



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”) and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (“the 2017 Rules”)

Chamber Ref: FTS/HPC/PR/22/2428

Re: Property at Flat 3/2, 48 Parkneuk Road, Glasgow, G43 2AG (“the Property”)

Parties:

Mr Ryan Baird and Ms Shannon Michelle Baird, formerly Mott, Flat 4, 14 Cornock Street, Glasgow, G81 3BP (“the Applicants”)

Govan Law Centre, Orkney Enterprise Centre, 18-20 Orkney Street, Glasgow, G51 2BX (“the Applicants’ Representative”)

Mr Mohammed Alam, 738 Pollockshaws Road, Glasgow, G41 2AE (“the Respondent”)

Tribunal Member:

Ms. Susanne L. M. Tanner K.C., Legal Member and Chair

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined that an order must be made in terms of Regulation 10 of the 2011 Regulations requiring the Respondent to pay to the Applicants the sum of TWO THOUSAND TWO HUNDRED AND FIFTY POUNDS (£2250.00) Sterling

Procedural background

1. On 19 July 2020, the Applicants' Representative made an application ("the Application") to the tribunal in terms of Rule 103 of the 2017 Rules, namely an application for an order for payment where the landlord (Respondent) has failed to carry out duties in relation to tenancy deposits.
2. The Applicants' Representative attached to the Application:
 - 2.1. Written submissions on a paper apart for Section 7(b)
 - 2.2. Copy tenancy agreement;
 - 2.3. Copy Bank statements showing five payments of £800;
 - 2.4. Emails from Letting Protection Service Scotland dated 25 May 2022, Safe Deposits Scotland dated 31 May 2022 and My Deposits Scotland dated 22 June 2022;
 - 2.5. Screen capture of Landlord register dated 15 July 2022; and
 - 2.6. Tenants' notice letter dated 31 March 2022.
3. On 25 July 2022, the Applicants' Representative provided a missing page from the Application, in response to a request from the tribunal.
4. On 26 July 2022, the Application was considered by a legal member acting with the delegated power of the President and the Application was accepted for determination.
5. Redacted copy bank statements were produced by the Applicants' Representative in response to a request from the tribunal and were substituted in place of the unredacted statements which had been lodged with the Application.
6. On 17 August 2022, the tribunal notified the parties that the Application had been referred to the tribunal and that a Case Management Discussion ("CMD") teleconference had been fixed for 5 October 2022 at 1000h, which both parties were required to attend. Parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the application. Parties were advised that if they did not attend the CMD, this would not stop a decision or order from being made by the tribunal if the tribunal considered that it has sufficient information before it to do so and the procedure has been fair. The Respondent was invited to submit any written representations he wished by 7 September 2022. The Application paperwork and notification of the teleconference was served on the Respondent by Sheriff Officers.

7. The Respondent submitted written representations and documents to the tribunal's administration prior to the CMD, including a document which was submitted the day before the Case Management Discussion.
8. The Applicants' Representative lodged further written submissions in response and a bundle of legal authorities.

Case Management Discussion ("CMD") – 5 October 2022 at 1000h – by teleconference

9. The Applicant's Representative attended the CMD on their behalf.
10. The Respondent attended the CMD.
11. The tribunal chair explained the nature and purpose of the CMD.

Respondent's submissions

12. The Respondent admitted in his written submissions and confirmed in his oral submissions that a tenancy deposit was received from the Applicants and that he had acted in breach of the duties imposed upon him under the Tenancy Deposit Schemes (Scotland) Regulations 2011 by his failure to lodge the deposit with one of the recognised tenancy deposit protection schemes.
13. The Respondent made submissions in mitigation. He stated that they had viewings in May 2021 and that after viewing, the Applicants stated that they wished to rent the Property. The Respondent received an initial 'deposit' on 12 May 2021 for £250. He stated that the Applicants said that they wished to secure the property but not move in until the following month, on 26 June 2021. He stated that it was intended that the £250 'deposit' would have been taken away from the first rent payment. He stated that the first rent payment was £755.00, which was £650 per month, plus £105 for 5 extra days and that £250.00 was taken away from that total, leaving the Applicants to pay £505.00, which was paid.
14. He stated that on top of that there should have been £750.00 paid for the tenancy deposit. It was due on 26th June 2021 but the Applicants had told him that they did not have that on the date of moving in. On 26th June 2021, the Applicants paid £150.00 and they said that they wanted to pay £150.00 per month for the following four months, totalling £750. The Respondent agreed to the payment of the deposit by instalments. It was paid in instalments on top of the Applicants' rent. Instead of

paying £650.00 per month they paid £800.00, to include £150.00 towards the deposit.

15. The first £150.00 was paid in June 2021, further payments were made in July, August and September 2021 and the fifth payment was made on 25 October 2021.
16. The Respondent stated that on 2 October 2021 he had received a call from the First Applicant, who said that his partner (the Second Applicant) was having a problem getting up the stairs as she was pregnant and that they wished to look for another property and leave 'early', as there was a 12 month lease term. The Respondent stated that the Applicants were granted 'permission' to leave 'early'. The Respondent assumed that it was the Applicants' intention to move as soon as they found an alternative property. The Respondent said that he told the First Applicant that that was fine.
17. However, the tenancy continued until 29 April 2022. The Respondent stated that initially the Applicants had stated that they wanted a 12 month tenancy. The rent was paid until 25 February 2022. There was no payment in March 2022. The sum of £650.00 was removed from the deposit by the Respondent for rent. The Respondent stated that after it was received and throughout the tenancy, the deposit was held by the Respondent in his current account.
18. The Respondent stated that the reason the Applicants' deposit instalments were not lodged in a tenancy deposit protection scheme was that he was waiting for the full deposit to be paid. The Respondent's explanation for his failure to lodge the deposit after it was paid in full by the Applicants was that he thought that the tenancy was going to end shortly after the conversation in early October 2021. However, the Respondent accepted that rent payments continued to be made until February 2022 and that the tenancy did not end until 29 April 2022, following notice in March 2022 from the Applicants.
19. The Respondent stated that he has other rental properties. He normally uses Safe Deposits Scotland for tenancy deposits. He stated that this is the first time he has had payment of a deposit by instalments. He stated that at the time he was operating under the assumption that he did not require to lodge the deposit until the final payment was made and that he did not realise that it could be paid into the scheme by instalments. He stated that he now knows that it can be lodged in instalments.
20. The Respondent stated that there were no discussions between him and the Applicants about the deposit in the period from October 2021 to April 2022 but that there were conversations about repairs and safety certificates.

21. The Respondent stated that the Applicants' final rent payment was not made in March 2022, after the Applicants stated that they wanted to leave. He accepted that there was no agreement between the parties that the Respondent could retain the Applicants' full deposit towards rent arrears. The Respondent stated that he unilaterally decided to take the Applicants' whole deposit.
22. The Respondent accepted that he deprived the Applicants of the right to use the tenancy deposit dispute resolution scheme.
23. The Respondent stated that after the deposit instalments were received, the money was held in a Metrobank personal account in his name. He stated that he uses personal accounts for all of the Property transactions because he is self-employed.

Applicant's Representative's submissions

24. The Applicants' Representative stated that the specific dates that the instalment payments of £150.00 were made were: 24 June 2021, 23 July 2021, 25 August 2021, 25 September 2021 and 25 October 2021.
25. The Applicants' Representative stated that official written notice to end the tenancy was given on 31 March 2022 and that the tenancy continued until Friday 29 April 2022. The notice is at page 35 in the Application bundle.
26. The application was made on 19 July 2022 and she got confirmation of acceptance on 28 July 2022.
27. She submitted that the legislation states that the deposit should be lodged within 30 days of the start of the tenancy and that the purpose and objective of the 2011 Regulations are to protect the tenant and landlord in the event of any disputes at the end of the tenancy and to ensure that funds are in the scheme, to allow for the arbitration service to be used. She submitted that each instalment should have been lodged in the scheme within 30 days from each instalment being paid.
28. She stated that the Applicants are seeking three times the amount of the deposit as a penalty. She submitted that there is no mitigation here. She referred to other examples of the Respondent's operations as a landlord and the failure to apply other legislative provisions, for example in the preparation of the tenancy agreement and the purported 12 month term, which she submitted was obviously not the law.

29. The Applicants' Representative referred to other concerns relating to the request for an electrical safety certificate, which was not provided at the start of the tenancy agreement, as required under the Housing (Scotland) Act 2006.
30. The Applicants' Representative referred to the list of authorities she had lodged and submitted that the tribunal has discretion in determining the amount awarded in a payment order.
31. She submitted that the tribunal should consider imposing a maximum penalty of three times the deposit.
32. In relation to the Respondent's statement that he was ignorant of the 2011 Regulations at the time, she referred to *Marcus Jenson v Gieseppe Fappiano (2015) WL 376066*, para 14, which states that: *'Ignorance of the regulations is, however, no excuse. Non-compliant landlords can expect no mercy from the courts if they conduct their business in flagrant disregard to statutory controls.'*
33. She submitted that another purpose of the 2011 Regulations is offering an arbitration scheme in the event of disputes. In response to the Respondent's reference to the behaviour of the Applicants and unresolved property damage, she submitted that it was a diversion and that the 2011 Regulations themselves are not to compensate tenants but to act as a deterrent to promote adherence to regulated schemes. She submitted that the Respondent had also precluded himself from being able to access an independent arbitration scheme by his failure to lodge the deposit.
34. The Applicants' Representative invited the tribunal to make a payment order for three times the amount of the original deposit, totalling £2250.00.

Response by Respondent

35. In response, the Respondent stated that he had been quite lenient in giving the flat to the Applicants. He referred to the advert (lodged the day prior to the CMD) in which it had been clearly stated that the rent was £650.00 per month and the deposit was £750.00. He submitted that the Applicants effectively used the deposit themselves for the final rent amount due but he accepted that this had not been the subject of discussion with the Applicants. He referred to the Applicants' notice letter in which it was stated that they would put the keys through the letterbox. The Respondent stated that he had asked the Applicants to come for a final inspection; however, the First Applicant had handed the keys over and driven away. The Respondent stated that at the end of the tenancy, there was damage including pet damage and foodstuffs which were left behind. The Respondent stated that he had

no contact with the Applicants after the tenancy ended. He said that when the Applicants' lawyer contacted him, he had responded with the full rent statement.

36. The Respondent repeated his initial submission that he did not know that deposit instalments could be paid into a scheme and that from the end of October 2021, after the deposit was paid in full, he thought that the tenant was moving out imminently as a result of the call on 2 October 2021 and that he was expecting the Applicants to contact him with a moving out date.
37. The Respondent stated that he had helped the Applicants in every way possible that he could. He stated that repairs were carried out. In relation to the electrical safety, he stated that a certificate was provided to the Applicants at the move in date. However, as he has several flats, he told the Applicants that he would be doing new electrical safety checks. He stated that the Applicants did not allow access on set dates so the electrician could not get in and it was not done during the tenancy. However, he stated that the previous certificate had not expired. He also stated that the gas safety had not expired.

Findings in Fact

38. The Applicants and the Respondent entered into a private residential tenancy agreement for the Property which started on 26 May 2021.
39. The tenancy agreement contained a term which purported to impose a 12 month tenancy term on the Applicants.
40. The tenancy deposit payable by the Applicants was £750.00.
41. The tenancy agreement did not specify which deposit protection scheme the Applicants' tenancy deposit would be paid into.
42. Prior to the start of the tenancy, the Respondent agreed that the Applicants could pay the tenancy deposit in five instalments of £150.00, on or about the same dates as their first five rent payments.
43. Five deposit payments on instalment of £150.00 were made by the Applicants on 24 June 2021, 23 July 2021, 25 August 2021, 25 September 2021 and 25 October 2021.
44. The Respondent did not register the Applicants' tenancy deposit with one of the Scottish tenancy deposit protection schemes.

45. The Respondent did not pay the Applicants' deposit instalments into a tenancy deposit protection scheme.
46. The Respondent retained the Applicants' deposit in a personal bank account from the date that each of the instalments was received until the end of the tenancy.
47. The prescribed information in terms of Regulation 42 of the Regulations was not issued to the Applicants by the Respondent.
48. On or about 2 October 2021, the First Applicant and the Respondent had a conversation during which the First Applicant informed the Respondent that the Second Applicant was pregnant and the three flights of stairs to the Property were difficult to manage, so they were looking for another property to rent.
49. The tenancy of the Property continued after the conversation of 2 October 2021 and the Applicants continued to pay rent payments to the Respondent on the specified date each month, until February 2022.
50. The Applicants' served written notice on 31 March 2022 to end the tenancy on 29 April 2022.
51. The Applicants did not pay the final rent payment which was due in March 2022.
52. The Applicants moved out of the Property on or about 29 April 2022 and returned the keys to the Property to the Respondent.
53. The Respondent retained the Applicants' whole deposit of £750.00 and used it to meet alleged rent arrears and alleged costs of repairs. There was no agreement by the Applicants that their deposit could be used in this way by the Respondent.
54. Because the Applicants' deposit was not lodged in a tenancy deposit protection scheme, they were denied the opportunity of use of the free arbitration scheme for deposit disputes.
55. The Respondent's reason for not registering the deposit and for not lodging the deposit instalments as they were received is that he was ignorant of the law, in particular that deposit instalments should be lodged in a tenancy deposit protection scheme.
56. The Respondent's reason for not registering the full deposit after the final instalment was paid in or about October 2022 was that he was expecting the Applicants to serve notice to end the tenancy once they found an alternative

property as a result of a telephone conversation with the first Applicant on or about 2 October 2021.

57. The Respondent has multiple rental properties and runs a self-employed lettings business. He normally uses Safe Deposits Scotland for lodging tenancy deposits.

Discussion

58. The tribunal took account of the Applicant's Representative's written and oral submissions; and the Respondent's written and oral submissions.

59. Given the Respondent's admitted breach of the 2011 Regulations, the tribunal considered that there was sufficient information on which to reach a decision on the Application.

60. The tribunal was required to make a payment order in respect of the Respondent's admitted breach of the 2011 Regulations. In deciding on the appropriate amount for a payment order, the tribunal had regard to the fact that the Applicants' deposit instalments were unprotected from the date that each was paid and that from on or about 26 October 2021 until the end of the tenancy on 29 April 2022, the whole deposit of £750.00 was unprotected. The deposit should have been registered with a statutory tenancy deposit protection scheme and protected within 30 working days of the start of the tenancy, or in this case 30 working days from the date that each deposit instalment was paid by the Applicants. The tribunal took account of the fact that the deposit has never been lodged, a deposit protection certificate has not been issued and the Regulation 42A information has not been provided by the Respondent to the Applicants. The Respondent retained the Applicants' whole deposit at the end of the tenancy, claiming that it was offset by him against alleged rent arrears and alleged repair costs. As a result of the Respondent's failure to lodge the Applicants' tenancy deposit, the Applicants were denied the use of the proper mechanism offered by the deposit protection scheme to be used in the event of a dispute. The Respondent's ignorance of the law in relation to tenancy deposit protection is not an excuse for his failure. He admitted that he owns and lets multiple properties as part of a lettings business. The tribunal further considered the fact that the private residential tenancy agreement for this Property contained a purported tenancy term of 12 months, which indicated a further lack of compliance by the landlord with tenancy law. The tribunal did not consider the matter of alleged rent arrears or alleged repairs costs to be relevant to the determination of the penalty for failure to comply with the 2011 Regulations.

61. On the basis of the findings in fact and for the reasons outlined, the tribunal decided to make an order for payment by the Respondent to the Applicant of the sum of

£2250.00, which represents three times the tenancy deposit of £750.00. That sum was considered to be reasonable in all of the circumstances.

62. The tribunal chair informed the parties that the Payment Order could not be enforced by the Applicants against the Respondent until after the expiry of the permission to appeal period; and that permission to appeal could be sought on a point of law only.

63. The Respondent was unhappy with the tribunal's decision and attempted to make further oral submissions. The tribunal chair repeated that a decision had been made, stated that the Respondent could seek legal advice if he wished to do so and repeated that permission to appeal could be sought on a point of law only. The CMD concluded.

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.

S Tanner

5 October 2022

**Ms. Susanne L M Tanner K.C.
Legal Member/Chair**