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 Regulations 9 & 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/23/3475

Re: Property at 36B Skeltiemuir Avenue, Bonnyrigg, Midlothian, EH19 3PX ("the Property")

Parties:

Miss Chloe Duffy, Mr Kerr Hall, 60 Dobbie's Road, Bonnyrigg, Midlothian, EH19 2AZ ("the Applicants")

Mrs Jennifer Drummond, Mr Paul Drummond, 8 Harmony Court, Bonnyrigg, EH19 3NY; 8 Harmony Court, Bonnyrigg, EH19 3NY ("the Respondents")

Tribunal Members:

Susan Christie (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents failed to comply with any duty in terms of regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 and the Respondents shall pay the sum of £750 which represents one and a half times the deposit of £500.

Background

1. The Applicants applied to the tribunal for a sanction, to require the Respondent, as landlords, to pay to them as tenants an amount not exceeding three times the amount of the tenancy deposit; with reference to regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the regulations") and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber(Regulations) 2017("the Rules").
2. The application was accepted by the tribunal on 4 October 2023.
3. The Respondents were invited to give written representations by 22 November 2023.They were submitted on that date.

4. There is an associated application in which the Applicants sought recovery of the £500 of the deposit payment under reference FTS/HPC/CV/23/3474.
5. There is included within the case paperwork the various written submissions and paperwork provided to the tribunal over the period to the hearing. Most of the material was common to both applications. Some of the material related to a separate issue around damage to a carpet.

The Case Management Discussion (CMD)

1. Both Applicants participated in the CMD on 13 December 2023 at 10am by conference call. Mr John McAuley, solicitor, represented the Respondents.
2. The tribunal proceeded with the CMD and explained the purpose of it to the Parties.
3. Further information was required to allow all Parties and the tribunal to be fully appraised of the timeline of events with Safe Deposits Scotland (SDS) and their procedures where there are substitute tenants with regards to any claims on the deposit. A Direction was later issued to the Parties to cover the matters discussed and agreed at the CMD as required.
4. As there are two applications dealing with the same tenancy and similar issues, the Hearing was scheduled to take place for both on the same day. Parties were made aware that each application would be determined separately, and they should be prepared to address the tribunal on their position in relation to each. For this application, Parties were asked to carefully consider the points they consider relevant.

The Hearing

1. Both Applicants and both Respondents participated in the Hearing conference call on 14 February 2024 at 10am.The date had been agreed with the Parties at the CMD.
2. An application to postpone the hearing made on behalf of the Respondents in the days leading up to the Hearing had been refused by the tribunal. The tribunal considered that progress could fairly be made and wished to discuss the details of the lateness of a response by the Respondents to the tribunal's Direction and to ascertain fuller details of any issues as preliminary matters before any evidence was led.
3. The Parties all presented their case and gave their evidence of their understanding of matters.
4. The tribunal received the late response to the Direction into the papers for overall consideration. This covered matters common to both applications.

Findings in Fact

1. The Property was initially rented by the Respondents to SN and another person, referred to in this decision as JB. Their tenancy commenced on 1 January 2022, as detailed in a Safe Deposits Scotland document provided by the Respondents.

2. A Deposit was paid by SN and JB to the Respondents each for £500 totalling £1000. This was placed with Safe Deposits Scotland (SDS). The date it was placed in the scheme is 17 February 2022.
3. The original tenant SN moved out of the Property without giving advance notice to the Respondents.
4. The Applicant Chloe Duffy and her partner Kerr Hall moved into the Property on 1 April 2022 effectively as a replacement for SN.
5. The Applicants occupied one of the bedrooms (and utilised the communal areas along with JB) as their principal home and therefore under a private residential tenancy from that date.
6. The Private Housing (Tenancies) (Scotland) Act 2016 ('the 2016 Act') applies to private residential tenancy matters.
7. The Applicant Chloe Duffy was the lead tenant at 1 April 2022.
8. No written private residential tenancy agreement was given to Chloe Duffy by the Respondents at the outset of the tenancy on 1 April 2022.
9. No private residential tenancy agreement was ever signed by the Parties.
10. No document setting out the terms of the tenancy was given to Chloe Duffy at the outset of the tenancy on 1 April 2022. Under section 10 of the 2016 Act the Respondents were under a duty to provide that by the end of 1 April 2022.
11. In the absence of written terms of the tenancy, statutory terms apply to the tenancy with reference to The Private Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017.Those do not have specific provisions for or relating to tenancy deposits.
12. Notwithstanding the absence of any tenancy agreement or written document setting out the terms of the tenancy at the outset, around 1 October 2022 the Respondents asked Chloe Duffy for £500 as a deposit.
13. The sum of £500 was transferred by Chloe Duffy to the bank account of SN on 8 November 2022.The way the money was paid over was proposed by the Respondents.
14. The Applicants paid the Respondents a tenancy deposit of £500 on 8 November 2022.
15. A second deposit payment of £500 was requested by the Respondents from Kerr Hall on 23 February 2023 following on from JB moving out. This was not paid.
16. The Parties did not have a written agreement that had a provision or clause in it that set out in writing what the deposit Chloe Duffy paid was to cover or what could be deducted from the deposit at the end of the tenancy, such as for unpaid rent, breakages or cleaning.
17. The Tenancy Deposit Schemes (Scotland) Regulations 2011 require a landlord to lodge any deposit they receive with a tenancy deposit scheme within 30 working days of the start date of the tenancy.
18. A tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid.
19. Where a deposit is paid under a written tenancy agreement, such as under a model private residential tenancy agreement, the agreement provides a contractual framework for reasonable costs for anything the tenant might be liable for to be deducted from any deposit at the end of the tenancy. The Parties had no such contractual arrangement.

20. The tenancy between the Applicants and the Respondents ended when they moved out around 30 June 2023.
21. A dispute arose regarding damage to a bedroom carpet. In summary the Respondents sought to deduct from the claim for £500 the cost of replacing a carpet. The facts around this are detailed in the separate application under reference FTS/HPC/CV/23/3474-Statement of Reasons.
22. SDS were advised on 17 February 2023 by the Respondents by telephone that SN had moved out. This is the only specific date that was established by the evidence on the matter. SDS was advised then by the Respondents that the Applicant Chloe Duffy had moved in and given SN her share of the Deposit. At that time JB had also moved out and her position on her deposit was also discussed with SDS.
23. The adviser at SDS had explained on 17 February 2023 to the Respondents what the landlord should have done at the time of SN moving out.
24. The adviser at SDS explained that SN would be removed from the account once it was confirmed by her that she had received her share of the tenancy deposit back from Chloe. Only then would she be removed from the account. Chloe Duffy would then have her deposit registered under her name.
25. SN was not removed from the account with SDS.
26. Chloe Duffy was never registered against the £500 deposit initially paid to SDS for SN.
27. On 3 July 2023 the Respondents called SDS to put through a repayment request. At that time SN's name was still on the tenancy deposit account.
28. The Parties to this and the associated application could have utilised a tenancy deposit scheme dispute resolution mechanism to settle the dispute over the cost of the repair to the damaged carpet, had the deposit paid by the Applicants (and more specifically by Chloe Duffy) been deposited and registered in the SDS scheme under her name. The monies she paid as a deposit were not registered in her name with SDS. Accordingly, the tenancy deposit scheme dispute resolution mechanism could not be utilised in this dispute.
29. The Respondents had singularly utilised the SDS tenancy deposit scheme dispute resolution mechanism to seek return of the full £500 being the deposit initially placed under the name SN, but the Applicants were unaware of this as they were not party to the procedure.
30. Regulation 3 of the regulations requires a landlord who has received a tenancy deposit in connection with a relevant tenancy within 30 working days of the beginning of the tenancy to pay the deposit into the scheme administrator of an approved scheme; and to provide the tenant with information required under regulation 42.The landlord also 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 until it is repaid at the end of the tenancy.
31. The tenancy between the Parties is a relevant tenancy for the purposes of the Regulations. The tenancy deposit regulations apply.
32. The Parties entered into a private residential tenancy from 1 April 2022.
33. A tenancy deposit was paid on 8 November 2022 of £500.
34. The tenancy ended around 30 June 2023.

35. The Applicants deposit was not paid into the SDS, or any other approved scheme, in their names, or one of their names.
36. There was a mechanism with SDS that could have been utilised to ensure the records were updated and corrected to secure the Applicants deposit, but it was not done.
37. The Respondents did not provide the Applicants, as tenants, with the information required under regulation 42.
38. The Respondents did not ensure that the tenancy deposit of the Applicants was held by SDS from the outset in their name or names or until it was repaid.
39. The Applicants deposit was unprotected for the duration of the tenancy as it had not been registered with SDS in their name or names.
40. The Respondents have failed in their duties towards the Applicants under the Regulations.
41. The deposit paid is being returned to the Applicants by a decision under the associated application.

Reasons for Decision

1. The tribunal saw from the paperwork produced that the two bedroomed Property had initially been let to two women, SN and JB. One of them was known to Chloe Duffy and when SN moved out without notice the Respondents were approached and asked to allow her to move in, which meant the Applicants moved in. When Chloe Duffy moved in her partner also stayed at the Property. The other tenant JB then decided to leave.
2. The usual formalities that should have been followed to set up the tenancy were not followed, and the Respondents came to regret this. It also caused the Applicants to have concerns about where the £500 deposit money went after it had been paid into the bank account of SN and whether it was in an approved scheme in their names. This arrangement of bank transfer had been proposed by the Respondents as the way to effectively refund SN her deposit and have the Applicant Chloe Duffy pay a deposit. A second deposit payment of £500 was requested by the Respondents from Kerr Hall on 23 February 2023 following on from JB moving out. This was not paid.
3. Whilst £500 was paid over and was understood to be a deposit, the specifics of what was to be done with it and what it was for were not set out in writing or agreed verbally.
4. The formalities required by SDS to allow for the paperwork to be corrected to show Chloe Duffy (or both Applicants) to be the new tenant and for the £500 to be attributed to her were not followed and not dealt with timeously.
5. When a dispute with SDS was raised to claim the deposit by the Respondents under the tenancy deposit scheme dispute resolution mechanism, there was a fatal flaw in the procedure because the Applicant Chloe Duffy or the Applicants were not a Party to it. The Respondents were repaid the deposit held with SDS because in the SDS's words, "the repayment proposal was entered on 12 July 2023 for the deposit to come back (to the Respondents) under the heading 'damage to the property' this then timed out on 24 August and payment was made on 25 August 2023".Behind that SDS had noted that SN's name was still on the deposit account. A copy tenancy agreement with Chloe Duffy had not been provided but asked for by SDS presumably to

correct their records. The Applicants had no recourse to dispute resolution through SDS.

6. In summary, there was no dispute that £500 was paid by the Applicants through Chloe Duffy to the Respondents and via the bank account of SN as a tenancy deposit. Ordinarily, a deposit is returned at the end of a tenancy unless a valid claim can be made against it by the landlord. To make a valid claim there has to be provision for a claim to be made. In this case there was no contractual framework or any other written framework for consideration. The SDS framework for settling any dispute over the deposit was flawed and the Applicants could not utilise it to participate even if they had been told about it.
7. The Respondents have failed in their duties towards the Applicants under the regulations.
8. Being satisfied that there was a breach of the regulations the tribunal then considered the gravity of the breach.
9. The tribunal considered that the informal way that the new tenancy came about and been approached by the Respondents had caused the events that then unfolded. Had the landlords started the tenancy on a formal footing they may have achieved success in having the Applicants tenancy deposit lodged with SDS in their name and timeously, that would then have enabled them to have the information to give them under regulation 42.That would also have secured the tenancy deposit of the Applicants throughout and allowed the dispute resolution mechanism to be appropriately used when a dispute arose.
10. The Respondents were the author of their own misfortune, therefore. They had let out this property to the original tenants and has used the tenancy deposit scheme then. Informality and passing the tenancy deposit over the way it was, was not going to work in harmony with the regulations and certainly not if SDS were not told immediately so as to give timeous advice and direction. They also had another property that they let out so were not unfamiliar with the regulations.
11. They had utilised the tenancy deposit dispute mechanism to the exclusion of the Applicants due to the way the situation ended.
12. The tenancy deposit then sat with them and became the subject of the dispute and associated application.
13. On the other hand, the tribunal did note that efforts had been made to contact SDS albeit too late in the day. The tribunal noted that both Respondents also worked and that they had other pressures on their time.
14. The tribunal was mindful to impose a sanction that is fair, proportionate, and just and had regard to the comments made by Sheriff T Welsh KC in the case of Jensen v Fappiano 2015SCEDIN6.The Respondents approach to the setting up of the tenancy and formalities was lacking and informal. They said in their evidence that they had come to regret this. The tribunal did not consider that they set out to wilfully subvert the regulations. The original tenancy deposits had been placed with SDS. The setting of a sanction in this application may well be deterrent enough for future timely compliance. The tribunal did not consider it was the most serious beach there could be. The tribunal did consider that it could not ignore however the situation whereby the Applicants were not afforded the protection and access to the dispute resolution mechanism through SDS.This has resulted in applications to the

First-tier tribunal and has used up time and energy of the Parties that could have been avoided had formalities been followed. The tribunal considers that a sanction of £750 is a fair, proportionate and just sanction for noncompliance in the circumstances set out.

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. Christie

_____ **14 February 2024**

Legal Member/Chair **Date**