



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/19/0140

**Re: Property at The Beeches, Mains of Condie, Forgandenny, Perthshire, PH2 9DN
 (“the Property”)**

Parties:

**Mr Barrie Colton, 16A Foundry Lane, Perth, PH1 5PR
 (“the Applicants”)**

**Mr Ralph Schenk and Ms Suni Liza Josefin Magyar, The Stables, Duncrub Park, Dunning, Perth, Perth and Kinross, PH2 0QR
 (“the Respondents”)**

**Fenton Property Limited, The Old School, Mekileour, Perth, PH2 6EB
 (“the Respondents’ Representative”)**

Tribunal Member:

Susanne L. M. Tanner Q.C. (Legal Member)

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 FIVE HUNDRED POUNDS (£2500.00) Sterling

1. Procedural background

- 1.1. On 15 January 2019, the Applicants made an application (“the Application”) to the tribunal in terms of Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”) and Rule 103 of the 2017 Rules.
- 1.2. The Applicants seek an order for payment for up to three times the amount of the deposit payable in respect of their tenancy of the Property (up to three times £1000.00).
- 1.3. The Applicants attached to the Application:
 - 1.3.1. An email to the Landlord confirming their notice and final date at the Property.
 - 1.3.2. An email chain to the Landlord asking for clarification as to whether the deposit had been protected.
 - 1.3.3. Email from MyDepositsScotland confirming that they had never held the tenancy deposit.
 - 1.3.4. Email from Letting Protection Scotland confirming that they had never held the tenancy deposit.
 - 1.3.5. Paper apart part 3
 - 1.3.6. Paper apart parts 7b and 8
 - 1.3.7. Bank statement from November 2015 showing deposit and first months’ rent payment;
 - 1.3.8. a copy of the short assured tenancy agreement dated 9 December 2015 (unsigned copy).
- 1.4. On 22 January 2019 the Application was accepted for determination by the tribunal.
- 1.5. On 7 February 2019 the parties were advised of the date, time and place of a Case Management Discussion (“CMD”). The Respondent was invited to submit written representations by 27 February 2019. Parties were advised that the tribunal can do anything at a CMD which it may do at a hearing, including making a decision on the Application which may involve making or refusing a payment order. Parties were advised that if they do not attend the CMD this will not stop a decision or order being made by the tribunal if the tribunal considers that it has sufficient information before it to do so and the procedure has been fair.
- 1.6. On 9 February 2019, the Respondent Mr Schenk submitted written representations to the tribunal. He stated that at the time the deposit was paid his wife was managing the Property and forgot to lodge the deposit in a

deposit scheme. He stated that to make sure that this does not happen again they have hired a property management company, Fenton Property Limited (now the Respondent's Representative). He stated that when they realised in October 2018 that the deposit was not lodged they deposited the funds in Safe Deposits Scotland. He stated that they are sorry that this was done late, that it was a mistake and not intentional. He stated that they have released the funds back to the ex-tenant who has since terminated the rental agreement with them so he was not sure what else they could do. He stated that he would not be able to attend the hearing as he is in Uganda where he mainly lives and requested a phone conference call. He attached a Deposit Protection Certificate from Safe Deposits Scotland dated 31 October 2018 showing that the funds were protected from that date; and an email from Safe Deposits Scotland confirming release of the funds on 9 February 2019.

1.7. On 25 February 2019, Maxine Fenton from the Respondents' Representative sent an email to the tribunal's administration to inform the tribunal that she had only been retained by the Respondents on 1 December 2018 and had no knowledge of receipt or protection of the deposit in respect of the tenancy and had asked the Respondents to release the deposit if they had not already done so.

1.8. On 25 February 2019, the Respondent Mr Schenk submitted written representations to the tribunal stating that he would like to represent himself in the proceedings. He advised that as intimated in his email of 9 February 2019, he lived in Uganda for the majority of the time and wished to participate in the hearing by conference call as he would not be in the UK and able to attend. He stated that his wife was managing the Property at the time that the deposit was received and that she forgot to deposit the £1000.00. He stated that they are very sorry about this. He stated that the deposit was protected on 31 October 2018 and the tenant had received an email about this from Safe Deposits Scotland. He stated that Safe Deposits Scotland was instructed to release the funds back to the tenant on 5 February 2019.

1.9. Arrangements were made by the tribunal's administration to set up conference call facilities in order that the Respondents could participate in the Case Management Discussion and the details were provided to Mr Schenk.

2. CMD – 4 March 2019 at 1000h at Inveralmond Business Centre, Perth (Respondent participating by conference call facility)

2.1. A CMD took place at 1000h on 4 March 2019 at Inveralmond Business Centre, Perth.

- 2.1.1. The Applicant attended the Case Management Discussion.
- 2.1.2. The Respondent Mr Schenk participated by case conference call from Uganda, on behalf of himself and his wife, the second Respondent.
- 2.1.3. The Case Management Discussion was observed by Maxine Fenton from the Applicant's Representative.

2.2. Written and oral Submissions by the Applicant

- 2.2.1. The Applicant confirmed that the tenancy started on 7 January 2016 and that the deposit was paid to a rental management company instructed by the Respondents to find a tenant.
- 2.2.2. The documents lodged include the short assured tenancy agreement between the parties which started on 7 January 2016.
- 2.2.3. The Applicant lodged a copy of a redacted bank statement which showed a payment of £1000 on 25 November 2015. This was said to be a faster payment to the rental management company.
- 2.2.4. The Applicant said that he had not really given thought to an amount he was asking the tribunal to order the Respondents to pay. He stated that the reason that he made the Application is the things he has had to deal with in his tenancy, particularly over the last three months. He stated that he had made the Application on the principle of getting them to do what they should do as landlords. He said that the Respondent had had a bad attitude over the last four months. When the Applicant submitted a repairing standard application to the tribunal, the attitude of the Respondents was not good, which is why the Applicant and his partner ended up leaving the property. The repairing standard case has caused a lot of upset for himself and his partner. It has been unnecessary in many respects. If they had done what they should have done we would not have been in this situation. The Applicant and his partner moved out at the end of January 2019. The repairing standard application was lodged at the beginning of August 2018. There is a repairing standard enforcement order on the house. There was an inspection and hearing on 9 January 2019. The decision was dated 7 February 2019. The Applicant had left the property by then.
- 2.2.5. The Applicant stated that during the progress of the Repairing Standard application he found that the deposit had not been protected. He received an email from Safe Deposits Scotland on 31 October 2018

asking him to create an account. From there, he started looking into whether the deposit was protected. In the tenancy agreement it stated that it would be protected.

2.2.6. When the Applicant asked the Respondent whether his deposit had been protected prior to 31 October 2018, the Respondent simply sent an email with another copy of the certificate from Safe Deposits Scotland, even though the Applicant had specifically asked for paperwork from 2016. When the Applicant asked again, the Respondent ignored what had been asked and just asked whether the Applicant had left the house. The Applicant referred to emails lodged with the Application paperwork.

2.3. Written and Oral Submissions by Respondent

2.3.1. The Respondent, Mr Schenk, confirmed that the tenancy started on 7 January 2016 and that prior to the start of the tenancy, a deposit of £1000 was paid by the Applicant to a rental management company.

2.3.2. Mr Schenk stated that the company was there to find a tenant and produce a tenancy agreement. He stated that his wife was managing the Property and originally stated that she was not aware that the deposit should be placed in some kind of deposit scheme, although he later changed to his submission to state that she was aware of deposit protection and forgot to do lodge this deposit.

2.3.3. He stated that they only realised in October 2018 that it had not been lodged and that it had then been lodged on 31 October 2018. He said that he had sent the proof that it had been lodged on 31 October 2018 to the Applicant.

2.3.4. He also stated that some time in February they released the payment via the Safe Deposits Scheme.

2.3.5. In response to a question by the tribunal about the arrangement with the property management company in respect of the deposit, Mr Schenk stated that he did not think that it was part of the agreement with the property management company to process the deposit protection. He thought that the property management company must have informed them that it was the landlord's responsibility to deal with the deposit before they even received it. Mr Schenk did not have any record of a letter about the arrangement.

- 2.3.6. Contrary to what had been suggested by Mr Schenk earlier in the CMD, he then stated that they did know that as landlords that they had to put the deposit in a scheme but did not know any further details. He confirmed that they knew that deposit protection existed but stated that they were definitely not aware that it had to be done "within 30 days or something like that". He said that it was obviously their mistake.
- 2.3.7. In response to a question from the tribunal about whether this was the only property he and his wife were letting out in around January 2016, he stated that this was the only property that he was letting out in January 2016 but that his wife was involved in letting two or three other properties and was providing the management service in a similar way to the Property. She was responsible for lodging the deposits in respect of those properties.
- 2.3.8. Mr Schenk stated that they were aware of deposit protection and it was by mistake that we did not register this deposit or protect it.
- 2.3.9. In response to a question from the tribunal about whether the Respondent were aware about the requirement in the regulations to provide specified information to the tenants about deposit protection, he said that he was not aware of that.
- 2.3.10. Mr Schenk stated that the deposit was lodged on 31 October 2018. The Applicant had taken them to the Scottish tribunal about other issues with the Property which is when Mr Schenk had got involved. He stated that he then tried to find out what all the legal requirements are. He realised the importance of deposit protection. The other tribunal application was a repairing standard case. After that application was made he looked into whether or not the deposit had been lodged.
- 2.3.11. In response to a question about the tribunal about how the money had been handled by the Respondents since its receipt from the property management company on 25 November 2015, Mr Schenk stated that it was transferred into his wife's bank account. He was not sure when and whether they received the deposit at the same time as the first month's rent minus commission. Mr Schenk said that the money was held in his wife's current account from around November 2015 until it was transferred to Safe Deposits Scotland on 31 October 2018. It was in a current account. And not a savings account. It was not a designated account for this property. It was the general current account she uses.
- 2.3.12. Mr Schenk accepted that he had not replied to the tenant's requests about protection prior to 31 October 2018 and that the first

admission that deposit had not been lodged prior to 31 October 2018 was in his written representations sent to the tribunal on 9 February 2019. He stated that there were many letters going back and forwards and all sorts of accusations about the standard of the Property. In his mind the biggest problem were the repairs issues. Mr Schenk stated that the tenant should have inferred that as the deposit was protected from 31 October 2018, it had not been protected earlier. Mr Schenk thought that it was obvious that it had not been protected.

2.3.13. In response to an invitation by the tribunal chair to make submissions in relation to the amount of any order up to three times the amount of the deposit, Mr Schenk stated that he had nothing to say about the level of the compensation, other than it was a mistake and they are very sorry about it. He stated that it will not happen again. They were not aware how important it is and that it was their fault.

2.4. Reasons for decision

2.4.1. Regulation 3 of the 2011 Regulations provides:

(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.

(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.

2.4.2. Regulation 9 of the 2011 Regulations provides:

“(1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal] 1 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 [...] 2 no later than 3 months after the tenancy has ended.”

2.4.3. Regulation 10 of the 2011 Regulations provides that: *“[i]f 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;...”

2.5. Findings-in-Fact

- 2.5.1. The Applicants paid a tenancy deposit of £1000.00 to the Respondent's former agent on 25 November 2015.
- 2.5.2. A Short Assured Tenancy for the Property commenced on 7 February 2016.
- 2.5.3. The Short Assured Tenancy ended on 31 January 2019.
- 2.5.4. The Applicant's deposit of £1000.00 was not protected in a tenancy deposit protection scheme until 31 October 2018.
- 2.5.5. The Respondents did not process the deposit with any of the three statutory deposit protection schemes or transfer the funds for protection.
- 2.5.6. The Respondent did not provide the Applicants with the information required in terms of the 2011 Regulations in the time period specified.
- 2.5.7. The Respondent did not admit the failure to lodge the Applicant's deposit in a scheme until 31 October 2018, despite requests by the Applicant to the Respondent for information about deposit protection after he received communication from Safe Deposits Scotland.
- 2.5.8. The deposit was repaid via Safe Deposits Scotland on 7 February 2019.
- 2.5.9. There was no communication from the Respondents to the Applicants to inform the Applicants that the deposit had not been protected from 30 working days after the start of the tenancy in January 2016 until 31 October 2018.
- 2.5.10. The first admission by the Respondents that the deposit had not been protected was in written representations to the tribunal in response to service of the Application paperwork and documentation and notification of the CMD.

2.6. Findings in Fact and Law

2.6.1. The tribunal was satisfied that the Respondent did not comply with the duties in regulation 3 of the 2011 Regulations in respect of the Applicants' tenancy deposit of £1000.00.

2.6.2. Being so satisfied, the tribunal must make an order in terms of Regulation 10 of the Regulations for an amount not exceeding three times the amount of the tenancy deposit.

2.7. Discussion

2.7.1. The tribunal took account of the Applicant's written and oral submissions; and the Respondents' written and oral submissions.

2.7.2. In particular the tribunal had regard to the fact that the deposit was unprotected for the period from 30 working days after 7 January 2016 until 31 October 2018, a period of around 2 and half years. The tribunal also had regard to the fact that at no point until the written representations on 9 February 2019, did the Respondent admit or apologise to the Applicant for the failure to protect the deposit or provide the required information, despite requests from the Applicant for information about deposit protection. The tribunal took account of the fact that the respondents were aware of the deposit protection scheme and stated that they forgot to protect this deposit. The tribunal also took account of the fact that the deposit was paid into a current account of the Respondents and was not secured. The purpose of the deposit protection scheme is to provide protection for tenants' deposit and a mechanism for resolving disputes.

2.7.3. For the reasons outlined, the tribunal decided to make an order for two and a half times the tenancy deposit of £1000.00, namely £2500.00.

2.7.4. The tribunal chair informed the parties that the Payment order would be made against the Respondent for £2500.00 and could be enforced by the Applicants against him after the expiry of the permission to appeal period.

3. 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.

S.Tanner

4 March 2019

**Susanne L M Tanner Q.C.
Legal Member/Chair**