondent was neither present nor represented.
2. This is an Application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). The Applicants contend that they made payment of a tenancy deposit of £475 at the beginning of their tenancy with the Respondent in respect of the Property on 9 August 2019. The Respondent failed to lodge the tenancy deposit with an approved Tenancy Deposit Scheme, or to provide the tenant with the

information specified in Regulation 42 of the 2011 Regulations, within 30 working days. The Respondent was using a letting agent at the time, who ought to have known about the Respondent's duties under the 2011 Regulations. Clause 11 of the Tenancy Agreement expressly stated, in the first sentence thereof: "*The Landlord must lodge any deposit they receive with a tenancy deposit scheme within 30 working days of the start date of the tenancy*". On that basis, the Applicants say, there can be no excuse for the Respondent's failure to lodge the deposit with an approved Scheme. The tenancy came to an end on 10 December 2021. The deposit was thereafter lodged by the Respondent's new letting agent with SafeDeposits Scotland on 14 January 2022. The full deposit was subsequently returned to the Applicants.

3. In terms of the 2011 Regulations:-

"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.

(1A) Paragraph (1) does not apply—

- (a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
- (b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(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.

(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.
- (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.

9.—

- (1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal]<sup>1</sup> 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]<sup>1</sup> 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.

42.— *Landlord's duty to provide information to the tenant*

- (1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).
- (2) The information is—
  - (a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;
  - (b) the date on which the tenancy deposit was paid to the scheme administrator;

- (c) the address of the property to which the tenancy deposit relates;
  - (d) a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;
  - (e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and
  - (f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.
- (3) The information in paragraph (2) must be provided—
- (a) where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or
  - (b) in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme.
- (4) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments—
- (a) paragraphs (2) and (3) apply as if the references to deposit were to each instalment of the deposit, and
  - (b) in relation to the information provided under paragraph (2)(a), confirmation of the cumulative amount of the tenancy deposit paid by the tenant in respect of each instalment after the first instalment.”
4. In terms of Rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, the Tribunal may do anything at a Case Management Discussion that it may do at a Hearing, including make a decision. In terms of Rule 2, the Tribunal requires to have regard to the overriding objection to deal with proceedings justly when making a decision; including the need to avoid unnecessary delay.
5. The Respondent has received service of the Application and notification of the CMD by advertisement on the Tribunal website. The Applicants were unable to find an address for the Respondent, who was also not registered as a landlord. On that basis, the Tribunal has not been presented with any basis to find that the Respondent disputes that he has failed to comply with his duties under Regulation 3. The Tribunal considers that a Hearing would only delay matters unnecessarily, and that it has sufficient information available to it to make a decision.

6. The Applicants have produced, with the Application, a printout from SafeDeposits Scotland which shows that, in respect of their tenancy, the tenancy start date was 9 August 2019 and the deposit was received by SafeDeposits Scotland on 14 January 2022. For that reason, the Tribunal is satisfied that the Respondent breached his duties under both Regulation 3(1)(a) and (b).
7. That being the case, the Tribunal is required by Regulation 10(a) to make an order for payment by the Respondent to the Applicants. That payment is a sanction for the Respondent's breach of statutory obligation. Regulation 10 creates strict liability. The only discretion afforded to the Tribunal relates to the sanction to be imposed. Regulation 10 imposes a maximum sanction of a sum not exceeding three times the tenancy deposit. The determination of the appropriate sanction involves an exercise of judicial discretion, having regard to all of the circumstances of the case.
8. The exercise of judicial discretion in cases such as this was considered by Sheriff Welsh in *Jenson v Fappiano*, 2015 SCEDIN 6. At paragraphs 11 and 12, Sheriff Welsh stated as follows:-

"11... I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

1. 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 judgment.
2. 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 of the case and a value attached thereto which sounds in sanction.
3. A decision based on judicial discretion must be fair and just ( '*The Discretion of the Judge*' , Lord Justice Bingham, 5 Denning L.J. 27 1990).

12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf *Tenzin v Russell 2014 Hous. L.R. 17* ). The judicial act, in my view, is not to implement

Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case.”

9. It is the Tribunal’s view that Sheriff Welsh’s observations represent the correct approach to determining Applications under the 2011 Regulations.
10. In this case, the tenancy deposit was not lodged in an approved Scheme at any time during the tenancy. The tenancy began on 9 August 2019 and terminated on 10 December 2021. The deposit was therefore unprotected for a period in excess of two years. That is not trivial non-compliance. The Respondent had the benefit of advice from a professional letting agent. The Tenancy Agreement expressly explained the Respondent’s duties under the 2011 Regulations. It is beyond doubt that the Respondent was well aware of his duties. However, it is important to note that the Respondent did ultimately lodge the deposit with an approved tenancy deposit scheme, thereby belatedly affording protection of the deposit to the Applicants. The Applicants had the benefit of the dispute resolution service provided by the scheme, albeit they did not need to make use of it given that the landlord consented to the release of the full deposit. Those are mitigating factors that the Tribunal has taken into account.
11. In all of the circumstances, the Tribunal has concluded that the Respondent’s failure was a flagrant breach of the 2011 Regulations, albeit one which he sought to address late in the day. For those reasons, the Tribunal is satisfied that the Respondents breach of statutory duty lies towards the more severe end of the spectrum. An appropriate sanction is a sum equal to two times the tenancy deposit, which is the sum of £950. The Tribunal accordingly made an order for payment in that sum.

## 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.**

Andrew Upton

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**Legal Member/Chair**

12 May 2022

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**Date**