Upper Tribunal for Scotland

2023UT19
Ref: UTS/AP/23/0006

DECISION OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER)
IN THE CASE OF

Mr Gordon Bavaird, Rigfoot Farm, Strathaven, ML10 6RP

Appellant

- and -

Ms Lisa Simpson and Mr David Simpson, 71 Saucel Crescent, Paisley, PA1 1UD

Respondents

FTS Case reference: FTS/HPC/PR/22/1227

Paisley 30 June 2023

Decision

The Upper Tribunal for Scotland allows the appellant's appeal against the decision of the First-tier Tribunal for Scotland dated 16 November 2022 ordering the appellant to pay the respondents the sum of £4,000 in terms of regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011; Remakes the decision and orders the appellant to pay the respondents the sum of £2,500 in terms of regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Introduction

[1] By Decision dated 16 November 2022, the First-tier Tribunal for Scotland ("FTS") ordered the appellant to pay the respondents the sum of £4,000 in terms of regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 in respect of the appellant's failure to comply with regulation 3 of those regulations.

[2] By Decision dated 23 March 2023, the Upper Tribunal for Scotland ("UTS") granted the appellant permission to appeal to the UTS on the sole ground that the sanction imposed by the FTS was excessive in all the circumstances. The Appellant accepted in the proceedings before the UTS that he ought to have lodged the deposit in an approved scheme and that the FTS was correct to impose liability on him. He argued, however, that the amount of the sanction was excessive based on his age, inexperience of the deposit scheme, and the return of the deposit to the respondents.

Essential Facts Found by the FTS

[3] The parties entered into a private residential tenancy in respect of 2 Rigfoot Estate, Strathaven with a start date of 1 November 2021. The appellant took a deposit of £2,000 from the respondents which he paid into his own account. The deposit was never paid into an approved scheme. The tenancy ended on 1 April 2022. The deposit was repaid to the respondents near to the end of the tenancy.

[4] These findings in fact may be slightly inaccurate as the appellant's evidence to both the FTS and the UTS was that the tenancy was terminated by mutual consent and the deposit was repaid the day after termination of the lease.

[5] The FTS might also have helpfully recorded that the deposit was repaid in full.

[6] In addition, the appellant did not make any deductions from the deposit for any reason. His evidence to the UTS was that he did not, as a matter of practice, ever deduct money from deposits in respect of wear and tear.

The Regulations

[7] Regulation 3 of the Regulations requires a landlord of a relevant tenancy who has received a tenancy deposit to pay the deposit into an approved scheme within 30 working days of the beginning of the tenancy. Regulation 9 allows the tenant thereof to apply to the FTS (previously the sheriff) for an order under regulation 10 where the landlord has not complied with regulation 3. On such an application, the FTS must make an order under regulation 10 requiring the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit, if satisfied the landlord did not comply with regulation 3.

[8] The tenancy in this case was a "relevant tenancy" for the purposes of the Regulations.

Decision of the FTS

[9] The FTS set out its reasons for imposing a sanction of £4,000 at paragraphs 25, 27, 28 and 29 of its Decision dated 16 November 2022. However, there is no mention therein of the legal test or approach it applied in arriving at this figure as set out in *Jenson v Fappiano* 2015 G.W.D. 04-89 and subsequent case law. Those authorities are helpfully reviewed by Sheriff Cruickshank in *Ahmed v*

Russell 2023 S.L.T. (Tr) 33 and confirm the FTS should seek to assess a sanction that is "fair and proportionate" in all the circumstances, taking into account both aggravating and mitigating circumstances.

[10] In this case the FTS did not, at least in its written reasons, adopt this approach. Instead, it applied a multiplier of two times the deposit, an approach which Sheriff Cruickshank has indicated is to be "discouraged" (*Ahmed v Russell* 2023 S.L.T. (Tr) 33 at page 39, paragraph [37]).

[11] Accordingly, I find the FTS erred in law by applying a wrong approach to its assessment of the sanction in this case. I therefore quash and remake its decision in relation to the appropriate amount of the sanction.

Remaking the Decision: Parties' Evidence and Submissions on the Appropriate Amount of the Sanction

[12] I heard oral evidence and submissions from the appellant on circumstances relevant to the appropriate amount of the sanction, and submissions thereon from Ms Simpson on behalf of both respondents at the hearing of the appeal on 29 June 2023. Neither party was legally represented at that hearing. Both parties presented helpful submissions for my consideration. I am obliged to them for their assistance in this regard.

[13] The appellant accepted he was unaware of the deposit scheme. He had been renting six properties since 2017 and had always returned tenants' deposits to them in full, as in this case. He said he was now fully compliant with the deposit scheme since the making of this application to the FTS. He submitted the scheme had been put in place to punish "rogue landlords", which he was not and the amount of the sanction as assessed by the FTS was excessive.

[14] Ms Simpson submitted this was a serious breach of the regulations as the deposit had not been paid into the scheme during the whole period that she and Mr Simpson had rented the property.

[15] She submitted the appellant's failure to comply with the Regulations had been a persistent one as the appellant had not paid previous' tenants' deposits into the scheme and that the FTS had been correct to take a serious view of the appellant's non-compliance with the Regulations.

Discussion

[16] In assessing an appropriate amount of sanction under regulation 10(a) of the Regulations, the FTS, or the UTS on appeal, first requires to identify the factors relevant to that assessment.

[17] In this case, the appellant submitted that although he had not been aware of the Regulations at the time, he had made his own arrangements to protect tenants' deposits; and, indeed, as in this case, the tenants' deposit was repaid immediately after termination of the tenancy. This had been quicker than a repayment from an approved scheme which took up to 10 days. I presume he has acquired this knowledge since becoming compliant with the tenancy deposit scheme.

[18] However, this is not a relevant factor to take into account: it is no excuse for the appellant's failure to comply with the Regulations and cannot therefore be considered as a mitigating factor by either the FTS or the UTS.

[19] The appellant put forward his age as a relevant factor. He is now 71 years of age. This, however, is in itself not a relevant factor. If this factor had impacted on the appellant's health or ability to comply with the Regulations, it might have had some relevance to the assessment of the sanction, but this factor is not relevant in this case.

[20] The appellant put forward his "inexperience" as a relevant factor, by which I take to mean his unawareness of the tenancy deposit scheme.

[21] However, again, ignorance of the Regulations is no excuse and cannot therefore be a mitigating factor. In this case, having heard in person from the appellant, I accept his evidence that he was unaware of his obligations under the Regulations at the time.

[22] I disagree with the FTS that the appellant had "chosen" not to participate in the scheme and therefore his decision not to lodge the deposit in an approved scheme had been "deliberate until pushed to do so" by the respondents (paragraphs 25 and 29 of the Decision of the FTS). The FTS made no finding in fact based on this discussion in its Decision; and, indeed, recorded only that it "appeared" to the FTS that the appellant had acted in this manner. The appellant did not accept this as a fair or correct conclusion in his submissions to the UTS and I accept his evidence to the UTS that his actions were not deliberate. Nor was he pushed into paying the deposit into an approved scheme by the respondents, given he did not pay the deposit into an approved scheme but instead took immediate action to return the respondents' deposit to the respondents after termination of the tenancy.

[23] The FTS or UTS would be bound to take into account as an aggravating factor any deliberate intention on the part of a landlord to ignore the tenancy deposit scheme, when that landlord had knowledge of the scheme, but had deliberately chosen to flout the Regulations. I do not find that to be the situation in this case.

[24] The relevant factors identified by the FTS in this case are the fact the deposit was exposed to risk for the duration of the tenancy and, as a mitigating factor, that the deposit was repaid immediately after the end of the tenancy.

[25] A landlord's past failures with previous tenants' deposits may be a relevant factor in assessing the appropriate amount of sanction, but as the payment thereof goes to the tenant directly affected by the breach of the Regulations, care has to be taken about the weight to be given to that factor in any given case.

[26] Having identified the relevant factors for consideration, the FTS or UTS on appeal ought then secondly to determine the weight to be attached to each factor.

[27] The FTS did not do that in this case. While it is true the deposit was at risk throughout the duration of the tenancy, the FTS did not assess how real that risk was. Although the appellant was non-compliant with the Regulations at the time, his evidence before the UTS showed he regularly repaid his tenants' deposits. Accordingly, the actual risk in this case was relatively insignificant, but as one purpose of the Regulations is to guard against *any* level of risk, moderate weight ought to be attached to this factor in the circumstances of this case.

[28] In my opinion, significant weight ought to be attached to the appellant's ignorance of the scheme over the prolonged period of five years as a landlord. On the other hand, significant weight falls to be attached to the mitigating factors that the respondents' deposit was repaid in full immediately after the termination of the tenancy and that the respondents suffered no loss or inconvenience as a consequence of the appellant's failure to comply with the Regulations.

[29] Having regard therefore to the foregoing factors and the weight to be attached to each of them, and the maximum sanction of £6,000 (three times the deposit of £2,000), I assess a fair and proportionate sanction in the sum of £2,500.

[30] This in my opinion is a sufficient sanction to punish the appellant for his serious failures to make himself aware of the regulations over five years as a landlord and to protect the respondents' deposit for the five month duration of their tenancy with him by paying the deposit into an approved scheme, but taking into account the significant mitigating factors of the immediate return to the respondents of the full amount of their deposit and the absence of any loss or inconvenience to them as a result of the appellant's breach of the Regulations.

Conclusion

[31] The appeal is allowed, the Decision of the FTS is quashed and the appellant is ordered to pay the respondents the sum of £2,500 in terms of regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Further Appeal

[32] A party aggrieved by this decision may seek permission from the UTS to appeal to the Court of Session on a point of law. This application must be made to the UTS within 30 days of the date on which this decision was sent to a party. It must be in writing and must: (a) identify the decision of the Upper Tribunal to which it relates; (b) identify the alleged error or errors of law in the decision; and (c) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important

point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

George Jamieson
Sheriff of North Strathclyde
Judge of the Upper Tribunal for Scotland