Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/18/0619

Re: Property at 15 St Thomas, Monymusk, AB51 7HQ ("the Property")

Parties:

Mrs Kathleen Lawson, 15 St Thomas, Monymusk, AB51 7HQ ("the Applicant")

Mr Graham Rennie, 15 Westdyke Gardens, Westhill, Aberdeen, AB32 6QS ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent, having breached Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, should be ordered to make payment to the Applicant in the sum of ONE THOUSAND SEVEN HUNDRED AND TWENTY FIVE (£1,725) STERLING, and that the Applicant's motion for expenses should be refused.

STATEMENT OF REASONS

1. This application seeks payment under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") of a sum not exceeding three times a tenancy deposit due to the Respondent's failure to pay the deposit to the administrator of an approved tenancy deposit within 30 business days of the beginning of the tenancy in accordance with Regulation 3 of the Regulations.

2. This case called before me for a Case Management Discussion on 15 May 2018 at 2.00pm. The Applicant was personally present, and presented her own case. The Respondent was represented by Ms Davidson, solicitor.

Agreed Facts

3. The following facts were agreed by the parties at the CMD:-

    a. The Applicant and the Respondent were parties to a tenancy agreement, being tenant and landlord respectively.
    b. The tenancy agreement commenced on 17 March 2017.
    c. The tenancy agreement terminated on 16 March 2018.
    d. A tenancy deposit of £1,150 was paid by the Applicant to the Respondent on 22 February 2017.
    e. The Respondent paid the tenant deposit into an approved scheme on 15 March 2018, being the penultimate day of the let and over a year after the deposit had been paid.
    f. The let property had been left in good condition by the Applicant at the expiry of the tenancy agreement, warranting the full return of the deposit.
    g. The tenancy deposit was repaid in full.
    h. The Respondent had not complied with his obligations under Regulation 3 of the Regulations to (i) pay the deposit to the administrator of an approved scheme, or (ii) provide information about the approved scheme to the tenant, within the period required by Regulation 3.
    i. The information required to be given by the Respondent to the Applicant under and in terms of Regulation 3 was given by MyDeposit Scotland following payment of the deposit to it.

Submissions

4. The Applicant confirmed that her application sought payment of a sum not exceeding three times the tenancy deposit, following upon the Respondent's breach of Regulation 3.

5. Ahead of the CMD, the Respondent had helpfully lodged written representations. He conceded that he was in breach of Regulation 3. It was submitted that he was not a professional landlord, by which Ms Davidson explained was meant that being a landlord was not his business. He had relied on advice given to him by his professional advisors, Parkhill Properties. His breach had not been a deliberate flouting of the regulations, but rather had been born of inadvertence, and in particular his ignorance of the time allowed for paying a deposit into an approved scheme. He was not a "hands on" landlord, in that he relied on his agents to manage the tenancy whilst he travelled back and forth to London for work. The deposit had ultimately been paid into a scheme, and the full deposit was repaid to the tenant. It was submitted that there had been no prejudice to the Applicant.

6. In response, the Applicant took exception to the written representations. Firstly, she advised that the Respondent had told her that he had experience of letting properties and, in any event, had the benefit of a letting agent.

Secondly, she took issue with the suggestion that the return of the tenancy deposit in full was a "gesture of goodwill", and advised that its return was due to the good condition that the property had been left in. Ms Davidson conceded that point. Thirdly, she took issue with the perceived suggestion in the written representation that she was somehow responsible for the Respondent's failure, by writing to an allegedly incorrect address. Ms Davidson helpfully clarified that what was actually being offered was an explanation as to why the Respondent had not acted earlier, and was not intended to imply that the Applicant was at fault. I had read the written representation in the way that Ms Davidson had suggested it should be read, and so I accepted that was the purpose. It would, in any event, have been folly for the Respondent to blame his failure to comply on the Applicant's failure to advise him of his responsibilities.

Decision

7. In terms of Regulation 10 of the Regulations, where the Tribunal is satisfied on application by the tenant that a landlord is in breach of its duties under Regulation 3, it must order that the landlord pay to the tenant a sum not exceeding three times the tenancy deposit. The Regulation provides for strict liability where a breach had occurred. The payment is sanction for noncompliance.

8. The Respondent accepts that he is in breach. Accordingly, I must make an order for payment. The only extant question is: what should the sanction be?

9. In making my decision, I had regard to the comments of Sheriff Welsh in *Jenson v Fappiano*, 2015 G.W.D. 4-89, at paragraph 11. In determining sanction in these cases, the judge is exercising judicial discretion, which he characterised as follows:-

   "1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment.
   2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.
   3. A decision based on judicial discretion must be fair and just."

10. In considering this matter, I was willing to accept that the Respondent was not a professional landlord, and had been ignorant of his obligations. I was also prepared to accept that his failure had not been a deliberate flouting of the Regulations.

11. However, I had considerable sympathy with the Applicant's submission that it was the Respondent's responsibility to be aware of his obligations, and that was particularly so where he had a professional agent instructed. Ignorance of the law is no defence.

12. The deposit in this case had been unprotected for almost the entirety of the period of let. It had been held by the landlord in an unprotected state for a period in excess of a year.

13. In addition, I consider that the sanction for these cases is not only a punishment for noncompliance; it is also a deterrent for future noncompliance by this and other landlords.

14. In the circumstances, and having regard to the above, I determined that an appropriate sanction was a sum equal to one and a half times the tenancy deposit. Accordingly, I will issue an order that the Respondent make payment to the Applicant in the sum of £1,725.

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.

ANDREW UPTON

15 MAY 2018

Legal Member/Chair **Date**