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/19/1713

Re: Property at 36 Rubislaw Square, Aberdeen, AB15 4DG ("the Property")

Parties:

Miss Megan Finlayson, Miss Emma Lowson, 18 Helen Street, Forfar, Angus, DD8 2HW; 1 Drummers Dell, Forfar, Angus, DD8 1XX ("the Applicant")

Mr Ewen Ritchie, 5 Westdyke Avenue, Elrick, Westhill, AB32 6QX ("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 payment of the sum of £1,200 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011(the Regulations) should be made.

BACKGROUND:
The Applicants made an application under Rule 103 of the Rules of Procedure which was received by the Tribunal on 4 June 2019. The application was for a payment under Regulation 10 (a) of the Regulations of the sum of £2,400 representing 3 times the deposit value of £800.

The Applicants submitted to the Tribunal tenancy agreement for the Private Residential Tenancy commencing on 1 March 2018, emails between the Applicants and the Respondent regarding the end of the tenancy on 29 June 2019 and subsequently also lodged confirmation from Aberdein Considine dated 27 February 2019 that the deposit had been paid by the Applicants, emails of the three tenancy deposit schemes that no deposit had been lodged at the time the Applicants made enquiries on 18 June 2019, the correspondence regarding the dispute resolution process from Safe Deposit Scotland dated 16 July 2019 and email correspondence dated 30 May 2019 between the Applicants and Aberdeen City Council.
The Respondent lodged an email stating the deposit was paid to Safe Deposit Scotland with the DAN number DAN487861, various photographs he states shows

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the state of the property when it was vacated, various text messages between the Applicants and the Respondent dated 1 July 2019, cleaning quote by First Class Cleaning and copy letter from Scottish Gas.

A Case Management Discussion (CMD) was fixed for 19 August 2019.

Both parties had been advised in the notification for the Case Management Discussion that the Tribunal may make a decision at that stage. The Tribunal was satisfied that due notice had been given to the Respondents of the CMD in terms of Rule 17 (2) of the Tribunal Rules of Procedure and that the Respondents were aware that the Tribunal could make a decision at the CMD and in absence of the Respondents in terms of Rule 18 of the Rules of Procedure.

The Case Management Discussion:

The Applicants both attended with Scott Henry as supporter, the Respondent attended and was represented by his partner Shiree Murray.

The legal member explained the purpose of the CMD. The legal member also explained the content of Regulations 3, 9, 10 and 42 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 and advised that this was the issue to be decided in terms of an application of this nature. The legal member explained that the demand for repayment of the deposit and the apparent dispute over the deposit which is currently subject to the Safe Deposit Scotland dispute resolution mechanism would be a separate matter and could not be dealt with in an application under Rule 103, which dealt with the matter of compliance of the landlord with The Tenancy Deposit Schemes (Scotland) Regulations 2011.

The Applicants explained that they had moved in in March 2018 and had paid the deposit of £800 to Aberdein Considine. When they were in the process of preparing to move out they made enquiries with all three deposit scheme providers and were advised no deposit was held in any of the schemes. On 1 July 2019 they asked the Respondent explicitly for information regarding the deposit and he told them this was none of their business. They then received notification from Safe Deposit Scotland on 4 July 2019 by email that there had been a deposit paid into the scheme an advising them of how to access the DAN number. This email was shown to the legal member and the Respondent and his representative at the CMD. The Applicants argued that the Respondent was an experienced landlord and that when the deposit was paid by them the person they dealt with in Aberdein Considine had told them he would also advise the Respondent of his duties when the deposit was paid over to the Respondent. They stated the Respondent has more than one property and is an experienced landlord who knew about the duty to lodge the deposit and had still not done so. He also had not provided them with the relevant information once the deposit had actually been lodged. Both Applicants confirmed that there had been arguments over the tenancy prior to them moving out.

The Respondent stated that he has two properties and has been renting them out for about 10 years. He is dealing with the financial side of rent etc himself and the deposit was paid from Aberdein Considine to him into his normal account. He has no separate account for the properties. He stated it was a genuine oversight on his part

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and he had always paid other deposits into the Safe Deposit Scotland scheme although the tenancy agreement does not specifically specify which scheme it will be paid into. He had no mechanism in place to check if after a tenancy commenced the deposit had been paid and would simply check about once a month if the rent was coming in. He stated that at the time the tenancy was coming to an end there were various disputes over items. Ms Murray then stated she had gone online to check about the deposit with Safe Deposit Scotland and had realised that the deposit had not been paid. The Respondent stated that he then lodged the deposit as soon as this had been identified. He was unable to give an exact date but was sure that it was in the week leading up to 28 June 2019 when the tenancy ended. He admitted that the deposit was lodged late as an oversight and that he should have realised this. He was aware of the duty to lodge the deposit. There was really no excuse for not having done so other than that it was an oversight. He also stated that even after the deposit had been lodged he did not provide the Applicants with the required information because by that time the parties were already engaged in an argument over the repayment of the deposit and he thought the scheme administrators would let the Applicants know.

The legal test:

In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) 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
(a) 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, or
(b) in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme."

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Findings in fact:

1. The Applicants and the Respondent entered into a Private Residential Tenancy Agreement for the property on 1 March 2018.
2. The Applicants paid a deposit of £800 to the landlord at the start of the tenancy period.
3. The tenancy ended on 28 June 2019.
4. The deposit was not lodged with an approved scheme until the week leading up to 28 June 2019.
5. The Respondent has two rental properties and has been acting as a landlord for approximately 10 years..
6. The Applicants did not receive any communication advising them of the matters stated in Regulation 42 (2) of the Regulations apart from the intended Scheme administrator.
7. The tenancy agreement states in clause 11 "The landlord must lodge any deposit they receive with a tenancy deposit scheme within 30 days of the start of the tenancy".
8. The landlord was aware of the deposit having been paid over and the duty to lodge the deposit.
9. He had done this for other tenancies previously.
10. He did not lodge the deposit in this case due to an oversight.
11. He did lodge it when this came to light at the end of the tenancy period.
12. The deposit is currently subject to the dispute resolution scheme of Safe Deposit Scotland.

Reasons for Decision:

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.

The Respondent admitted the breach a the CMD. The deposit was not paid over to an approved scheme within 30 working days of the commencement of the tenancy agreement and the information stated in Regulation 42 (2) of the Regulations was not provided by the Respondents to the Applicant. The Respondent did not even provide the information about the account number for the deposit on request by the Applicants.

Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the rules.

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.

Whilst the Tribunal notes the request in the written submissions of the Applicants for payment of the maximum of three times the deposit amount, the Tribunal does not agree that the case warrants the maximum remedy.

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The Tribunal considers that the discretion of the Tribunal requires to be exercised in the manner set out in the case Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015 by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.

The Tribunal took into account the length of time the deposit was unprotected, which was for almost the entire time of the tenancy period, the fact that the landlord has another property and had experience as a landlord and the fact that the landlord made no efforts to provide the information required and provided as an explanation as to why the deposit was not protected immediately on receipt of the deposit payment that this was an oversight and that when the deposit was lodged he and the Applicants were already in an argument and thus he did not write to them with the required details as this would be done by the administrator.

On the other hand the Tribunal also took into account that the Respondent did ultimately lodge the deposit, albeit late, unprompted when he discovered the oversight in the last week of the tenancy period. The Tribunal took into account that it believed the Respondent had not set out to not comply deliberately with the Regulations but that this had been an oversight. The Tribunal further considered that in this case the matter of the return of the deposit is still pending and that ultimately the purpose of the Regulations, namely to provide the tenants access to the dispute resolution service and to have the deposit held by a third party until any dispute over the repayment of the deposit is resolved had been achieved.

This was not a case of a flagrant and repeated disregard of the Regulations and thus not at the top end of the sanction open to the Tribunal but also not a minor delay by an inexperienced landlord unaware of their obligations and thus not at the low end of the sanction.

In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £1,200, which constitutes a meaningful sanction for non-compliance of the Regulations at the level of 1 and 1/2 times the deposit sum of £800.

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Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £1,200 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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

19.8.19

Legal Member/Chair **Date**