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 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/18/1976

Re: Property at 40 Shore Road, Skelmorlie, PA17 5DR ("the Property")

Parties:

Ms Heike Noack, 85 Broomhill Court, Greeenock, PA15 4ET ("the Applicant")

Mrs Lynne Stewart, 10 Raillies Avenue, Largs, KA30 8QY ("the Respondent")

Tribunal Members:

Lesley Ward (Legal Member) and Gordon Laurie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent as landlord of the property at 40 Shore Road Skelmorlie PA17 5DR did not comply with any duty in Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and accordingly makes an order for the Respondent to pay to the Applicant the sum of nine hundred and seventy pounds (£970) being a sum equal to twice the deposit of £485.

This is an application in terms of Rule 103 of the First-tier Tribunal for Scotland (Procedure) Regulations 2017, 'the rules', for an order for payment where a landlord has not paid the deposit into an approved scheme in terms of regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011,"the regulations". The application was made on behalf of Ms Heike Noack by Miss Seonaid Cavanagh of the Legal Services Agency. The respondent was Mrs Lynne Stewart.

A case management discussion took place on 25 September 2018 and both parties were present. Miss Cavanagh represented the applicant. The tribunal made the following direction:

Lesley Ward

The Respondent is required to provide the Tribunal with a copy of her bank account statement showing the payments she received from the tenant through out the period of the lease.

Both the applicant and respondent attended the hearing today and the applicant was represented by Miss Cavanagh.

Preliminary matters

The tribunal noted that the direction above had not been complied with and no documents had been lodged by the respondent. The respondent stated that she had brought her bank statement along today to the hearing. She had been unable to lodge them as she was on holiday. She only had the originals and they contained information which she would only want the tribunal members to see.

The tribunal noted that the applicant has lodged 24 pages of bank statements. The respondent had not received these and she thought the tribunal may have used an old email address.

The tribunal decided to proceed and adjourn later in the hearing to make the documents available, if required.

The tribunal had before it the following copy documents:-

1. Application received by the tribunal on 2 August 2018.
2. Tenancy agreement dated 21 and 27 October 2016.
3. Letter by applicant to respondent dated 4 June 2018.
4. Text messages dated 20, 21September 2016
5. Letter from respondent to tribunal dated 18 September 2018.
6. Tribunal directions dated 25 September 2018.
7. Notes on case management discussion dated 25 September 2018.
8. Applicant's bank statements from 27 October 2016 until 26 July 2018.

Findings in fact

1. The parties entered into a tenancy agreement for the rental of the property at 40 Shore Road, Skelmorlie on the 21 and 27 October 2016.
2. The rent was £485 per month payable in advance.
3. The sum of £485 was to be paid in advance by way of a deposit.
4. The applicant obtained the keys for the property around the last few days of October 2016.

Lesley Ward

5. The applicant made a payment of £473.25 to the respondent on 20 September 2016 and a further payment of £11.75, on the 21 September 2018 totalling £485. This sum was a deposit for the property.
6. The applicant made a payment of £485 on the 27 October 2016 for the first rent due on 1 November 2016.
7. The deposit was not paid into a recognised tenancy deposit scheme. The respondent did not comply with any of the duties contained in regulation 3.
8. The respondent gave notice to the applicant that she was giving up the tenancy on 4 June 2018. The applicant left the property around the 26 June 2018 and paid rent until the 4 July 2018.
9. The deposit has not been returned to the applicant despite requests from the applicant for her to do so.
10. The respondent is not an experienced landlord and has only rented the property to one other tenant before the applicant. She used a letting agent on that occasion.

Reasons

The tribunal heard oral evidence from the applicant and respondent. The parties were largely in agreement about the payments made by the applicant to the respondent. The area of dispute was in relation to the payments made on 20 and 21 September 2016. The applicant's view was that this was her deposit for the property and the respondent's view was that this was payment of rent.

The evidence of the applicant can be summarised as follows:

The applicant was living in Norwich and was looking to rent a new property. She contacted the respondent via facebook and had a video chat to discuss matters.. On the video chat the respondent told the applicant that she has another person interested in the property. The applicant met the respondent at the flat on 4 October 2016. On the video chat the applicant agreed to pay a deposit of one month's rent. The applicant paid this in two instalments before she viewed the property. The applicant was not told about payment of rent in advance.

The evidence of the respondent can be summarised as follows:

The respondent had a flat to rent out. Her previous tenant had been paying at £600 per month and she used a letting agent on that occasion. She decided to manage the flat herself and she had a conversation with the applicant who stated she could not afford the full rent and lower sum of £485 was agreed. The respondent asked the applicant to pay £485. In her mind this was for payment of rent and not a deposit. The respondent's evidence was that a landlord is entitled to charge both a month's deposit and a month's rent but she felt sorry for the applicant and agreed only to take the rent. In the respondent's mind, she was charging rent from the day the parties

verbally agreed to the terms of the lease which was on the 16 September 2016. In the respondent's mind, the payment in advance of £485 was rent up until the lease was signed on 21 and 27 October 2016. The lease refers to a payment of a deposit but the respondent only downloaded a form from the internet and filled in the blanks. The respondent was aware that the applicant had agreed to provide 30 days' notice of the end of the lease and she insisted on a payment of rent of 30 days from her letter of 4 June 2018. The respondent's evidence was she is an inexperienced landlord and she accepts that the text message she sent to the applicant on 20 September 2016 referred to payment of a deposit but she was only using the terminology introduced by the applicant who is an experienced tenant. The respondent accepted that her bank account has two entries from 20 September 2016 and 21 September 2016 which refer to the applicant making payment of a deposit. The respondent also accepted in her evidence that the written tenancy agreement lodged in clause 12 states "On execution of this Agreement the Tenant has paid the Landlord a security deposit of £485". Her evidence was that she took £485 in respect of rent from 16 September 2016 until October 2016, and not a deposit. She had been asked via the applicant's solicitors to return the money and she had refused to do so as she alleges that the applicant left the property in a state of disrepair and removed blinds belonging to the respondent.

The task of the tribunal was to weigh this conflicting evidence. In doing so the tribunal had regard to the written evidence referred to above. The parties are diametrically opposed as to the nature of the payments made on 20 and 21 September 2016. Were they a deposit of £485 or not? If the sum of £485 was a deposit there is a clear breach of the regulations and the tribunal has to decide on the gravity of the breach.

The tribunal decided that the money paid was indeed a deposit. The lease clearly refers to a deposit and the text message sent by the respondent herself to the applicant refers to a deposit. The applicant lodged the money as a deposit with her bank and the two payments totalling £485 show as "deposit" on the respondent's bank statements. The respondent's letter of 18 September 2018 to the tribunal states

"I confirm that I have not put any deposit in the relevant scheme. I can offer no explanation other than I did not fully understand this as I have never managed a tenancy myself and the previous tenancy was managed by an agent who did not mention this to me. "

The letter goes on to state

Ms Noack transferred £472.25 worded as a deposit on 19 September 2016 ...I did confirm this as deposit although I need to point out that in my eyes I didn't see it as this and more of a rent as I did not receive a further payment until 26/10/16 which was a month's rent.

The tribunal preferred the oral evidence of the applicant which was supported by the written evidence. The respondent's view was that she was entitled to charge rent from the date of the verbal agreement to secure the property. There is not reference

to this in the written agreement it the text messages and indeed the tribunal's view is that any purported agreement to this effect may well breach other regulations which do not require to be mentioned further here. The payment was clearly a deposit according to the applicant's oral evidence and the written evidence and the tribunal accepted this evidence. There was no dispute that the deposit was not lodged in an appropriate scheme and that the terms of regulation 3 had not been complied with.

Turning to the gravity of the breach, the tribunal reviewed the recent case law regarding the tenancy deposit schemes. The tribunal noted the decision of Sheriff Jamieson in Kirk-v- Singh 2015 SLT (Sh ct) 111. The sheriff noted the differing judicial decisions taken in calculating the appropriate sanction. He refers to Jensen-v- Fappiano as more consistent with the policy of the regulations and that the sanction should be *''fair, proportionate and just ''* having regard to the seriousness of the noncompliance

The tribunal noted that the breach here, taking the respondent's evidence at its highest level was not perhaps wilful and was instead a mistake made out of ignorance. The respondent was not a professional landlord. She has however refused the return the deposit and has referred to her own dispute with the tenant as her justification. The tribunal considered that this was the type of situation the regulations were designed to prevent arising. The tribunal decided that the sum of £970 in respect of two times the deposit was fair proportionate and just in all of the circumstances. The decision was unanimous. .

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 Ward

1 November 2018

Lesley A Ward Legal Member **Date**