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 Section in an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 Chamber Ref: FTS/HPC/PR/18/1578

Re: Property at Centre Top Flat, 2/11 Wardlaw Terrace, Edinburgh, EH11 1UH ("the Property")

Parties:

Miss Catherine Sargent and Mr Luke McColl, both residing at 13/5 Wheatfield Street, Edinburgh, EH11 2PB ("the Applicant")

Mrs Lee Cairns, 53 Caroline Terrace, Edinburgh, EH12 8QX ("the Respondent")

Tribunal Members:

Lesley Johnston (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted and compensation paid in the sum of £650.

Background

Introduction

The Applicants, Catherine Sargent and Luke McColl ('the Applicants') apply to this Tribunal in terms of Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the Regulations'). The application is made to the Tribunal in terms of rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules for Procedure) Amendment Regulations 2017 ('the Rules').

The Applicants seek an Order for Payment from the Tribunal in terms of regulation 10 in respect that the Respondent failed to pay the tenancy deposit into an approved tenancy deposit scheme.

The Case Management Discussion

The case called for a Case Management Discussion on 26 September 2018 at 2pm.

Catherine Sargent was present at the hearing. She was represented at the hearing by her sister, Pamela Sargent. Her representative's details were provided to the Tribunal in advance of the hearing. On the day of the hearing, Pamela Sargent emailed the Tribunal to advise that while she is qualified as a solicitor, she was not instructed as such by the Applicants.

I was content to allow Pamela Sargent to represent the Applicants during the hearing, there being no objection from the Respondent.

Ms Cairns was personally present at the hearing. She was not represented.

The Applicants presented the following documents with their application, namely:

1. The Short Assured Tenancy Agreement dated 17 September 2017
2. The AT5 Notice dated 17 September 2017
3. Photographs
4. Email dated 19 September 2017 from Catherine Sargent to Lee Cairns at 22:12
5. Email dated 19 September 2017 from Lee Cairns at 22:45
6. Email chain from Luke McColl to Lee Cairns from 13 April 2018 at 9.05am to 17 April 2018 at 12:08.

Submissions by the Applicants

The Applicants submitted that the tenancy deposit was paid to the Respondent on 18 September 2017. The Applicants accepted that the rent and deposit had been paid a day late. The reasons for the delay in payment are not relevant to this application.

The Applicants submitted that the Respondent did not advise them of the tenancy deposit scheme to which their deposit had been paid.

The tenancy ended on 12 April 2017, on which date the Applicants returned the keys to the Landlord.

The deposit was repaid by the Respondent to the Applicants on 17 April 2018.

The Applicants asked the Respondent (by email dated 17 April 2018) to confirm the name of the scheme to which the deposit had been paid.

The Applicants therefore made enquiries with the approved tenancy deposit schemes who advised that there was no record of having received a tenancy deposit in respect of the tenancy.

The Applicants therefore asked the Tribunal to grant compensation in terms of Regulation 10.

Submissions by the Respondent

The Respondent presented oral as well as written submissions to the Tribunal.

The Respondent accepted that she was in breach of Regulation 3. She advised that:

1. She received the tenancy deposit of £650 on 18 April 2018 (albeit a day late);
2. She did not pay the tenancy deposit into an approved scheme
3. She did not give the details of the scheme or scheme administrator to the Applicants
4. The tenancy deposit was held, for the duration of the tenancy, in a bank account rather than an approved scheme

In mitigation, the Respondent submitted that while she knew that she was required to pay the deposit into an approved scheme at the outset of the tenancy, her failure to do so was due to administrative oversight.

At the time the deposit was paid to her, the Respondent thought that her husband was dealing with paying the deposit into an approved scheme. In addition, she felt stressed and distracted by the fact that the deposit was paid late, although she accepted that it was only one day late.

The Respondent advised that the tenants did not make enquiries about whether the deposit had been paid into a tenancy deposit scheme until the end of the tenancy.

At the end of the tenancy, the Respondent realised that the funds had not been deposited with a scheme. It turned out that while she thought her husband was dealing with lodging the funds with a scheme, he had thought she was dealing with the scheme. In the result, the funds were never paid.

In responding to questioning from the Tribunal, the Respondent advised that she had been a Landlord for around 10 years. This was the first time she had breached the regulations. She advised that there is a new tenant in the property and his tenancy deposit has been paid into an approved scheme.

The Respondent advised that she could only apologise for this oversight. She felt that she had been a good Landlord to the Tenants over the years; had always refunded them in respect of any expense relating to the Property; and had replaced certain white goods during the tenancy. She had been shocked to receive notice of the application having been made to the Tribunal for compensation.

Findings in Fact

1. That the parties entered into a Short Assured Tenancy agreement on 17 September 2017 in respect of the property at 2/11 Wardlaw Terrace, Edinburgh;

2. That in terms of clause 6 of the Lease, a deposit of £650 was payable by the Applicants;

3. On 18 September 2017 the Applicants paid the deposit of £650 to the Respondent;

4. The Respondent did not pay the deposit into an approved scheme;

5. The Respondent did not give the Applicants any information required under regulation 42;

6. The tenancy ended on 12 April 2018 at which point the keys were returned by the Applicants to the Respondent;

7. The Respondent returned the Applicants' deposit to them on 17 April 2017;

8. By email dated 17 April the Applicants asked the Respondent to confirm the name of the deposit scheme to which the deposit had been paid;

9. By application date 12 June 2018 the Applicants applied to this Tribunal for an Order under Regulation 10;

10. The Landlord is not a local authority, registered social landlord or Scottish Homes;

11. The Applicants are not relatives of the Landlord.

Decision

The tenancy is a 'relevant tenancy' for the purposes of regulation 3.

The Applicants have made an application to this Tribunal timeously in terms of regulation 9, having lodged the application not later than three months after the tenancy ended.

In terms of Regulation 10, if the Tribunal is satisfied that the Landlord did not comply with any duty in regulation 3, the Tribunal must order the Landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit (Regulation 10(a)).

The Respondent accepts that she has not complied with the terms of regulation 3. The only matter for this Tribunal to determine, therefore, is the level of compensation to be paid by the Respondent.

The Tribunal has an "unfettered discretion" as to the amount of compensation payable (see *Fraser and Pease* v *Meehan* (2013 SLT (Sh Ct) 119 per Sheriff Mackie at p121).

The Tribunal has taken into account the mitigation put forward by the Respondent as well as the fact that she candidly accepted, before the Tribunal, that she had breached the Regulations.

The Tribunal also notes that the Landlord was aware of her duties and responsibilities under the Regulations having been a Landlord for around 10 years. The Regulations were expressly referred to in the lease documentation. Her non-compliance was not therefore intentional.

The Tribunal has left out of account in determining the level of compensation to be paid, the Respondents submissions in relation to her reimbursement of expenses (for example for repairs, cleaning etc.) to the Applicants during the course of the tenancy and the fact that she purchased new white goods for the property during the Tenancy. Neither of these issues relevant factors as to the question of the Respondent's failure to comply with the Regulations.

While the Tribunal accepts that the Respondent was surprised by the application having been made; and that the Applicants only asked for details of the tenancy deposit scheme at the end of the tenancy, these factors are not relevant mitigation in respect of this application. It is not the responsibility of the Tenant to make enquiries of the Landlord as to where their deposit has been paid. The responsibility under regulation 3 rests solely upon the Landlord.

The Tribunal is also mindful of the purpose of the Regulations. The Regulations were introduced in order to protect the tenancy deposit throughout the duration of the tenancy and for parties to have access to the dispute resolution procedure should any issues arise on termination of the lease.

In this case, no issues arose such as to require the dispute resolution service and the deposit was returned to the Applicants at the end of the tenancy. However, throughout the period of the lease, the tenancy was unprotected.

In all the circumstances, the Tribunal exercises its discretion and orders the Respondent to make payment of compensation to the Applicants. The Tribunal orders the Respondent to pay the Applicants the sum of £650, being a sum equal to the tenancy deposit.

Postscript

At the conclusion of the hearing, the Respondent asked the Applicants if they would consider paying the compensation to a local homelessness charity. The Tribunal reminded the parties that the order from this Tribunal was for payment by the

Respondent to the Applicants and that the Applicants were free to do with that money what they wished.

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.

Lesley Johnston

26/9/18

Legal Member/Chair **Date**