Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/19/0767

Re: Property at 49 Donmouth Court, Bridge of Don, Aberdeen, AB23 8FY ("the Property")

Parties:

Mr Jacob Jones, Flat H, 3 Rosebank Gardens, Aberdeen, AB11 6WH ("the Applicant")

Ms Kirsty McIntyre, 5 North Beach Road, Balmedie, Aberdeen, AB23 8XG ("the Respondent")

Tribunal Members:

Ewan Miller (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent had failed to comply with the duty imposed by Regulations 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and that an Order should be granted against the Respondent for payment to the Applicant of the sum of SEVEN HUNDRED AND FORTY SEVEN POUNDS and 50p (£747.50) Sterling

Background

The Applicant and his partner had been tenants of the Respondent in a property at 49 Donmouth Court, Bridge of Don, Aberdeen ("the Property"). The tenancy had come to an end in February 2019. Issues had arisen towards the end of the tenancy as to the location of the deposit and whether it had been properly lodged in one of the approved tenancy deposit schemes as required by the Tenancy Deposit Schemes (Scotland) Regulations 2011.

The Applicant had applied to the Tribunal as a result of these issues, seeking a determination on the matter.

Case Management Discussion ("CMD")

A CMD took place on 30 May 2019 at the Credo Centre, John Street, Aberdeen at 10am. The Applicant was present and represented himself. The Respondent worked abroad but joined the CMD by telephone conferencing and represented herself.

Both parties had been notified in the paperwork provide to them by the Tribunal that the matter may be decided at a CMD. There was no dispute that the funds had not been placed in a deposit scheme within the required timescale. There were no material points of law to be addressed and accordingly the Legal Member was satisfied that it was appropriate to make a decision at the CMD.

Findings in Fact

The Tribunal found the following facts to be established:-

- The Respondent was the owner of the Property;
- The Respondent had let the Property to Applicant and his partner on 5 April 2017;
- The lease came to an end on or around 28 February 2019;
- The lease stated that a deposit of £495 was payable, although through some error £500 was actually paid;
- The Applicant had paid the deposit to the Respondent's agent who, in turn, had sent it on to the Respondent;
- The Respondent had not put the deposit of £495 in to an approved scheme until 1 March 2019, being a date after the tenancy had terminated;
- The deposit had now been repaid in full to the Applicant via the scheme

Reasons for Decision

There was no dispute by the Respondent that the deposit had been placed in to an approved scheme well after the statutory 30 day limit. Accordingly, there was no question of there not being a breach of the obligation under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to place a deposit in to an approved scheme. The principal question before the Tribunal was, therefore, the level of penalty that should be imposed upon the Respondent. The Tribunal has the power to award an amount up to 3 times the deposit.

The Tribunal was guided in reaching a decision on the level of penalty by the Sheriff Court case of Jenson v Fappiano, 28 January 2015. The Sheriff in that case indicated that in reaching a decision as to the level of penalty, it was not the case that the maximum penalty should be awarded automatically. Rather there was an obligation to act in a fair manner and be proportionate.

In this case there were a number of factors both in favour of and against the Respondent. Against the Respondent were the facts that:-

- The Respondent had used the scheme before and was aware of the obligation to place the money in to the scheme;

- The Applicant had raised the question of the whereabouts of the deposit in January but it had taken until 1 March for it to be placed in a scheme;
- Even if there had been, as the Respondent suggested, an IT issue with her email that meant that she had thought she had placed the money in to a scheme, she should have noted that the money had not left her account;
- The money had been unprotected for the whole period of the tenancy.

Factors in favour of the Applicant were:-

- She did eventually place the money in to a scheme thus giving the Applicant the benefit of protecting the deposit and allowing them to utilise the adjudication scheme provided by the scheme provider;
- The deposit had been returned to the Applicant in full;
- The Respondent worked abroad and managed the Property remotely, which had contributed to the error on her part;
- The Respondent, during the hearing, was open and honest about her failing, was contrite and apologised to the Applicant.

The Tribunal considered and weighed all these factors. The Tribunal took the view that the "culpability" of the Respondent fell in the middle of the scale. She should have dealt with this sooner and there had been a long period when the deposit was unprotected. However, it had, ultimately, been placed on deposit and she accepted her failings.

The Tribunal took the view that the correct deposit amount was £495 as that was the amount specified in the lease. However, the Applicant had paid £500 and only £495 had been repaid by the scheme (the Respondent having put the £495 specified in the lease in to the scheme). The parties both accepted there had been an administrative error and that there was a £5 shortfall due to the Applicant.

The maximum sum that could be awarded was £1485 and the Tribunal took the view that an award at 50% was appropriate - £742.50. As both parties had acknowledged the error in relation to the £5 and the Respondent had confirmed her willingness to repay it, it was agreed that £5 would be added to the payment order to tidy up the administrative error. On that basis the Tribunal was satisfied that an order for £747.50 was the fair and proportionate penalty to impose on the Respondent.

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.

Ewan Miller

Legal Member/Chair

30/5/19

Date