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 on an application made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/1840

Re: Property at 0/1, 15 Havelock Street, Glasgow, G11 5JB ("the Property")

Parties:

Mr Jamie Young and Mrs Jennifer Young, 0/1, 324 Crow Road, Glasgow, G11 7HS ("the Applicant")

Ms Lucy Roy, 69 Hughenden Lane, Glasgow, G12 9XN ("the Respondent")

Tribunal Members:

George Clark (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted and made an Order for Payment by the Respondent to the Applicant of the sum of One Thousand Seven Hundred and Ninety Pounds (£1,790).

Background

By application, received by the Tribunal on 14 June 2019, the Applicants sought an Order for Payment in respect of the failure of the Respondent to lodge a tenancy deposit in an approved tenancy deposit scheme, as required by Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

The application was accompanied by a copy of a Private Residential Tenancy Agreement between the Parties commencing on 1 December 2017 at a monthly rent of £895, with a deposit of £895, and copies of e-mail confirmations from SafeDeposits Scotland (20 May 2019), LPS (22 May 2019) and My Deposits Scotland (12 May 2019) that they did not hold the tenancy deposit. The Applicants also provided the Tribunal with copies of e-mails dated 22 May 2019 and 31 May 2019 from the Applicants, advising the Respondent that the Applicants would settle for return of the deposit itself and an e-mail of 21 May 2019 from the Respondent's letting agents, Vanilla Square Letting & Sales, advising the Applicants that, if the

deposit was not lodged, it was an error on their part and, if it was acceptable to the Applicants, they would return it directly.

On 16 July 2019, the Tribunal advised the parties of the date, time and venue for a Case Management Discussion and the Respondent was invited to make written representations by 5 August 2109.

On 1 August 2019, the Tribunal received written representations from the Respondent's solicitor, Bruce the Lawyers, Motherwell. They stated that the Respondent had at no time held or intromitted with the deposit money. It had been paid to the letting agents and had never been received by the Respondent, who believed the deposit had been lodged in a tenancy deposit scheme as specified in the tenancy agreement. The Respondent had been entirely unaware that the deposit had not been returned to the Applicants on the termination of the tenancy in May 2019, until the application was served on the Respondent on 18 July 2019. The Respondent had immediately asked the letting agents to return the deposit money to the Applicants and had been assured by them that they had made an error and accepted liability for this. A copy e-mail from the letting agents to the Respondent dated 18 July 2019 confirmed that they saw the liability as theirs, and the Respondent was of the view that the Tribunal should direct that the deposit funds be returned to the Applicant by the letting agents.

On 7 August 2019, the Respondent e-mailed the Tribunal to advise that the deposit had now been returned in full to the Applicants.

A Case Management Discussion took place on 23 August 2019, when the matter was adjourned to a full Hearing. It was noted that it was agreed between the Parties that the deposit had never been paid into an approved deposit scheme, that the deposit had been paid to the letting agents for the landlord at the start of the tenancy, that the tenancy started on 1 December 2017 and ended on 10 May 2019 and that the deposit had been returned to the Applicants on 5 August 2019 by the Respondent's new letting agents. There appeared to be the potential for discussion between the Parties to resolve the dispute, but it was agreed that a Hearing would be arranged to preserve the position of the Applicants and to prevent further delay.

The Hearing

A Hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow on the afternoon of 2 October 2019. The Applicants were present. The Respondent was represented by Mr Ian Scott of Bruce the Lawyers, Motherwell.

The Parties presented a Joint Minute in which they accepted that the facts set out in the application were accurate, and that, with one exception, the facts stated in the Respondent's written representations were accepted. The summary of evidence set out in the Note of the Case Management Discussion of 23 August was accurate and the only outstanding issue between the Parties was *quantum*. The Respondent's solicitor had lodged with the Tribunal on 25 September copies of e-mail exchanges between him and the Applicants over a number of weeks which had been an attempt by the Parties to agree an amount that the Respondent was willing to pay and the Applicants were willing to accept to settle the matter. These negotiations had, however, not been successful.

The Applicants told the Tribunal that the breach had been serious, and they were looking for three times the amount of the deposit by way of sanction. Their deposit had not been lodged over a period of some 18 months and it had taken a further three months to recover it at the end of the tenancy and this at the time they needed it most. Initially, they would have accepted return of the deposit but the delay in

refunding it and the resulting financial hardship had caused their view to change. The Respondent had claimed ignorance of the Regulations, but she had recognised her inexperience by engaging letting agents. She had done nothing to contact the Applicants during the period of three weeks from the date she received service of the application to the Tribunal.

The Applicants felt that the amount to be awarded by the Tribunal should be at the higher end and referred the Tribunal to two previous Decisions of the Tribunal as being in point.

In *Hastings v Haas* (FTS/HPC/PR/18/1896), a case in which the landlord had taken over the letting from his previous agents, the landlord had said that she was unaware of the 2011 Regulations, but the Tribunal had stated that it was incumbent on landlords to make themselves aware of all legal duties they have towards tenants before contracting with them. The landlord had failed to take any action to settle the matter even after she became aware of her breach of the Regulations and the Tribunal had decided that it was fair, just and reasonable to require her to make a payment of three times the deposit.

In *Kinney v Rodger* (FTS/HPC/PR/19/2036), the Tribunal had decided that a sum equivalent to 2.5 times the deposit should be paid. In that case, the landlord had forgotten to place the deposit with an approved scheme, and it had been unprotected for more than 2.5 years. He had, however, placed it in a scheme when he discovered his mistake.

Mr Scott, for the Respondent, told the Tribunal that the facts were not contested, but the blame lay solely with the letting agents, who had retained the deposit. The Respondent had managed to get it repaid to the Applicants, but the problem had not been of her making. He referred the Tribunal to the case of *Jenson v Fappiano* (25 January 2015 (B646/14), regarding failure to lodge a tenancy deposit in an approved scheme. In that case, the landlord had been a "amateur" in the sense that he was not a seasoned or professional landlord. This had been his first letting experience. He was not a serial non-complier and his failure had been remedied halfway through the tenancy when he had received legal advice and had then lodged the deposit. He had also told the sheriff that he had been thoroughly chastened by the experience. Ignorance of the Regulations was, however, no excuse. The sanction in that case had been one-third of the deposit.

In *Osman and Owczarska v Cairney* (FTS/HPC/PR/19/1591), the Respondent had been a landlord for 13 years. She had changed solicitors prior to the commencement of the tenancy and had mistakenly assumed the lodging of the deposit was the responsibility of her new solicitors who had, in fact, paid the deposit to her rather than lodging it in a tenancy deposit scheme. The Tribunal considered it a serious matter but accepted that the landlord had made a genuine mistake in failing to clarify her responsibilities with her new solicitors. She had not deliberately failed to lodge the deposit. The sanction imposed by the Tribunal was one times the deposit.

The outcome had been the same in *Ross v Bishop* (FTS/HPC/PR/19/1630), where the Respondent had not thought that by imposing a rolling two-month payment of rent in advance he was holding a tenant's deposit. The Tribunal had also made an Order for Payment of one times the amount of the deposit in *Miller v Spence* (FTS/HPC/PR/19/1707), a case in which the Respondent had said he had been unaware of the requirement to lodge the deposit. He had only ever owned one property as a landlord and the Applicant was his only tenant. The Tribunal had recognised that he had not wilfully ignored his legal obligations and that he no longer owned any rental properties.

The final Decision referred to by Mr Scott was *Masson v Witherington* (FTS/HPC/PR/19/1398), where the Tribunal's Order was for payment of one times the amount of the deposit (£2,325), this sum having been offered by the Respondent and accepted by the Applicant.
Mr Scott told the Tribunal that, in the present case, the letting agents had accepted that it was entirely their fault, but they had not responded to the Respondent's enquiries either. In summary, the Applicants had, in effect, had their money stolen and the Respondent had got it back for them. The actual loss that might otherwise have been sustained was £895. It was important that the Tribunal's sanction should be proportionate.
The Applicants reminded the Tribunal that the Respondent constantly blamed the letting agents, but in terms of the 2011 Regulations, responsibility for compliance lay with the Respondent.

Reasons for Decision
The Tribunal noted that the Parties are agreed as to the facts of this case. The Respondent accepted that there had been a failure to comply with the 2011 Regulations and the only matter for the Tribunal to determine was the level of sanction to be applied under Regulation 10 of those Regulations.
The Tribunal accepted that there had been no wilful failure on the part of the Respondent to comply, nor was there a refusal to remedy the situation, but the Applicants' funds had been at risk for a lengthy period. There had been no suggestion from the Respondent that she would have sought to retain any part of the deposit, but there had been a further delay of three months from the date the tenancy ended to the date that the deposit was finally refunded. The Tribunal had heard that this had caused the Applicants financial difficulty.
The Tribunal acknowledged that the Respondent had e-mailed the letting agents as soon as she became aware of the failure to lodge the deposit. The Productions before the Tribunal included her e-mail to them of 18 July 2019 and a further e-mail sent on the following morning. Nevertheless, the deposit was not repaid until 7 August 2019.
The Tribunal considered all the previous Decisions to which it had been referred in the course of the Hearing.
In *Hastings*, there was evidence that the Respondent had failed to take any action even after she became aware of her breach and in *Kinney*, whilst the landlord had lodged the deposit whenever the failure was discovered, the tenant's funds had been at risk for 2.5 years. In *Osman and Owczarska*, the tenant's funds had been exposed for a much shorter period (6 months) than in the present case and had been refunded within 3 days of the tenancy coming to an end. In *Ross*, the period of the tenancy had been just under 6 months, so the deposit had been at risk for some 5 months. In *Miller*, the Respondent had been unaware of the requirements of the 2011 Regulations and, whilst ignorance of the Regulations can never be regarded as an excuse for failing to observe them, the Tribunal had noted that he had not acted wilfully and it also placed emphasis on the fact that he had since sold the property and was no longer a landlord.
In the *Mosson* case, there had been an acknowledgement of the failure and an offer had been made which the Applicant had been prepared to accept. Finally, in *Jenson*, the funds had only been at risk for 6 months and the landlord had taken steps to lodge the deposit when he discovered his mistake and he was clearly contrite.

The cases cited illustrate just how much the factual positions vary from case to case. Regulation 10 of the 2011 Regulations obliges the Tribunal to make an Order for Payment, but in determining the sanction in any particular case, the Tribunal must have regard to the whole facts and circumstances in arriving at a decision that is fair, just and proportionate. Sheriff Welsh in the *Jenson* case had set out a very helpful analysis of the factors to be considered in arriving at a decision regarding failure to lodge a tenancy deposit in an approved scheme. He had concluded that the judicial discretion must be exercised in such a way as to impose a fair, proportionate and just sanction in the circumstances of the case.

In the present case, the continued reluctance of the Respondent to acknowledge her own responsibilities and her insistence on blaming the letting agents was a factor that the Tribunal had to take into account. No evidence had been led of any steps she had taken to badger the letting agents after her e-mails of 18 and 19 July 2019. There was no evidence that she had done anything between 19 July and 5 August. Mr Scott had confirmed there had been no contact after the two initial e-mails. This had prolonged the Applicants' wait for return of the deposit, which had been at risk for an overall period of 20 months.

Having regard to all the circumstances of the case, the evidence presented and the decisions of the Tribunal in previous cases, the Tribunal concluded that a fair, proportionate and just sanction was £1.790, two times the amount of the deposit.

Decision

The Tribunal determined that the application should be granted and made an Order for Payment by the Respondent to the Applicant of the sum of One Thousand Seven Hundred and Ninety Pounds (£1,790).

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.

G. Clark

2 October 2019

Legal Member/Chair **Date**