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 Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (Regulations)

Chamber Ref: FTS/HPC/PR/19/2692

Re: Property at 105/7 Causewayside, Edinburgh, EH9 1QG ("the Property")

Parties:

Dr Ivayla Ivanova, Mr Martin Asenov, 3F2, 104 Spring Gardens, Edinburgh, EH8 8EY ("the Applicant")

Mrs Julie Robertson, C/o Grant Property Solutions Ltd, 14 Coates Crescent, Edinburgh, EH3 7AF ("the Respondent")

Tribunal Members:

Alan Strain (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent pay the sum of £1,700 to the Applicants

Background

This is an application under Regulation 9 of the Regulations and Rule 103 of ***The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017*** **(Rules)** in respect of an alleged failure to protect a tenancy deposit.

The Tribunal had regard to the following documents:

1. Application received 28 August 2019;
2. Private Residential Tenancy Agreement (**PRTA**) commencing 23 July 2018;
3. Receipt for payment of advance rental of £1,700;
4. Safe Deposit Scotland (**SDS**) Certificate dated 16 August 2018;
5. Written Submissions from Respondents agents dated 22 November 2019;
6. Written Representations from Respondent dated 28 January 2020.

[redacted]

The case had called for a Case Management Discussion **(CMD)** at which the following facts were agreed:

1. The Parties entered in to the PRTA commencing 23 July 2018;
2. The Applicants paid a deposit of £1050 which was protected with SDS as of 16 August 2018;
3. The Applicants paid the sum of £1,700 on 8 July 2018 in respect of a non-guarantor payment (**NGP**);
4. The PRTA ended on 25 July 2019;
5. The Applicants received the sum of £430.82 from the Respondent following termination of the PRTA in respect of the NGP and the balance was used by agreement for the final rent period;
6. The NGP was not protected in an approved scheme but was kept by the Respondent's agents.

The issues between the Parties were identified as:

1. Whether or not the NGP constituted a tenancy deposit under section 120 of the Housing (Scotland) Act 2006;
2. If it did, what sanction (if any) was just, fair and proportionate in the circumstances.

Hearing

The Applicants appeared in person and represented themselves. The Respondent did not appear but was represented by Ms Simpson and Andrew Hutton, Director of Property Management, both of Grant Property.

The Tribunal confirmed with the Parties that the above facts were agreed and what the disputed issues were.

The Tribunal then heard from the parties.

Mr Hutton confirmed that the Respondent's position was that the NGP was 2 months' payment in lieu of rent and not a deposit. He referred to their Written Submissions which contained the terms and conditions and asserted that the Applicants agreed to them when they sought to lease the Property from the Respondent through them. The terms and conditions state that the NGP *"is an additional 2 months' rent which will be used for your final 2 months stay in the Property* ***provided there are no rent arrears****."* (Emphasis added by Tribunal).

The terms and conditions do not form part of the PRTA and were accepted by the Applicants through the Respondent's agent's online portal.

Mr Hutton confirmed that the NGP was paid in to the Respondent's agent's client account and held there until the end of the tenancy. It was not an interest bearing account and in the event of insolvency the funds were protected.

He also confirmed that in the event of there being any arrears of rent then the NGP would be utilised towards the arrears before the last 2 month's rent. The use of the

NGP was conditional upon there being no arrears of rent. He referred to the NGP as "**additional security**". The Tribunal checked this position with him to confirm his understanding of "additional security".

The Applicants position was that they did not know what the money was for and how it would be used. They had not been provided with a proper receipt or any terms and conditions governing the holding and return of the NGP. They accepted that the NGP had been utilised by agreement at the end of the tenancy.

The Respondent's agent's submitted that the NGP was a practice they had used for 12 years and they managed over 1,600 properties in the UK. It was not a tenancy deposit.

The Respondent had relied upon their advice in this matter, was an experienced Landlord who had been with them since 2013 and for whom they managed 5 properties.

Decision and Reasons

The Tribunal made the following additional findings in fact:

1. The NGP was kept in the Respondent's agent's Client Account, was non-interest bearing but protected from insolvency;
2. The Respondent had acted on her agent's advice with regard to the NGP;
3. The Respondent was an experienced Landlord, aware of the requirement to protect tenancy deposits and had 5 properties managed by her agents since 2013;
4. The Respondent could have utilised the NGP towards any rent arrears instead of the last 2 month's rent;
5. Use of the NGP for payment of the last 2 month's rent was conditional upon there being no rent arrears;
6. The NGP was additional security for the Respondent.

The Tribunal referred the Parties to the definition of *"tenancy deposit"* in section 120 of the **Housing (Scotland) Act 2006** the essence of which is that it is a sum of money held as security for performance of the tenants' obligations arising under or in connection with the tenancy.

The Tribunal also referred to the case of ***Cordiner v Al-Shaibany 2015 SC DUND 51***. In that case the Sheriff found that a payment in respect of the first and last month's rent of a Property did not constitute a tenancy deposit due to the fact it was a payment required under the lease and that operated to extinguish the obligation to pay the first and the last month's rent. There was no evidence to suggest the money was held for any other purpose or as security for performance of obligations.

The Tribunal consider that the circumstances of ***Cordiner*** are distinct from the present in that the NGP is taken in respect of the last 2 months' rent, the Respondent has the discretion not to allow the NGP to be used for the last 2 months' rent in the event of arrears and the obligation to make the NGP is not contained within the PRTA. Further, a deposit was taken and protected in addition to the NGP

which is also distinct from ***Cordiner***. It did not appear to the Tribunal that it could be said the obligation to pay the last 2 months' rent had been extinguished. Accordingly it appeared that the NGP was a tenancy deposit as security for payment of rent.

The Tribunal found that the NGP was in fact a tenancy deposit which had not been protected in breach of the regulations. Having made that finding it then fell to the Tribunal to determine what award should be made in respect of the breach. In so doing the Tribunal referred to and adopted the approach of the court in ***Russell-Smith and others v Uchegbu [2016] SC EDIN 64***. The Tribunal considered what was a fair, proportionate and just sanction in the circumstances of the case always having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend upon its own facts and in the end of the day the exercise by the Tribunal of its discretion is a balancing exercise.

The Tribunal weighed all the factors and found it be of significance that the NGP was unprotected for the duration of the tenancy; the Respondent was an experienced landlord with knowledge of the Regulations and had acted on the advice of her agents. The NGP had ultimately been utilised with the agreement of all Parties so there was no prejudice to the Applicants.

In the circumstances the Tribunal considered the breach to be at the lower end of the scale and awarded the sum of £1,700.

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.

[redacted]

30 January 2020

Legal Member/Chair **Date**