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/19/0330

Re: Property at 7 Inchard Place, Kinlochbervie, Sutherland, IV27 4RZ ("the Property")

Parties:

Mr Christopher Mounfield, previously of 1 Shean Villas, Durness, IV27 4PY and now of 3 Gordon Place, Rogart, Sutherland, IV28 3XN ("the Applicant")

Mr Gavin Eastcroft, Mrs Dorothy Eastcroft, 93 Evan Barron Road, Inverness, IV2 4JE ("the Respondents")

Tribunal Members:

Helen Forbes (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") orders the Respondents in respect of their breach of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"): (1) to make payment to the Applicant of the sum of £400 in terms of Regulation 10(a); and (2) to make payment of the tenancy deposit of £400 into an approved scheme in terms of Regulation 10(b)(i) of the Regulations.

Background

The Applicant lodged an application dated 31st January 2019 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules") seeking an order in terms of Regulation 10 of the Regulations.

The case previously called for a Case Management Discussion on 4th April 2019. At that time, certain facts were agreed and the case was set down for a hearing on 20th May 2019 at the Spectrum Centre, 1 Margaret Street, Inverness. It was agreed that the issue to be resolved at the hearing was whether the £400 payment made by the

Applicant to the Respondents on 1st August 2017 was a deposit, as claimed by the Applicant, or a payment towards heating oil, as claimed by the Respondents. Both parties said they would have a witness at the hearing.

When the hearing called on 20th May 2019, the Respondents said they had not received the usual information regarding preparation for the hearing. It was clear that information had been sent to the Property address rather than to their home address. Consequently, they were not aware that they required the attendance of their witness at the hearing. The Applicant said he no longer wished to lead a witness. After some discussion, the Respondents made a motion to adjourn the hearing. The Applicant did not oppose the motion, and the Tribunal decided, in the interests of justice, to grant the motion to adjourn the hearing to allow the Respondents to prepare for the hearing and to have their witness present.

Subsequently, the Respondents decided to lodge a written statement from the witness, Mr Graeme Smart, rather than lead him as a witness. His unsigned statement was lodged by the Respondents by email dated 7th June 2019.

The Hearing

A hearing took place at the Spectrum Centre, 1 Margaret Street, Inverness on 27th June 2019. Both parties were present. Neither party was represented. Neither party led witnesses.

The Applicant's Evidence

The Applicant referred to the email dated 27th March 2019, which had been lodged by the Respondents. He took issue with the statement that he knew the Inverness address of the Respondents; this was not the case. He pointed out that the Respondents had said that family members were checking the Property, yet they had claimed at the last hearing not to have received papers that were sent to them by the Housing and Property Chamber. He felt this was contradictory.

The Applicant pointed out further contradictions between the email and the statement from Graham Smart, as the email stated that he had approached Mrs Eastcroft at her work, yet the statement by Mr Smart stated he had introduced the parties. Furthermore, the Respondents had stated in their email that they had no intention of letting the property, yet Mr Smart referred to their house 'being available from August 2017'. He felt these matters were relevant to the honesty of the Respondents and the accuracy of Mr Smart's statement.

The Applicant said there were other inaccuracies in Mr Smart's statement, including that the Applicant was living in a caravan when he first arrived in Kinlochbervie. This was incorrect; he was staying in Scourie until Easter 2017, when he then moved into the caravan. He felt that the statement 'I have no knowledge of the rental arrangements' contradicted the following statement 'it would be unusual in the area for any deposit to be charged' and introduced ambiguity. He noted that Mr Smart was also staying in a rented property with 'a similar arrangement' and he questioned whether it was appropriate that Mr Smart was living in an unregistered tenancy, given his position as a safeguarder within the community. Asked by Tribunal

members what the relevance of these matters were to the matter in hand, the Applicant said that Mr Smart was making statements he was not qualified to make and he was not a housing expert. He pointed out that Mr Smart's comment regarding his understanding of the arrangements made in relation to heating oil in the tank before he moved in could only have come from the Respondents as he had no such discussion with Mr Smart.

Responding to questions from the Tribunal regarding the payment of £400 at the start of the tenancy, the Applicant said he met with both Respondents at the Property and agreed the terms of the rental. He said he was asked to provide a deposit of £400. There was a small amount of oil in the tank. The Respondents said he was welcome to use it, but he would have to top it up. No figure was mentioned in respect of a price for the oil. He was travelling back and fore to England and oil was cheaper there, so he topped it up with 20 litre cans he brought back. He then topped up the tank with a delivery of oil in or around October 2017.

Responding to questions from the Tribunal regarding how the tenancy had ended, the Applicant said the parties met 2 or 3 weeks before he left the Property, when the Respondents came round to ask if he was leaving. He thought there were maybe rumours in the village that he was leaving and presumed the Respondents had heard this. There was no mention of the £400 at that time. The Applicant was asked by the Tribunal why he did not ask for the deposit back at that stage and he said there were issues with his wife and her feelings of intimidation in the small community, and they wanted to leave the Property quickly. He assumed he would get the deposit back and had no reason to think otherwise. His mind set was not 100% at the time due to personal circumstances. He was not aware of the tenancy deposit schemes until after the tenancy ended, when he took advice from Shelter. He said he had been naïve and thought it was all 'above board' as he had been introduced to the Respondents by the head teacher at the school where he taught.

There was no written tenancy agreement between the parties. There was a laminated document at the Property and he was not sure if it was a contract or an inventory. Nothing was signed by the parties.

In summing up, the Applicant referred the Tribunal to the bank statement he had lodged. This showed there were three electronic payments made by him to Gavin Eastcroft on 1st August 2017, the start date of the tenancy, in the following amounts and with the following references:

1. CT August 2017 Gavin Eastcroft – £127
2. Rent August 2017 Gavin Eastcroft – £470
3. Deposit Gavin Eastcroft – £400.

The Applicant said he had specifically mentioned 'deposit' because that is what the payment was for.

Responding to questions from the Tribunal as to the amount of order sought, the Applicant submitted that his application was not about the money but about the principle of the matter.

The Respondents' Evidence

Mrs Eastcroft said that the statement previously made that the Applicant could not contact them was incorrect – there had been contact by text message between the parties throughout the tenancy. This had been the best method of communication as the Applicant did not usually answer his phone. The Respondents said Graeme Smart had heard they were leaving the village and he had asked what they were doing with the Property. They had not let the Property prior to that.

The Applicant came to see the Property. He was shown round and a discussion took place in the garden concerning the oil tank. Mr Eastcroft said he told the Applicant that the bobble in the gauge for measuring the oil level sometimes became stuck and, if that happened, he should take the top off and use a stick to discover how much oil was left. The tank had been filled with oil in April or May. The figure of £400 was mentioned to the Applicant by Mr Eastcroft as a sum that would cover the amount of oil in the tank. They agreed on a rent of £470 per month.

When the Respondents went to the Property before the tenancy ended, they found the oil tank was empty. Mr Eastcroft said he told the Applicant he wouldn't be getting his £400 back as the tank was empty. Mrs Eastcroft said there was an agreement that the tank would be left full at the end of the tenancy. Responding to questions from the Tribunal as to why the Applicant would get anything back at the end of the tenancy, if the £400 he had paid initially was for the oil in the tank, the Respondents said it was 'a deposit for oil'. Mrs Eastcroft then said it was not a deposit, and, had they wanted to charge a deposit, it would have been a lot more than £400. Not only was the tank dry, the heating system had to be repaired as it was not working, due to the tank not having been filled. The Respondents were left out of pocket and would not wish to rent long-term again. The Respondents arranged and paid for the tank to be filled up on 28th October 2018, before the Applicant left the property.

The Tribunal pointed out that the Respondents had written in their email of 27th March 2019, in relation to the £400 'we never asked for this amount'. This directly contradicted their evidence at the hearing that they had asked for this amount. Mr Eastcroft said he couldn't remember clearly as it was two years ago.

Mrs Eastcroft said the laminated document was an inventory.

In summary, Mrs Eastcroft said if it had been a 'legal tenancy' they would have gone down the right road as they were renting in Inverness themselves by the time they let their property to the Applicant and they knew what was involved. In this case, the tenancy had come about through a friendship and they had trusted the Applicant.

Findings in Fact

1. The Respondents are the owners of the Property.
2. The parties entered into a tenancy agreement in respect of the Property, commencing on 1st August 2017, at a rent of £470 per month.
3. There was no written tenancy agreement.

4. At the start of the tenancy, there was an amount of heating oil in the tank at the Property. A discussion about the heating oil and the tank took place prior to the commencement of the tenancy.
5. On 1st August 2017, the Applicant paid a total of £997 by electronic bank transfer to the Respondent, Mr Eastcroft. The payment was made in three separate amounts of £127, £470 and £400, and the payments labelled CT, rent and deposit respectively.
6. The payment of £400 was a deposit.
7. The deposit was not lodged in a tenancy deposit scheme as required by the Regulations.
8. The tenancy ended on or around 31st October 2018.
9. The deposit was not returned to the Applicant.
10. The Respondents have breached Regulation 3.

Reasons for Decision

The Tribunal took account of the written and oral evidence of the parties. In relation to the matter of whether the £400 payment was a deposit or a payment towards the oil, the Tribunal preferred the evidence of the Applicant. The Tribunal found compelling the evidence that the Applicant had described the payment as a deposit when making the electronic bank payment on 1st July 2019. The Applicant had gone to the trouble of making three separate payments, in respect of each of the matters discussed with the Respondents. It was felt by the Tribunal that, had the Applicant known that the payment was to cover the oil in the tank, he would have described the payment as for oil, rather than labelling it 'Deposit'. The Tribunal also took account of the Mrs Eastcroft's statement that it was 'a deposit for oil'.

The Tribunal noted that the Respondents had made a prior inconsistent statement in their email of 27th March 2019 to the Housing and Property Chamber, in stating that the amount of the payment made towards the oil was not discussed. This statement was directly contradicted by the Respondents in their oral evidence, and, when challenged on the matter, Mr Eastcroft claimed not to remember, given the passage of time. This had a direct bearing on the reliability of their evidence.

The Tribunal gave no weight to the statement by Mr Smart. He had not witnessed any of the discussions between the parties in respect of whether the sum of £400 was a deposit. Much of his statement was based on alleged normal practice in the area rather than a particular knowledge of the circumstances of this case.

It was clear to the Tribunal that the Respondents distinguished the letting of the Property from 'a legal tenancy', such as the tenancy they now have in Inverness. The law does not allow such a distinction. Section 120 of the Housing (Scotland) Act 2006 provides that a tenancy deposit is a sum of money held as security for the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement or the discharge of any of the occupant's liabilities which so arise. It further provides that a tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation. In this case, a deposit was taken, and, in terms of the Regulations, it ought to have been lodged in a tenancy deposit scheme, so that both

parties would have the benefit of adjudication over any discrepancies arising at the end of the tenancy.

There were discrepancies at the end of the tenancy, namely that the oil tank was left empty, allegedly resulting in damage to the heating system. These are matters over which the Tribunal has no jurisdiction; however, the Tribunal noted that, had the deposit been lodged in a tenancy deposit scheme, both parties would have benefited from adjudication. Accordingly, the Tribunal now orders the Respondents to lodge the sum of £400 in a tenancy deposit scheme to allow adjudication over the sum. This will allow both parties to present evidence to the scheme in the hope that a fair outcome will prevail.

With regard to the sum ordered by the Tribunal in terms of Regulation 10, the Tribunal took into account the fact that the deposit was unprotected throughout the term of the tenancy, which is a serious matter. However, in mitigation, the Respondents were, effectively, accidental landlords, with no experience of letting properties. They did not intend to let the Property until asked by a friend to let it to a local teacher. The Tribunal considered the sum of £400 was a fair and just sanction in the circumstances.

Decision

The Tribunal orders the Respondents in respect of their breach of Regulation 3 of the Regulations: (1) to make payment to the Applicant of the sum of £400 in terms of Regulation 10(a); and (2) to make payment of the tenancy deposit of £400 into an approved scheme in terms of Regulation 10(b)(i) of the Regulations.

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.

Helen Forbes — **Legal Member/Chair**

27 June 2019 — **Date**