Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014 on an application made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/2133

Re: Property at Flat 1/1, 76 Sinclair Drive, Glasgow, G42 9PY ("the Property")

Parties:

Mrs Mariam Kassm, 6/1 120 Mossheights Avenue, Glasgow, G52 2TZ ("the Applicant")

Mr Waleed Shamki, 32 Lancelot Crescent, Wembley, HA0 2AY ("the Respondent")

Tribunal Members:

George Clark (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of One Thousand Five Hundred Pounds (£1,500)

Background

By application, received by the Tribunal on 9 July 2019, the Applicant sought an Order for Payment in respect of the failure of the Respondent to comply with Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). The Applicant's complaint was that the Respondent had failed to lodge her deposit of £1,000 in an approved tenancy deposit scheme.

The application was accompanied by a copy of a Tenancy Agreement between the Respondent as landlord and the Applicant and her husband as tenants, which provided for a deposit of £1,000 and by evidence from the Applicant's bank of the transfer of the deposit to the Respondent on 18 August 2016. The Applicant also provided with the application copies of letters from SafeDeposits Scotland (dated 6 June 2019), My Deposits Scotland (dated 10 June 2019) and LPS Scotland (dated 10 June 2019) that the deposit had not been lodged with them.

On 27 September 2019, the Tribunal advised the Parties of the date, time and venue for a Case Management Discussion and the Respondent was invited to make written representations by 17 September 2019.

On 17 September 2019, the Respondent's representatives, Miller Campbell, solicitors, Glasgow submitted written representations. The Respondent admitted that the deposit had been paid but had no information as to whether it was paid solely by the Applicant. The keys had not been returned until 9 May 2019. They denied that it would be fair, proportionate and just for the maximum sanction of 3 times the deposit to be applied, under explanation that the Respondent had not been aware of his obligations under the 2011 Regulations until it was brought to his attention by the Applicant's application for legal aid. The Respondent had been verbally requested by the joint tenant to use the deposit to cover unpaid rent of £550 for October 2018. That request had been confirmed by e-mail by the Respondent to the joint tenant, Mr Dahej Kassm on 8 October 2018 and the e-mail had been copied to the Applicant on the same date. The Respondent's representatives argued that the Applicant was personally barred from seeking return of the deposit, having requested that it be used towards unpaid rent.

Case Management Discussion

A Case Management Discussion was held at Glasgow Tribunals Centre, 20 York Street, Glasgow on the morning of 2 October 2019. The Applicant was represented by Laura Simpson of Govanhill Law Centre and the Respondent was represented by Joanna Millar of Millar Campbell.

Ms Simpson reiterated the point made in the application, namely that the deposit had been unregistered for almost three years, so the Applicant was seeking the maximum award. The deposit, even now, was still unregistered. The Respondent was seeking to rely on lack of knowledge, but he had instructed solicitors in March 2019 and he could have lodged the deposit then when, presumably, he discovered his omission. Ignorance of the rules was no excuse. When you become a landlord, it is incumbent on you to familiarise yourself with all relevant legislation. The Respondent had offered no mitigating circumstances apart from lack of knowledge.

Ms Millar submitted that other awards made by the Tribunal were relevant and the cases said that all matters must be taken into account. There had been no deposit to lodge after October 2018, when it was used by agreement to meet unpaid rent. Her instructions in March 2019 had related to recovery of possession, but not beyond that. The Respondent had admitted the deposit had not been lodged within 30 working days. One of the matters to be taken into account was what did the landlord do? In this case, the Respondent had admitted his failure. There was no malice aforethought. He simply did not realise he had to lodge the deposit.

The Respondent and his wife had previously used letting agents, having purchased the Property in 2009. The Applicant and her husband had appealed to the Respondent through friends and had asked him not to use agents as they were not in a position to pay 2 months' deposit and an agency fee and they had no references. All they had was their shared community. The Respondent had allowed the Applicant and her husband to move in one week early without payment. The Respondent had then moved to London. Mr Kassm had contacted the Respondent, asking him to use the deposit towards the rent, as he and his wife were separating. As at 8 October 2018, the unpaid rent of £550 had been taken by agreement. Mrs Kassm had been made aware of that by e-mail.

The Respondent and his wife had subsequently met with Mrs Kassm at the Property and explained that they were intending to sell the Property. She said that she had no money and was applying for assistance. They had suggested she contact Citizens Advice. They had discussed the £450 balance of the deposit in a civil way and a verbal agreement had been reached that it could be used towards arrears of rent. The Respondent and his wife had been genuinely trying to help.

Ms Millar referred the Tribunal to a number of previous decisions regarding deposits. In *Tyrell v Stirling (FTS/HPC/PR/19/1661*, it had been a first-time landlord who had been well aware of the tenancy deposit scheme. One times the deposit had been awarded. The Respondent in the present case was not a first-time landlord, but he was flying solo for the first time. In *Jenson v* Fappiano *(B646/4)*, a sheriff court decision of 28 January 2015, Sheriff Welsh had stated that the starting point is not the maximum which is then adjusted to take account of mitigating factors. The consideration has to be what is fair, proportionate and just. It is a sanction, so all matters must be taken into account. In the present case, the Respondent was not an unscrupulous landlord. He had no knowledge of the scheme and his actions to help at the beginning must be taken into account. Following the reasoning of Sheriff Welsh, all the circumstances of the case had to be considered and the sanction must be fair and just. The Respondent was not a serial non-complier and the failure had been remedied because as at 1 November 2018 there was no deposit to lodge. He had sold the Property a soon as the Applicant moved out. He did not intend to be a landlord again, due to the stress and expense involved in this case. Accordingly, no further deterrent was necessary.

In *Rogers v Strong (FTS/HPC/PR/19/1757)*, the order had been for one-half of the deposit, as the failure had been admitted and had not been wilful. In *Ross v Bishop (FTS/HPC/PR/19/1630)*, the figure had again been one-half of the deposit on the basis of the background information and in *Gretz v Harrison (FTS/HPC/PR/19/1065)*, the sanction had been two times the deposit when there were no mitigating circumstances whatever.

Ms Millar argued that the Respondent had really engaged with the tenants, and particularly with Mrs Kassm and there was no doubting that he had been instructed to use the deposit. He had met Mrs Kassm in person and she had agreed that the balance could be used.

For the Applicant, Ms Simpson advised the Tribunal that some of the factual background narrated by the Respondent's solicitor had been new to her and had not been in the written answers, but the conduct of the Respondent had not been helpful. The Respondent had indicated that when the Respondent visited the Property, he had been quite intimidating. She had not given him her new address as she was worried about further threats. Ms Millar had been unable to take instructions about the e-mail of 8 October 2018, but there was no evidence to suggest that the Applicant had consented to the deposit being utilised to pay the October 2018 rent. In any event, the question of whether the deposit still existed was irrelevant, as the deposit should have been lodged in September 2016, long before any issue about the October 2018 rent.

Ms Simpson asserted that, as the Respondent had previously used letting agents, it could be assumed he was aware that there were duties incumbent on landlords. This was a circumstance that should be taken into account following the test described by Sheriff Welsh in the *Jenson* case.

In *Lenik v Owen (FTS/HPC/PR/18/2481)*, the length of time the deposit had remained unprotected (4 years and 7 months) had been regarded as significant and

it had been stated that the penalty should act as a deterrent to the Respondent and other landlords. In *Steele v Cassidy (FTS/HPC/PR/18/0456)* the deposit had been repaid in cash at the Hearing and the Respondent had stated that failure to lodge it had been an oversight resulting from a family bereavement, but the sanction had still been two times the amount of the deposit. In the present case, no justification had been put forward apart from lack of knowledge of the system.
In *Rozentale v Caldwell (FTS/HPC/PR/17/0527)* the amount had been three times the deposit and the Tribunal had reiterated the point about there being no mitigation. There had, said the Tribunal, been a "flagrant and continuing disregard of the statutory regulations".
Ms Simpson invited the Tribunal to take the same approach as in the *Rozentale* case and to focus only on the failure to lodge the deposit in a scheme, other financial issues between the Parties being irrelevant.
Ms Millar said that. In July 2019, she had specifically suggested to the Applicant's representatives, Govanhill Law Centre, that they take instructions from the Applicant regarding the fact that it had been agreed that the deposit could be used to pay off outstanding rent, so there was no good reason why Ms Simpson did not have instructions regarding the e-mail of 8 October 2018. In Ms Millar's submission, there had been consent to its being utilised in this way. It was not fair to say that a letting agent should have a discussion with clients about landlords' responsibilities when they cease to use the agent's services. The Respondent was not trying to contract out of the Regulations. He did not know about them. It was clear in the *Steele* case that the landlord had known about the scheme, so it could be distinguished from the circumstances of the present case. In *Rozentale*, the landlord had misled the tenant about retention of the deposit. In this case, the Respondent's position was clear. He had been instructed to use the deposit to pay rent and the Applicant had been aware of that from the e-mail of 8 October 2018, advising her that Mr Kassm had asked for part of the deposit to be used to pay the October rent. The Tribunal should look at all the facts proportionally. Following *Jenson*, she considered that one-third of the deposit would be a reasonable sanction, as the Respondent was no longer a landlord and making an example of him would not assist in letting other landlords know the importance of complying with regulations.
Ms Simpson, in her closing remarks, said that it had been Mr Kassm who had dealt with the Respondent and the Applicant had felt threatened by both Mr Kassm and the Respondent.

Findings in Fact

- The Parties entered into a lease of the Property which commenced on or about 18 August 2016.
- A tenancy deposit of £1,000 was paid to the Respondent from an account in the name of the Applicant.
- The Respondent failed to lodge the deposit in aa approved tenancy deposit scheme within 30 working days of the commencement of the tenancy and did not lodge it at any time thereafter
- The Respondent sent an e-mail to the Applicant on 8 October, in which he stated that the Applicant's husband had asked him to use part of the deposit to pay the October 2018 rent.

Reasons for Decision

Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required and that it would determine the application without a Hearing.

Under Regulation 3(1) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"), a landlord must, within 30 working days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme. Under Regulation 10, if satisfied that the landlord did not comply with any duty in Regulation 3, the Tribunal **must** order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit.

Much of the argument put forward on behalf of the Respondent in the present case centred on the Respondent's assertion that the Applicant and her husband had agreed that the deposit be used to meet unpaid rent. The view of the Tribunal was that, whilst the Respondent's belief that he had authority that to use the deposit in this way might have some bearing in assessing the level of sanction (following the guidance given in the *Jenson* case to consider all the facts and circumstances), the simple fact was that the Respondent should have lodged the deposit in an approved tenancy deposit scheme within 30 working days of the commencement of the tenancy, on or about 18 August 2016. Accordingly, the Respondent had failed to comply with the obligation imposed on him by Regulation 3 of the 2011 Regulations and the only matter for the Tribunal to consider was the level of the amount to be included in the Order for Payment that it was required to make.

Both Parties had provided the Tribunal with copies of Decisions in previous cases. The Tribunal considered these cases in arriving at its Decision but stressed that each case turns on its own facts and circumstances and these vary widely. The conduct of a landlord, the length of time that the tenant's money was at risk and all potential mitigating circumstances had to be considered and none of the cases cited was exactly in point. It was not possible to draw up a defined list of factors that the Tribunal should consider. It was a question of looking at all the circumstances and arriving at a decision that was fair, proportionate and just.

In *Tyrell*, the deposit was only at risk for some 4 months and the landlord had tried to lodge it in an approved scheme but had had difficulties with the platform. When the tenant had queried the position, the landlord had resolved the issue and protected the deposit. The Tribunal had also taken into account the fact that the landlord had been suffering health difficulties. The sanction in that case was one times the deposit.

In the *Rogers* case, where the sanction was one-half of the deposit, the landlord had lodged the deposit as soon as she discovered her mistake. She had also been taking medication for depression at the relevant time.

In *Ross*, the landlord had not understood that the arrangement with the tenant was actually a deposit and this was factor in the Tribunal's decision to make an Order for one-half of the deposit.

In *Gretz*, while there were no mitigating circumstances, the Tribunal, in ordering a payment of two times the deposit, had taken into account the fact that the landlord's agents had returned all but £25 of the deposit at the end of the tenancy.

In *Lenik*, the tenant's money had been at risk for more than 4 years and that clearly was a significant factor in the Tribunal's decision to order payment of 2 times the deposit. The same amount had been awarded in *Steele*, where the failure had been

stated to be due to an oversight at the relevant time and the deposit was returned in cash on the day of the Case Management Discussion, but the Tribunal noted in that case that the landlord had failed to respond to text messages from the tenant regarding where the deposit was held and the landlord had overlooked the lodging of the deposit for the whole duration of the tenancy, from April 2015 until December 2017. In *Rozentale*, the Tribunal saw what it regarded as a classic example of the very mischief the 2011 Regulations were introduced to protect against and noted that, not only had the deposit not been lodged, it had not been repaid at the end of the tenancy and had still not been refunded at the date Case Management Discussion. Accordingly, the Tribunal ordered the maximum payment that it could.

The view of the Tribunal in the present case was that the Respondent had not acted wilfully in failing to lodge the deposit and that he believed he had authority from Mr Kassm to take part of it to meet the rent for October 2018, but that he was also aware that the Respondent and her husband were separating and it was not sufficient for him simply to tell the Respondent by e-mail what her husband had asked him to do and then to retain £550. In the circumstances, he should have asked her to confirm she was content to accede to her husband's request. As already noted, however, the question should not have arisen as the deposit should have been lodged in an approved scheme some two years earlier.

The Tribunal was unable to make a finding on the Respondent's assertion that he had been trying to help the Respondent and her husband, with particular reference to the meeting at the Property with the Applicant, as the Applicant's representative had suggested that the Applicant had felt intimidated at that meeting. There was no additional evidence to support either version of events.

Landlords cannot use ignorance of the law as an excuse for failing to comply with the 2011 Regulations. The reasons for a landlord being unaware of his or her obligations may, however, have a bearing on the amount that the Tribunal orders a landlord to pay and the Tribunal took this into account. The Tribunal did not regard the fact that the Respondent had previously used letting agents as somehow making his conduct any more or less reprehensible. Landlords are well aware that they are entering into arrangements which have, for many decades, been the subject of statutory intervention and regulation and it is their duty to familiarise themselves with all current obligations imposed by statutory regulation and, if unsure, to take such professional advice as they require. In the present case, the Respondent's ignorance may have been genuine, but it was not excusable. The Tribunal was, however, satisfied that this had not been an attempt by the Respondent to contract out of his obligations, but the consequence had been that the Applicant had been denied the essential safeguard provided by the 2011 Regulations, namely the opportunity to challenge the decision of the Respondent to retain the entire deposit.

Having considered all the facts and circumstances of the case, the Tribunal decided to order the Respondent to pay to the Applicant the sum of £1,500. This was a figure that the Tribunal regarded as fair, proportionate and just, as the failure of the Respondent was serious and prolonged.

The Respondent had raised in the written representations the question of whether the deposit had been paid solely by the Applicant. The Tribunal saw evidence that the deposit had been paid from an account in the name of the Applicant and it was not necessary for all tenants to join in the application. Should Mr Kassm lodge a similar application at a later date, the matter was *res judicata* but, in any event, such an application would now be time-barred, as it had not been made within three

months after the tenancy had ended. This matter had not, however, been pursued at the Hearing.

Decision

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.

George Clark

Legal Member/Chair

2 October 2019

Date