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/19/0262

Re: Property at 41 Edmondside, Pitmeeden, Ellon, Aberdeenshire, AB41 7GP ("the Property")

Parties:

Dr Suraya Zainol Abidin, 38 Chapelwell Place, Balmedie, Aberdeen, AB23 8HU ("the Applicant")

Mr Keith Haggan, 10 Cowieson Crescent, Pitmedden, Ellon, AB41 7GJ ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for £800 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") should be made.

The First-tier Tribunal determined that the Respondent should be ordered to pay the tenancy deposit to an approved scheme within 28 days of today's date and to provide the Applicant with the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid in terms of Regulation 10 (b) of the Regulations.

BACKGROUND:
The Applicant made an application for payment under Rule 103 and Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) on 22 January 2019.

The Applicant submitted to the Tribunal a copy of tenancy agreement between the Applicant and the Respondent for a Short Assured Tenancy starting 27 November 2015, emails from the three approved tenancy deposit schemes showing no deposit had been lodged for the tenancy and copy letter stating the end of the tenancy as 27 October 2018 and a letter of 8 January 2019 to the Respondent advising of the possible application to the Triubnal. On 8 March 2019 the Applicant further lodged written representations together with a further copy of the tenancy agreement, the bank statement as evidence for the payment of the deposit, a futher copy of the emails from Letting Protection Scotland, My Deposit Scotland and Safe Deposits Scotland as well as a further copy of the letter confirming the end of the tenancy as 27 October 2018.
In her cover email the Applicant advised she would be unable to attend the CMD due to mandatory training.
The Respondent provided written representations 3 March 2019 including a copy letter dated 17 January 2019 and email exchanges between him and the Applicant of 18.1.19, 16.1.19, 15.1.19, 21.12.18, 12.12.18, 30.10.18 and 29 .10.18.
A Case Management Discussion was fixed for 15 February 2019. The Applicant did not attend.
The Respondent was present.

The letter to the Applicant regarding the Case Management Discussion included the information that the tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision on the application which may involve making or refusing a payment order.

On receipt of the Applicant's email of 8 March 2019 the tribunal advised the Applicant that if she wished the date of the Case Management Discussion to be postponed she would have to make a written request. No postponement request was received.

The evidence:
The written representations of both parties are referred to for their terms and held to be incorporated herein.

The Applicant's position as set out in her representations is that the deposit was paid to Easthaven Property Management acting for the Respondent on 10 November 2015. The tenancy agreement states that the deposit will be paid into an approved scheme and it was not paid into an approved scheme during the duration of the tenancy. The deposit was not returned on the basis that it was "forfitted for repairs".

The Respondent's position as stated in his representations is that the deposit was not paid into an approved scheme due to an oversight. He stated at the Case Management Discussion that this was his first let and he had used Easthaven Property Management to assist him. He fully admitted that the deposit was never paid into an approved scheme but he stated this had since been offered to the Applicant and this was stated in his letter of 17 January 2019. He would still be happy to do that. He states there are repairs and costs that were specified by him but never agreed by the Applicant and the Applicant was not answering his emails. He confirmed at the Case Management Discussion that the deposit was paid by the

Applicant to Easthaven Property Management and that they would have paid this over to him. He stated that this was a simple mistake and there had been no intention not to comply with the Regulations, he had simply forgotten all about it. He had never been reminded by the Applicant during the tenancy and had not been asked for information about the scheme by the Applicant. There was nothing sinister about forgetting to pay the deposit into an approved scheme and he accepts it was never lodged. He had offered to lodge it now.

The legal test:

In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 an application under that Regulation must be made within 3 months of the end of the tenancy. In terms of Regulation 10 "if satisfied that the landlord did not comply with any duty in Regulation 3 the First tier Tribunal 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."

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; and (b) provide the tenant with the information required under regulation 42."

In terms of Regulation 42 (2) the information includes " (a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord, (b) the date on which the tenancy deposit was paid to the scheme administrator...(d) a statement that the landlord is , or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of 2004 Act, (e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid and (f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement. (3) the information in paragraph (2) must be provided (a) where the tenancy deposit is paid in compliance with regulation 3 (1), within the timescale of set out in that regulation"

Findings in fact:

1. The Applicant and her husband were joint tenants of the property.
2. They paid a deposit of £800 to the Easthaven Property Management on 10 November 2015.
3. The tenancy started on 27 November 2015 and terminated on 27 October 2018.
4. The tenancy agreement states in clause 5.2 that the Landlord or the Landlord's agents shall pay the deposit into an approved tenancy deposit scheme within the required period and provide the Tenant with the necessary information all in accordance with the Housing (Scotland) Act 2006 and the Tenancy Deposit Schemes (Scotland) Regulations 2011.
5. The Applicants moved out of the property on 27 October 2018
6. The deposit was never lodged with an approved scheme.
7. The Respondent was a landlord at the time of a single property and had engaged Easthaven Property Management to deal with finding the tenants.

8. The deposit is in dispute between the parties as the Respondent is claiming that payments for repairs are due.
9. the deposit has not been returned to the Applicant and her husband.
10. the Respondent has offered to lodge the deposit into an approved scheme prior to the application having been made on 22 January 2019.

Reasons for Decision:
The Tribunal considered that the essential and material facts of the case were not disputed. The Respondent had admitted the breach and provided an explanation for it. The Applicant did not attend the Case Management Discussion.

In terms of Rule 17 of the Rules of Procedure:
Case management discussion
17.—(1) The First-tier Tribunal may order a case management discussion to be held—
(a)in any place where a hearing may be held;
(b)by videoconference; or
(c)by conference call.
(2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.
(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, including by—
(a)identifying the issues to be resolved;
(b)identifying what facts are agreed between the parties;
(c)raising with parties any issues it requires to be addressed;
(d)discussing what witnesses, documents and other evidence will be required;
(e)discussing whether or not a hearing is required; and
(f)discussing an application to recall a decision.
(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.
Power to determine the proceedings without a hearing

However, in terms of Rule 18 of the Rules of Procedure:

18.—(1) Subject to paragraph (2), 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; and
(b)must make a decision without a hearing where the decision relates to—
(i)correcting; or
(ii)reviewing on a point of law,
a decision made by the First-tier Tribunal.

In terms of Rule 29 of the Rules of Procedure:

29. If a party or party's representative does not appear at a hearing, the First-tier Tribunal, on being satisfied that the requirements of rule 24(1) regarding the giving of notice of a hearing have been duly complied with, may proceed with the application upon the representations of any party present and all the material before it.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties.

The Respondent did not dispute that the deposit had not been lodged and no information about the deposit being lodged had been provided to the Applicant. The date when the tenancy commenced and ended were not in dispute. The Applicant had stated clearly she would not be attending the Case Management Discussion but had not made an application for a postponement despite having been advised of the option to do so in reply to her email. The Tribunal did not consider that there was any need for a hearing as the material and important facts of the case were not disputed and the evidence was sufficient to make the relevant findings in fact to determine the case. It considered that the Applicant had clearly stated she wishes as the outcome a payment order of £800 to be made. It did not consider that it would be contrary to the interests of the parties to decide the matter at the CMD. The Respondent asked that the matter be dealt with on the day.

The tribunal considers that the landlord did not comply with the requirements of Regulations 3 and 42 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the rules. There have been various approaches in calculating the appropriate sanction in terms of the Regulations. The preferred approach appears to be that adopted in Jenson v Fappiano, 2015 GWD 04-89 should be "fair, proportionate and just, having regard to the seriousness of the con-compliance".

In this context it is important that the matters raised by both the Applicant and the Respondent about the outstanding issues about repairs etc are not relevant to these proceedings in so far as the Tribunal does not adjudicate on these. All these have their own remedies and indeed any dispute about return of the deposit should be decided upon by dispute resolution services of the approved schemes. At some point in their representations and documents both parties refer to the option of these matters being resolved by the deposit being paid into an approved scheme even after the end of the tenancy.

All the Tribunal can consider in the context of this application is whether a breach of the Regulations occurred, under what circumstances and with which consequences.

The Tribunal has discretion to award up to three times the amount of the deposit, in this case the upper limit would be £2400. The Applicant asked for payment of the one time the deposit value of £800. The Respondent stated he would be prepared to lodge the deposit with an approved scheme and asked the Tribunal to consider that this was a simple mistake and he was an inexperienced landlord.
The Tribunal took into account:

1. the length of time the deposit was unprotected, namely the entire duration of the tenancy and a total time of almost 3 years.
2. that the landlord clearly had known about the duty to lodge the deposit with an approved scheme and this was clearly stated in clause 5.2 of the tenancy agreement
3. that the Respondent did not provide any notification to the tenants regarding the deposit
4. that the tenancy had come to an end and the deposit was not returned due to a dispute about potential repairs.
5. that the Regulations wished to specifically avoid such a situation by deposits being paid to a third party and by provision of a specialist dispute resolution service.
6. that the Respondent admitted the breach of the duty to lodge the deposit at an early stage
7. that the Respondent made a mistake due to his inexperience
8. that the Respondent had offered to put the deposit into an approved scheme prior to the application having been made

Taking this into account the Tribunal considered that in all the circumstances the amount should not be at the maximum or minimum level in this case. Clearly the Respondent was an inexperienced landlord and his credible explanation was that this was a simple mistake. However, the deposit had been unprotected for the entire time of the tenancy and the situation had now arisen that there was a dispute over the deposit and the dispute resolution scheme of an approved scheme had not been available to deal with the matter to date. The Tribunal further considered that the Respondent by his own admission was not ignorant of the need to pay the funds into the tenancy deposit scheme as this was clearly stated in the tenancy agreement.

In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £800 being the equivalent of one time the deposit amount to the Applicant.

The Tribunal in terms of Regulation 10 (b) (i) may order the landlord to pay the tenancy deposit to an approved scheme. The Applicant clearly had proposed this course of action previously and stated this in point 7 of her representations. The Respondent had offered this in his letter of 17 January 2019 to the Applicant. Given the ongoing dispute over the deposit the Tribunal considered that the appropriate way to deal with the deposit at this stage is to have this paid into an approved scheme so that the Applicant and the Respondent can then use the dispute resolution scheme, which is intended to deal with exactly these matters.

Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £800 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011. The First-tier Tribunal for Scotland (Housing and Property Chamber orders the Respondent to pay the tenancy deposit to an approved scheme within 28 days of today's date and to provide the Applicant with the

name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid.

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

21. 3.19

Legal Member/Chair **Date**