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 Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/20/0760

Re: Property at 117 Cardowan Road, Glasgow, G32 6RW ("the Property")

Parties:

Ms Karen Thorburn, 202 Cardowan Road, Glasgow, G32 8RQ ("the Applicant")

Mr Stephen McCullagh, 105 Gartcraig Road, Glasgow, G33 2RY ("the Respondent")

Tribunal Members:

Shirley Evans (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent failed to comply with his duty as a Landlord in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011("the 2011 Regulations") as amended by The Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 by failing to pay the Applicant's Tenancy Deposit to the scheme administrator of an Approved Tenancy Deposit Scheme, grants an Order against the Respondent for payment to the Applicant of the sum of Four Hundred Pounds (£400) Sterling.

Background

1. This is an application under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 for an order for payment where it is alleged the Respondent as a Landlord has not complied with his duties under Regulations 3(1) and 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). The Tribunal was asked to consider whether a payment made was advanced payment of rent or a deposit under section 120 of the Housing (Scotland) Act 2006.

2. The application proceeded to a Case Management Discussion ("CMD") on 11 August 2020. Ms Cochrane from Dailly and Co represented the Applicant. Mr McCullagh appeared on his own behalf.

3. At the end of the CMD the Tribunal decided it wished to hear direct evidence from the Applicant and the Respondent regarding the payment of the £400 in order to determine whether this fell within the legal definition of "tenancy deposit" in terms of Section 120(1) of the Housing (Scotland) Act 2006.

Hearing

4. A hearing proceeded by way of teleconference call 24 September 2020. Ms Cochrane from Dailly and Co represented the Applicant. Mr McCullagh appeared on his own behalf.

5. At that hearing both parties gave evidence on their own behalf. Reference is made to the Notes from the Hearing issued by the Tribunal. In essence although much of the evidence relating to the two tenancies between the parties was not contentious, the crux of the dispute was whether a £400 payment made by the Applicant to the Respondent was a deposit or an advance payment of rent.

6. The Applicant gave evidence that she understood the £400 she had paid to the Respondent at the start of her first tenancy at 37 Loretto Street, Glasgow in June 2011 and then carried over to her second tenancy at 117 Cardowan Road, Glasgow in June 2015 was a deposit. She knew and trusted the Respondent. She denied she had asked the Respondent to take the money for advanced payment of rent although in cross examination she conceded she was scared that housing benefit would not pay or sort out her rent. She stated the Respondent had used the word "deposit" and that she understood she would get it back if there was no damage to the flat at the end of the tenancy. The Respondent told her to get her benefits sorted out. She did not pay much attention to the written terms of either tenancy agreement or signed declarations both of which stated *"this payment will be advanced payment of rent in the unseen circumstances of late rent".* The first tenancy agreement provided for a "NIL" deposit and the second tenancy agreement for a deposit of £400 in clause 7. She denied she had asked the Respondent to include clause 7 in the second tenancy agreement for the purpose of getting housing benefit. She accepted she fell into arrears of rent in March 2019 and advised there was an issue with the state of the property. She felt it was unfair the Respondent had not placed the deposit into a scheme and did not know what had happened to it.

7. The Respondent's evidence was that as he did not take any deposits for his rental properties, the payment made by the Applicant was for advanced payment of rent which the Applicant had persuaded him to take as a "safety net" as she was concerned she might fall behind with her rent. Paragraph 12 of the Respondent's written submissions reflected that evidence and stated he *"held onto the advanced rental payment because as it is worded it's advanced*

rental payment, and while the applicant did not pay rental from 18/3/2019 to the 7/12/2019, I have every right to use the £400 in advanced rental payment against unpaid rent, as a safe guard". He drew up the tenancy and declaration and placed the money in a bank account in June 2011. At the start of the second tenancy in June 2015 he explained he had tried to give the Applicant the money back, but she had asked him to keep it. He had then drawn up a declaration in the same terms as the first agreement. Although the rent in the second agreement was £550 the Applicant had only paid £525 which he was happy with. When the Respondent fell into arrears in March 2019, he gave evidence that he had used the money to pay his mortgage. In cross examination he conceded he may have retained some of the money if there had been damage; had the property been in a reasonable state and had there been no arrears, he would have returned the £400.

8. Due to the shortness of time the hearing was continued to a further date for written submissions. A Note on the Hearing was issued by the Tribunal which fully sets out the evidence.

9. Before the continued hearing, the Tribunal issued a Direction for the Respondent to lodge a rent statement. The Respondent thereafter lodged the rent statement. Both parties lodged written submissions.

Continued Hearing

10. The continued Hearing took place by teleconference call on 18 January 2021. Ms Cochrane from Dailly and Co again represented the Applicant. Mr McCullagh appeared on his own behalf.

11. The Tribunal explained to parties that they wanted to ask the Respondent about the rent statement before proceeding with parties' submissions. The Tribunal noted that when the second tenancy started in June 2015 the rent was shown as £550 but only £525 had been paid. The Respondent gave evidence that when the Applicant realised she would not get housing benefit for £550 she asked him to take £25 off the rent. Housing benefit had taken some time and was paid at £525. The Respondent explained he was happy to agree rent at £525 as the Applicant was a good tenant.

12. The Tribunal noted from the rent statement lodged that between June 2015 – August 2016 rent was nevertheless shown at £550 and £25 per month been used up of the £400. The Respondent gave evidence that he was happy to take £525 and was aware the £400 was dwindling away.

13. The Tribunal asked Ms Cochrane whether she had any questions arising from the Respondent's further evidence on the rent statement. She stated she had, but sought permission to recall the Applicant to ask questions arising from the rent statement before her further cross examination of the Respondent. The Tribunal was agreeable to that and Ms Thorburn joined the conference call to give further evidence. She stated she had never seen a copy of the rent statement lodged. Within the first month of the second tenancy agreement she gave evidence that she had had a conversation with the Respondent in

which she had asked for the rent to be reduced to £525 which he agreed to. She was not aware that £25 per month was being deducted as shown on the rent statement. The Respondent had never mentioned this. She was cross examined by the Respondent that the money was an advanced payment of rent, which she denied, and maintained she had never been aware that £25 per month was being used in this way. When questioned by the Tribunal she explained she had only become aware of a landlord's obligations to pay a deposit into an approved scheme about a year before she had left the second tenancy when there were issues with the house and she had taken legal advice.

14. Ms Cochrane then cross examined the Respondent on the rent statement. She challenged him that at the last hearing he had given evidence that he had used the £400 towards his mortgage in about March 2019 when the Applicant went into rent arrears, but on his evidence at the continued hearing there were no arrears when he deducted £25 per month as he was happy to agree rent at £525, although the rent statement showed rent of £550. She put it to him that his evidence was inconsistent. She also referred him to his written submission in which he stated that at no time did he use the money until the later stages of the tenancy. His evidence was that he did use the money and had explained that to the Applicant until the money had been reduced to nil. She again put it to that on his evidence it was not clear at what point the £400 had been used and that the £400 could only have been used to pay the mortgage if it was intact and available in March 2019 when the Applicant started to go into arrears. He explained that he used a lot of money and that he would use everyone's rent to pay the mortgage. He was again asked whether in March 2019 the £400 was available or not. His response was he had to sell the property.

15. The Respondent was also cross examined on the first two entries of the rent statement and asked why the advanced payment of rent £400 had not been used to cover the non-payment of rent for the first two months. He explained that as he knew that housing benefit would take about 6-8 weeks he would not use the £400 to cover that. That concluded parties' evidence.

16. The Tribunal had the benefit of both parties written submissions in advance of the continued hearing. The Tribunal thanked both parties for their submissions and explained they would take parties through some points of these submissions.

17. With regards to the Applicant's submissions, the Tribunal asked Ms Cochrane to go through the case of *Cordiner v Al-Shaibany 2015 SLT (Sh Ct) 189* which was referred to in her submissions for the sake of the Respondent. In that case it was held that an advanced payment of rent was not a deposit where the tenant had paid the first and last month's rent at the beginning of the tenancy in accordance with the lease and could not be seen to be held on security as the obligation to pay the first and last month's rent had already been discharged. Ms Cochrane distinguished *Cordiner* from the current case where in her submission the payment was taken as security against non-payment of rent in the future and not intended to discharge an obligation to

pay rent for a specific period. There was nothing written into the current lease that showed the money was an advanced payment of rent. In her submission the £400 payment fell within the definition of tenancy deposit under section 120 of the Housing (Scotland) Act 2006 as being held as security for the performance of any of the Applicant's obligations. She relied on the evidence the Respondent had given in the first hearing that he would have used the £400 for any damage. In her submission therefore, despite the wording of the declarations signed by both parties that the money was an advanced payment of rent, it was parties' intention that the money be held as security for arrears and damage to property.

18. Picking up on the Respondent's written submissions that the £400 did not fall within the definition of a deposit under section 120 of the Housing (Scotland) Act 2006 in which the Respondent submitted the £400 was not held as security for *any* of the Applicant's obligations but the specific purpose of advanced rent to be used "in the event of unforeseen circumstances", Ms Cochrane invited the Tribunal to reject the Respondent's interpretation of the word "any" in section 120. In her submission, if his interpretation of the word "any" was correct it would allow landlords to escape the 2011 Regulations simply by stating that a specific single obligation was covered and others excluded; this could not be what parliament had intended. The use of the word "any" included each and every obligation in the tenancy agreement.

19. She asked the Tribunal to award the maximum penalty of £1200 based on the length of time the Applicant's money had been unprotected from June 2011 throughout the duration of the tenancy and on the basis the Respondent did not intend to pay the deposit due to rent arrears which he states are due under the lease. The Tribunal challenged her on that point as the first tenancy had terminated in June 2015. After discussion, she conceded that she could not rely on any breach relating to the first tenancy. Further in her submission the Respondent was an experienced landlord who was aware of the 2011 Regulations and his actions were a deliberate attempt to avoid them by categorising the payment as advanced payment of rent.

20. The Respondent was asked whether he had anything to add to his written submissions or if he wished to respond to Ms Cochrane's submissions. He advised he did not and couldn't explain better what his position was other than what was in his written submission which had been prepared by his solicitor Mr Doig. In summary his written submission was that the payment had not been a deposit but rather an advanced payment of rent to be used in the unforeseen failure of the Applicant's failure to pay rent. That created a distinction between a qualified and specific purpose for the retention of advanced funds as opposed to a deposit which in terms of section 120 of the Housing (Scotland) Act 2006 could be applied against any of the tenant's obligations. It was not held as security of any of the Applicant's liabilities, but for a specific purpose. It was used by the Respondent for that purpose and not against any other obligation as he recognised the qualified basis on which the advanced payment was made. In his written submission, it was this lack of generality that created a distinction between the advanced payment being

held for a specific purpose as opposed to a deposit which was held to cover any obligation.

21. The Respondent added he hoped he would be successful in his defence, but if not, he asked the Tribunal to make a penalty at the lower end of the scale. He finished off by stating he should never have taken the money.

22. The hearing drew to an end. The Tribunal thanked both parties for their courtesy in their conduct of the hearing and for their written submissions and advised parties a written decision would be issued in due course.

Findings in Fact

23. The Applicant and the Respondent entered into a tenancy agreement in relation to the property at 37 Loretto Street, Glasgow ("the first tenancy") on or about 17 June 2011. The parties knew each other.

24. The Applicant was in receipt of benefits throughout the period of the first tenancy. The Applicant paid the Respondent £400 cash on 17 June 2011 as a "safety net" as she was scared housing benefit may be suspended at some stage. The Applicant trusted the Respondent.

25. The Respondent had a number of properties which he let out. The Respondent would not normally take a deposit from any of his tenants. The Respondent drafted a declaration dated 17 June 2011 which was signed by both parties that *"this payment will be advanced payment of rent in the unseen circumstances of late rent"*. He put the £400 into the bank.

26. The tenancy agreement for the first tenancy provided that the deposit was "NIL". It contained no provision setting out any agreement with regard to the advanced payment of rent.

27. The first payment towards the rent was made about 6 weeks later after the Applicant's housing benefit was sorted. Throughout the whole period of the first tenancy there were no arrears. The first tenancy terminated on 6 June 2015.

28. The Applicant and the Respondent entered into a second tenancy agreement in relation to the property at 117 Cardowan Road, Glasgow ("the second tenancy") on or about 7 June 2011.

29. The payment of £400 made at the start of the first tenancy was carried over to the second tenancy. The Respondent drafted a second declaration dated 7 June 2015 which was signed by both parties that *"this payment will be advanced payment of rent in the unseen circumstances of late rent"*.

30. Clause 7 of the tenancy agreement for the second tenancy provided that the deposit was "£400". Clause 5.1 provided that the rent was £550 per month.

The second tenancy contained no provision setting out any agreement with regard to the advanced payment of rent.

31. Parties understood the Respondent could retain the £400 if there had been damage to the property, except wear and tear and that he would have no reason not to repay the money if there was no damage or arrears.

32. The Applicant was in receipt of benefits throughout the period of the second tenancy and applied for housing benefit. It became apparent shortly into the second tenancy that housing benefit would only pay £525 per month towards the rent. The Applicant approached the Respondent to see if he was agreable to the rent being reduced to £525 per month as opposed to £550. The Respondent agreed to the rent of £525 per month. After about 6 weeks the Respondent started to receive rent of £525.

33. The Applicant fell into arrears of rent on 18 March 2019 when a dispute arose between parties with regards to the repairs at the property. The second tenancy terminated on or about 6 or 7 December 2019.

34. The Respondent has not returned the payment of £400 to the Applicant.

Reasons for Decision

Tenancy deposit or advanced payment of rent

35. The primary matter for the Tribunal to determine is whether the payment made by the Applicant to the Respondent was a deposit or an advanced payment of rent and thus bringing the payment under the 2011 Regulations. In terms of section 120(1) of the Housing (Scotland) Act 2006 –

"A tenancy deposit is a sum of money held as security for
(a)the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or
(b)the discharge of any of the occupant's liabilities which so arise."

It was not disputed that if the payment did fall into the definition of "deposit" that the 2011 Regulations would apply.

36. Whilst the Tribunal had no hesitation in believing that the Respondent would not normally take a tenancy deposit and that the Applicant had given the Respondent the money as a safety net or as he referred to it in his written response to the Tribunal as a "safe guard" in case housing benefit was suspended at some stage, the wording of the two declarations is confusing and conflates "advanced payment of rent" (with no specified period) with "late rent". Using this money to meet an obligation to pay advanced rent is very different from using it "in unseen circumstances of late rent being paid". Advanced payment of rent is a specific obligation. That obligation was not reflected in either tenancy agreement. It appears that the holding of this

money by the Respondent was for the purpose of covering any late rent in the future and was not for advanced rent.

37. The Tribunal preferred the submissions of the Applicant that a genuine advanced payment of rent was not a deposit with reference to the case of *Cordiner v Al-Shaibany 2015 SLT (Sh Ct) 189.* In that case the tenant had paid the first and last month's rent at the beginning of the tenancy in accordance with the lease. That payment could not be seen to be held on security as the obligation to pay the first and last month's rent had already been discharged. In the current case the Tribunal accepts the Applicant's submission that *Cordiner* can be distinguished from the current case where the payment was taken as security against non-payment of rent in the future and not intended to discharge an obligation to pay rent for a specific period.

38. The Tribunal does not accept the Respondent's written submission that the use of the word "any" in section 120 of the Housing (Scotland) Act 2006 creates a distinction between a qualified and specific purpose for the retention of advanced funds as opposed to a deposit which could be applied against any of the tenant's obligations. The Tribunal preferred the oral submissions made by Ms Cochrane that "any" included each and every obligation in a tenancy agreement.

39. In any event, on the Respondent's own evidence it was clear that as well as being able to use the money for late rent, he felt that he could use the money to cover any damage to the property. The Respondent's evidence on this point was very clear on cross examination in the first hearing. When asked what he would do with the money if there had damage to the property, the Respondent explained he may retain some of the money, but that if there had been any repairs which were down to wear and rear, there would be no reason for him not to pay the money back if the repairs were not down to damage. If the property had been in a reasonable state and there had been no arrears, he would have returned the £400. His own evidence was unfortunately fatal to the Respondent as it put beyond doubt that this money was for all intents and purposes a deposit. That understanding was corroborated by the Applicant's evidence.

40. On the evidence it appeared that despite what was in the declarations signed by both parties, the reality of the situation was that both parties accepted that the money could be used to cover not only unpaid rent but damage to the property. The Tribunal formed the opinion that neither party had given much thought about the wording or consequences of the declarations and accepts that whilst the Respondent was trying to be accommodating to the Applicant whom he knew, by accepting her money he had inadvertently placed himself into a position whereby he had taken a deposit.

41. Further the Tribunal considered that the transference of the £400 from the first to the second tenancy was of importance. At the time of the second tenancy, with the benefit of the knowledge that the Applicant had not been in arrears throughout the first tenancy, the £400 was retained and applied to the second tenancy with a specific reference to a £400 deposit in clause 7. The tenancy

agreement is the contractual agreement governing the occupation of the property by the Applicant. Clause 7 is clear in its terms which terms should not be ignored, despite the contrary declaration which does not form part of the tenancy agreement. The Applicant's and the Respondent's evidence both pointed to the fact that they viewed this money for all intents and purposes a deposit certainly by the time they entered the second tenancy agreement and for use of not only late payment of rent but damage to the property.

42. The Tribunal have accordingly formed the view that the payment made by the Applicant in June 2011 which was then transferred to the second tenancy agreement in June 2015 was a deposit in terms of section 120 of the Housing (Scotland) Act 2006 and was not held for advanced payment of rent.

The Tenancy Deposit Scheme (Scotland) Regulations 2011

43. That being the case, the Tribunal must consider the impact of the 2011 Regulations and make an award. Regulation 3(1) provides –

> *"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."*

Regulation 42 provides -

"*(1)The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).*
(2)The information is—
(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;
(c)the address of the property to which the tenancy deposit relates;
(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 the 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 set out in that regulation; or
(b)in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme."

44. For the purpose of Regulation 9(2) of the 2011 Regulations, the Tribunal found that the application was made in time within 3 months of the second tenancy terminating. The Tribunal does not consider that the first tenancy has any relevance to any breach of the 2011 Regulations by the Respondent. The first tenancy terminated in June 2015, nearly 5 years before the application was made. The Applicant cannot therefore rely on any breach of the 2011 Regulations by the Respondent in relation to the first tenancy. However in relation to the second tenancy the Respondent has failed in his duty under Regulation 3 of the 2011 Regulations to pay the deposit into an approved scheme. It follows from that that the Respondent has also failed in his duty to provide the Applicant with relevant information under Regulation 42 of the 2011 Regulations.

45. The 2011 Regulations were intended, amongst other things to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit to the landlord or tenant or divided between both, at the termination of a tenancy. They were introduced to address any perceived mischief by landlords in taking deposits from tenants and then unjustly retaining the deposit at the end of the tenancy.

46. If the landlord fails in his duties under Regulation 3, the Tribunal has discretion to make an award of up to three times the amount of the deposit, in terms of Regulation 10 of the 2011 Regulations. The amount to be paid is not said to refer to any loss suffered by the Applicant. Accordingly, any amount awarded by the Tribunal in such an application cannot be said to be compensatory. The Regulations do not distinguish between a professional and non-professional Landlord. The obligation is absolute on the Landlord to pay the deposit into an Approved Scheme.

47. The Tribunal has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach. The Applicant sought three times the amount of the deposit whereas the Respondent submitted that any award should be at the lower end of the scale.

48. The Tribunal formed the view that the Respondent had genuinely tried to accommodate the Applicant in the taking the £400 and accepted his evidence that he would not normally take a deposit and therefore drafted the declarations. He knew the Applicant and on her evidence she trusted him with her money. In that regard, it appeared to the Tribunal that there was no bad faith on the part of the Respondent despite his actions having unintended consequences which have led parties to this position.

49. However, the Tribunal considered the Respondent's explanation as to when he had used the money and for what purpose to be confusing. At the first hearing he gave clear evidence that he only used the £400 to pay the mortgage on the property when the Applicant fell into arrears in March 2019.

At the continued hearing with reference to the rent statement lodged, he gave contrary evidence that he had taken £25 off each month and applied it to the shortfall between £525 housing benefit paid and the rent of £550, despite the fact he had agreed to a reduced rent of £525. It is not clear to the Tribunal as to how or when the Respondent used the Applicant's £400. What is clear from the evidence is that he did not and does not intend to repay the deposit to the Applicant. That arguably is understandable from the Respondent's perspective if the Applicant has left arrears although both parties alluded to the fact that there is a dispute as to whether the property met the repairing standard. In the Tribunal's opinion, this case highlights the very reason for the 2011 Regulations which provide for a dispute resolution process in the event of a dispute between parties.

50. The Respondent was aware of the 2011 Regulations, but at no stage did he lodge the money with an approved scheme despite on his own evidence that he would use the money not only towards unpaid rent but for damage to the property, had there been any. Had he done so, the deposit would have been protected and enabled the scheme administrator to adjudicate between parties on the return of the deposit and the division of payment as between the parties. In that regard the Applicant has been prejudiced by the Respondent's failure during the course of the second tenancy to pay the deposit into an approved scheme. The purpose of the 2011 Regulations has been defeated by his failure to do so.

51. On her evidence the Applicant could not say if she had been prejudiced by the Respondent's breach. She felt it was unfair that he had not paid the deposit into an approved scheme. She gave no evidence that this had caused her any particular financial hardship for example or any stress or worries.

Decision

52. In all the circumstances, the Tribunal was not inclined to order the maximum amount of three times the deposit. The Tribunal considered that a fair, proportionate and just amount to be paid to the Applicant was £400 which would effectively put parties back into the same position had the deposit not been paid. Accordingly the Tribunal made an Order for Payment by the Respondent to the Applicant. The decision of the Tribunal was unanimous.

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.

24 January 2021

Shirley Evans

Legal Chair	**Date**