



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

**Chamber Ref: FTS/HPC/PR/20/0772**

**Re: Property at 1 Braevalla Chalets, Skinidin, Dunvegan, Isle of Skye, IV55 8ZS (“the Property”)**

**Parties:**

**Mr Neale Farnaby, c/o 8 Fasach, Glendale, Isle of Skye, IV55 8WP, per his wife and representative, Mrs Susan Farnaby, (“the applicant”)**

**Mr Iain Copeland, 1 Braevalla Chalets, Skinidin, Dunvegan, Isle of Skye, IV55 8ZS (“the respondent”)**

**Tribunal Members:**

**Mr David Preston (Convener) and Mrs Elizabeth Dickson, (Ordinary Member)**

**Decision:**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:**

**The deposit paid by the applicants in respect of the tenancy agreement between the parties dated 16 October 2018 was carried forward to the subsequent tenancy agreement between the parties dated 6 March 2019.**

**The Respondent had failed in his duty to pay the deposit paid by the Applicant to the scheme administrator of an approved scheme under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”); and**

**Orders the Respondent to pay to the Applicant the sum of £350 in terms of Regulation 10(a).**

**Background:**

1. By application dated 24 February 2020 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 and Regulation 9 of the Regulations the applicant sought an order for payment under Regulation 10.

2. By Notice of Acceptance dated 13 March 2020 a legal member of the First-tier Tribunal with delegated powers so to do, accepted the application for determination by the First-tier Tribunal and appointed the case to a Case Management Discussion (“CMD”).
3. A CMD took place by telephone on 13 August 2020. Mrs Farnaby represented the applicant and the respondent was represented by Mr Burd, Solicitor.
4. A Note of the CMD dated 13 August 2020 was issued to the parties in response to which the parties made further representations and submissions.
5. A full hearing took place by telephone on 24 September 2020 at which Mrs Farnaby was in attendance on behalf of the applicant and Mr Copeland who represented himself.
6. The tribunal had before it:
  - a. Application form dated 24 February 2020.
  - b. Tenancy agreement in the form of a Short Assured Tenancy dated 16 October 2018.
  - c. Tenancy agreement in the form of a Private Residential Tenancy Agreement dated 6 March 2019.
  - d. Representations from the respondent dated 30 July 2020.
  - e. Applicant’s response to representations dated 10 August 2020.
  - f. Representations from the applicant dated 6 Sept 2020.
  - g. Representations from respondent dated 11 September 2020.
  - h. Representations and submissions from the applicant dated 22 September 2020.
  - i. The tribunal was also given access to a video lodged by the respondent, access to which was also provided to the applicant.
7. At the outset of the hearing the convener outlined the purpose of the hearing. He noted the productions and representations made by the parties but pointed out that the tribunal would only have regard to such evidence as was relevant to the question of whether the deposit had been placed on a scheme in accordance with the regulations or not.

## **Evidence**

8. Mrs Farnaby referred to the written representations and submissions. The deposit had been paid to the respondent at the start of the first tenancy agreement in October 2018. No information had been provided about a deposit scheme into which it had been paid. At the end of that agreement no information had been forthcoming and no discussion had taken place about it. The applicant therefore presumed that the deposit had been carried forward to the new agreement. When that tenancy was terminated by the Notice to leave dated 7 January 2020 the applicant asked for details of the deposit and referred to it in text messages, but

no information had been provided. The respondent had specifically referred to the deposit in a number of text messages regarding the termination of the tenancy.

9. The Convener referred to the CMD of 23 August 2020 and the references made by Mr Duncan Burd who represented the respondent at that meeting. Mr Burd had stated at the CMD that the deposit had been retained by the respondent and set against rent arrears.
10. The respondent stated that this was not the case and was unsure why Mr Burd had said that. Mr Burd was no longer representing him.
11. The respondent acknowledged that he had not placed the deposit into a scheme. He said that he was aware of the existence of the deposit regulations but had thought it was a voluntary scheme and had not realised that it was mandatory. He accepted that in terms of the regulations the tribunal was required to impose a penalty for such a failure and that the level of penalty was at the discretion of the tribunal.

### **Findings:**

1. The tribunal made the following findings in fact:
  - a. The parties entered into a tenancy agreement on 16 October 2018.
  - b. In terms of the tenancy agreement a deposit of £325 was paid by the applicant to the respondent.
  - c. The respondent did not pay the deposit into an approved tenancy deposit scheme.
  - d. In March 2019 a new tenancy agreement was entered into with no provision for a deposit.
  - e. The deposit from the initial tenancy agreement was carried forward to the second agreement.
  - f. The respondent did not pay the deposit into an approved tenancy deposit scheme.
  - g. The deposit was neither returned to the applicant nor set against any arrears of rent or damage to the property.
  - h. The respondent failed in his duty to lodge the deposit with any approved tenancy deposit scheme.

## Reasons for Decision:

12. Regulation 9(2) provides that an application under the regulations must be made no later than 3 months after the tenancy has ended.
13. In the present case, the tenancy under which the deposit had been paid came to an end on 6 March 2019 when the parties entered into the new tenancy agreement. In that event an application under the regulations would require to be made no later than 6 June 2019. However, the second agreement was entered into on that date with no reference to the deposit, apart from the provision that no deposit was payable.
14. The tribunal is satisfied that the deposit carried forward to the new agreement on 6 March 2019 and subsisted until the applicant vacated the property in February 2020 during which time the deposit remained unprotected. In reaching this decision the tribunal had regard to the text messages from the respondent referred to by the applicant which said "...You've also not provided me with a forwarding address and as soon as you do I'll have my solicitor get in touch regarding your deposit..." and "...I need you to pay the full rent and then when you're moving out we talk about the deposit..."
15. Regulation 10 provides that if the tribunal finds that the landlord did not comply with any duty in Regulation 3, the Tribunal *must* order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit.
16. The tribunal is required to exercise discretion in deciding what level of order is appropriate, subject to the maximum of three times the amount of the deposit which would be £975. This case has come about as a result of a lack of knowledge by the respondent about the necessity of lodging the deposit with a scheme.
17. However, the deposit was unprotected in terms of the 2011 Regulations for the period from 16 October 2018 until and the end of the second tenancy in February 2020 and the applicant had been denied the opportunity to make use of the dispute resolution provisions under the tenancy deposit system.
18. The tribunal was mindful that there was nothing to suggest that the respondent's failure had been wilful, or that he had systematically been in default in respect of a number of properties.
19. In the whole circumstances presented to the tribunal, it considered that while any default of this sort is a serious matter, this failure was not at the most serious end of the scale which would attract the maximum sanction of three times the deposit. It also had regard to the mitigating factors put forward by the respondent and considers that the fair, proportionate and just sanction in this case, having regard to the maximum sanction available, is the sum of Three hundred and fifty pounds (£350).

## **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.**

David Preston

29 September 2020