

Housing and Property Chamber
First-tier Tribunal for Scotland



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/20/2569

Re: Property at Plumtree Hall, Plumtree Place, Galashiels, TD1 1PZ (“the Property”)

Parties:

Mr Gary Stewart, 11 Polton Court, Bonnyrigg, EH19 3HF (“the Applicant”)

Network Rail Ltd, 1 Eversholt Street, London, NW1 2DN (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (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 Applicants of the sum of £447.70 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. The application was lodged by the Applicant and received by the Tribunal on 11 December 2020 terms of Rule 103 of the Procedural Rules.
2. The Applicant further provided the agreement of the co-tenant, his daughter. He lodged a copy of the tenancy agreement, the My Deposit Scotland deposit protection letter and stated the tenancy ended on 19 October 2020.
3. A Case Management Discussion (CMD) was scheduled for 7 April 2021 and the application intimated on the Respondent by Sheriff Officers on 5 March 2021.
4. The Respondents authorised Robb Residential to appear on their behalf and provided representations explaining the situation in an email of 29 March 2021.

B: EVIDENCE

1. At the CMD both parties attended via telephone conference call. The Respondent was represented by Ms McQueen from Robb Residential.
2. At the start of the next CMD the legal member set out the purpose of the CMD and clarified the scope of an application under Rule 103. As it was admitted by the Respondent that the deposit had been lodged outwith the 30 working day period stated in Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations), both parties confirmed they did not consider that a hearing would be necessary as the factual background of the case was not in dispute.
3. The Applicant confirmed that the tenancy commenced on 11 September 2017 and ended on 19 October 2020. His position was that it was hard to believe that it would take 6 months to find an error in the internal postings of deposits and that the systems applied cannot have been proper monthly audits. He criticised the landlord regarding the state of the property and the letting agent as he stated that correspondence was not dealt with timeously when he made several complaints. He confirmed he had received the deposit back after the tenancy had ended.
4. The Respondent admitted that Robb Residential, who act as letting agents on behalf of Network Rail Ltd. had not paid the deposit into MDS until 16 March 2018 although the funds had been received in full by 24 August 2017. Robb Residential act as letting agent for Network Rail Ltd and manage on their behalf a large number of residential properties. On 26 September 2017 staff of the letting agent posted the deposit out of the internal ledger and opened an account for the deposit with MDS. It is admitted that the system, which was mainly manual at the time, had not picked up that the funds had not in fact been posted out of the actual bank account. The person dealing with the matter, as set out in the email of 25 March 2021 lodged by the Respondents, had transferred the funds out on the internal system but, for whatever reason, this internal posting was not followed up by the next manual step, which was to then physically transfer each post on the accounting system through the bank account and into to the relevant recipient. Ms McQueen explained that she had not been part of the team in 2017 but had, occasioned by this case, made herself familiar with the processes and subsequently undertaken a full audit of all deposit payments with MDS and SafeDeposits Scotland to ensure no other deposits were lodged with delay. This one had been the only case. Back in 2017 there were monthly audits but these had not picked up that there was a credit balance in the account. The system then was much more manual. The matter came to light because the MDS portal showed the tenancy as live but with no funds against it. As soon as the error had been identified it was then rectified on 15 March 2018. The date given in the email of 29 March 2021 of 15 March 2019 was a typing error. The MDS records show that the funds arrived with MDDS on 16 March 2018. Since then the company had vastly improved their system and now works with a system that automatically triggers the transfers to be put through from the bank account. This mistake could now not happen again. It was human error. All staff are trained and have been put through all relevant Letting Agent courses to ensure the standard complies with the Letting Agent Code of Practice. Ms

McQueen further reiterated how accommodating the landlord had been to the Respondent not insisting on payment of rent for an extended period whilst repairs were ongoing.

5. The legal member explained that much of the information regarding the state of the property and the conduct of tenant and landlord over the course of the tenancy were not matters which were strictly relevant for the outcome of the case. Both the Respondent and the Legal Member identified that part of the relevant information, the copy of the entries in the internal ledger attached to the email of 9 March 2021 to Ms McQueen were not fully shown in the printouts included in the bundle. Ms McQueen resent the email in a different format, which then was read by both the Legal Member and the Respondent.
6. The following documents were lodged in respect of this case:
 - a) My Deposit Scotland Tenancy Deposit Protection document
 - b) Tenancy Agreement commencing 19 September 2017
 - c) Authorisation of Gary Stewart by Natasha Stewart
 - d) email from Robb Residential dated 29 March 2021 including explanation, screenshot of internal records, property report and rent statement
 - e) email Geraldine Grieve to Rachel McQueen dated 9 March 2021 including the ledger information for the property.The documents are referred to for their terms and incorporated herein.

C THE LEGAL TEST:

1. In terms of Rule 17 (4) of the Procedural Rules the Tribunal can do anything at a CMD it can do at a hearing.
2. In terms of Rule 18 (1) of the Procedure Rules 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;
3. 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.
4. 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.”
5. 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;

D: FINDINGS IN FACT

Based on the documents lodged and the discussion at the CMD the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The full deposit amount of £1,200 was paid by the Applicant to the Respondent in cash by 24 August 2017.
2. The parties entered into a tenancy agreement over the property which commenced on 11 September 2017 and ended on 19 October 2020.
3. The application was made within 3 months of the end of the tenancy.
4. The deposit was lodged with MDS on 16 March 2019.
5. For the period from 11 September 2017 to 16 March 2018 the deposit had not been lodged with a registered scheme.
6. The deposit was paid back to the Applicant in full at the end of the tenancy.
7. The landlord is a large company and outsourced the management of residential property stock to the letting agent Robb Residential.
8. The letting agent had systems in place to lodge deposits for tenancies managed by them.
9. On 26 September 2017 a member of staff had opened a deposit account for this property and the Applicant with MDS and carried out the internal records adjustment posting the deposit out.
10. The next step should have been to use the paper printout of the transactions and to then transfer the corresponding funds from the bank account to MDS.
11. Through human error the internal posting of the deposit out to the registered scheme was missed and the deposit not lodged on 26 September 2017.
12. The error was not picked up in the internal audit procedures until March 2018.
13. On or around 15 March 2018 the error came to light through the information available in the MDS portal, which showed an open account but no deposit lodged against it.
14. On 16 March 2018 the deposit was lodged with MDS.
15. The letting agent's procedures were audited and improved.
16. The element of human error at this stage in the process has now been eliminated by an automatic trigger of funds transfers once the internal postings of the deposit are put through.

E: REASONS FOR DECISION:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the CMD and without a full hearing on the basis of the information provided by both parties.
2. It was admitted by the Respondent and also clear from the documents lodged, that in this case a deposit of £1200 was paid to the Respondent prior to the start of the tenancy on 11 September 2017 and that the deposit was not lodged until 16 March 2018.

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. 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.
4. In the case *Tenzin v Russell*, of 20 December 2013, Sheriffdom of Lothian and Borders, Sheriff Principal Stephen stated at para 19 *"There are no rules as to the approach that the court should take in assessing the amount of the order. The court must make an order and it is therefore reasonable to read into the regulations that Parliament intended to leave it entirely to the court to determine the level of penalty to impose. The regulations do not enumerate any matters or criteria which the court must have regard to. Accordingly, the sheriff has complete discretion as to the level of the order and is constrained only by the amount of the deposit and a triple multiplier. The sheriff, of course, will have regard to any evidence offered by way of mitigation. In dealing with non-compliance no distinction has been drawn by the legislators between the careless or devious; the experienced or inexperienced, the culpable or inadvertent. Likewise the strict liability consequences of non-compliance allow the court to promote rigorous application of the regulations pour encourager les autres. In other words deterrence."*
5. The Tribunal considers that the discretion of the Tribunal is correctly 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, or 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..."*
6. In the case of *Russel-Smith v Uchegbu*, (Sheriff Court, Lothian and Borders) (Edinburgh) 2016 G.W.D 31-553 Sheriff Welsh applied a calculation method taking into account a first element relating to the duration of the period of non protection of the deposit and a second element based on mitigating and aggravating factors. In this case the Tribunal follows this approach.
7. The deposit was unprotected for 187 days out of the whole tenancy period of 1135 days. A proportionate starting point thus is to take the deposit sum, divide it by the days of the tenancy and multiply it by the days of the non

protected period. In this case £1,200 divided by 1135 days and then multiplied by the unprotected 187 days resulting in an amount of £197.70.

8. To that sum a weighing is added to reflect other relevant facts of the case. The landlord in this case is not an individual amateur landlord but Network Rail Ltd, a company with a substantial property stock. There is an expectation that such a company would be aware of the duties and have measures in place to ensure compliance with the legislative requirements. In order to deal with the management of that stock the landlord employed a letting agent. The landlord had clearly been aware of the duty to lodge the deposit with a registered scheme and had outsourced that activity. The letting agent's systems, at the time the tenancy started, were set out to ensure that deposits were correctly allocated to individual properties, accounts for the deposits would be opened with a registered scheme and once the internal information system had been updated with the deposit, the funds should be transferred into that account in the registered scheme. The Tribunal did accept that the letting agent had identified through this case a flaw in that system open to human error, namely the third step in the process of taking the printout of the internal postings and carrying out the physical funds transfer from the bank account. The letting agent had then improved their system to ensure that human error could not lead to a deposit being correctly posted through the internal system but not followed up with the physical transfer of the funds to the registered scheme. This was now automatically triggered. Important in this context is that there were no other such cases identified in the audit and this points to the system on the whole being appropriate and functioning. The landlord, Network Rail Ltd, whilst responsible in terms of the Regulations, had relied on a third party to ensure that the landlord duties with regard to lodging the deposit were carried out and the late lodging was not due to a flaw in the landlord's own system of processing funds.
9. Further relevant considerations were that the deposit had been paid into the registered scheme as soon as the matter was identified through the information being flagged up from the MDS portal, although this did take about 6 months.
10. Importantly, the deposit was protected at the end of the tenancy, which is the time when decisions about the return of the funds are made and the Applicant did have access to the dispute resolution scheme at the relevant time. Ultimately the main goal of the Regulations, that both parties have access to the dispute resolution mechanism when the tenancy ends, was achieved in this case and the deposit returned to the Applicant in full.
11. The Tribunal believed that the late lodging of the deposit was a genuine oversight due to human error and that it was in no way a deliberate non compliance with the regulations. The human error led to a delay, which was not picked up by adequate audit measures within the letting agent's organisation for about 6 months.
12. An appropriate amount for the weighing element is £250.

13. 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. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal does not consider that the failure to comply with the Regulations in this case warrants a penalty at the higher end of the scale.
14. In all the circumstances the tribunal considers it fair, proportionate and just to make a payment order for the total sum of £ 447.70, which reflects both the seriousness and duration of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

- 15. The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £447.70 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.

Petra Hennig McFatridge
Legal Member/Chair

7 April 2021
Date