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/20/0435

Re: Property at 3 Cochrane Street, Falkirk, FK1 1QB ("the Property")

Parties:

Dr Laura Gonzalez Saavedra, Unit 32205, PO Box 26965, Glasgow, G1 9BW ("the Applicant")

Mr Kamal Menshawi, Holly Cottage, Crossroads West Plean, Plean, Stirling, FK7 8AT ("the Respondent")

Tribunal Members:

Andrew Cowan (Legal Member)

DECISION

1. **The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £1100 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011 should be made.**

Background

2. This is an application, dated 9th February 2020, brought in terms of Rule 103 (Application for order for payment where Landlord failed to carry out duties in relation to tenancy deposits) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended. The

application is made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

3. This case called for a Case Management Discussion on 11th August 2020. Due to the ongoing disruption caused by the COVID-19 pandemic, the hearing took place using tele-conferencing facilities. The Applicant and the Respondent both took part in the conference call.

4. At the stat of the Discussion the Tribunal set out their intended approach to the hearing and sought to ensure that both parties were given appropriate opportunities to make verbal submissions and comments. Both parties indicated that they wished to proceed with CMD without independent advice or support.

5. The Applicant provided, with her application, a copy of the tenancy agreement in relation to the lease of the Respondent's property at 3 Cochrane Street, Stirling, FK1 1QB.

6. The Respondent had lodged a written submission with the Tribunal dated 13th July 2020. In that submission the Respondent had acknowledged that he had failed to lodge the Applicants' tenancy deposit with an approved scheme as required by the 2011 Regulations.

Findings in Fact

7. The following facts were agreed by the parties at the CMD:-
    a. The Applicant (along with another party – hereinafter jointly referred to as "the Tenants") and the Respondent were parties to a tenancy agreement, being Tenants and Landlord respectively.
    b. The tenancy agreement commenced on 14th January 2019.
    c. The tenancy agreement terminated on 11th November 2019.
    d. A tenancy deposit of £1100 was paid by the Tenants to the Respondent on or around 18th December 2020. being a date before the start date of the Tenancy.

e. The Respondent failed to pay the tenancy deposit into an approved scheme within 30 working days of the beginning of the tenancy, or at any time during the term of the Tenancy,
f. The tenancy deposit was repaid to the Applicants within one month of the end of the Tenancy. The Respondent deducted the sum of £42.60 from the deposit and paid the balance of the deposit in the sum of £1057.40 to the Tenants on 3rd December 2019.
g. The Respondent did not comply with his duty under Regulation 3 of the 2011 Regulations

Reasons for Decision

8. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—
(a)may make a decision without a hearing if the First-tier Tribunal considers that—
(i)having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and
(ii)to do so will not be contrary to the interests of the parties.

9. Regulation 3 of the 2011 Regulations (which came into force on 7 March 2011) provides as follows:
"(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy-
(a) Pay the deposit into the scheme administrator of an approved scheme; and
(b) Provide the tenant with the information required under regulation 42."

10. Regulation 10 of the 2011 Regulations provides as follows:

"If satisfied that the landlord did not comply with any duty in regulation 3 of the First-tier Tribunal-

(a) Must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and

(b) May, as the First-tier Tribunal considers appropriate in the circumstances of the application, order the landlord to-

I. Pay the tenancy deposit to an approved scheme; or

II. Provide the tenant with the information requires under regulation 42."

11. The Tribunal is satisfied (on the Respondent's admission both in his written submissions and at the Case Management Hearing) that the Respondent did not comply with his duty under Regulation 3 of the 2011 Regulations, and accordingly (in accordance with Regulation 10 of the 2011 Regulations) it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

12. In determining the level of possible sanction for the failure to comply with Regulation 3, the Tribunal had regard to the comments of Sheriff Welsh in Jenson v Fappiano, (2015 G.W.D 4-8), at paragraph 11. , on the exercise of judicial discretion, which he characterised as follows:-

"1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement.

2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.

3. A decision based on judicial discretion must be fair and just."

13. In the case of Tenzin v Russell 2015 Hous. L.R.11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

14. The Tribunal also took some guidance on the amount of any sanction from the decision by Sheriff Ross ([2019] UT 45 Darren Rollett and JuliaMackie) which sets out: " Cases at the most serious end of the scale might involve repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals." None of these factors were present in this case. This case is not at the most serious end of the scale.

15. The Tribunal noted that, in the case of Stuart Russell and Laura Clark v Samdup Tenzin (December 2013) , Sheriff Principal Stephen referred to the "strict liability consequences of non-compliance". She indicated this allowed the court to "promote rigorous application of the regulations". She indicated the purpose of the regulations was "deterrence". In the case of Cooper v Marriott (March 2016), Sheriff Welsh indicated that the scheme was intended "to regulate and control by rules and sanctions important aspects of the property rental market". He indicated it was not a scheme "principally introduced to compensate the tenant for harm done although the net result of the application of sanction may seem like the tenant is being compensated". Further, in the case of Fraser and Pease v Meehan (August 2013) Sheriff Mackie at Edinburgh Sheriff Court noted that the amount to be paid "cannot be said to be compensatory". She noted that the relevant part of the regulations is headed "sanctions" and stated that the amount to be paid is in the form of a sanction or a penalty. She indicated that the awards to be made were designed to "punish" the landlord's behaviour and to "express condemnation of or indignation at the enormity of the offence. A tenant's receipt of such an award may be regarded as a windfall". In considering the level of award to be made in the present case the Tribunal accordingly had regard to the requirement to recognise that any award should recognise it being imposed as a penalty and not as compensation to the Applicant.

16. The 2011 Regulations are there to be complied with for the protection of tenants in respect of their deposit and to ensure that they can obtain repayment of their deposit at the conclusion of the lease. The regulations

ensure that an approved scheme administrator makes available a mechanism for the resolution of disputes as to the amount of any deposit which should be repaid to the Tenants at the end of the tenancy,

17. The breach in this case is aggravated by the fact the deposit was not protected for the full term of the Tenancy. Accordingly the Tenants did not have access to any approved deposit scheme dispute resolution mechanism.

18. The Tribunal does, however, accept that the circumstances do provide some mitigation in respect of the sum to be awarded in the exercise of its judicial discretion. In the Tribunal's opinion, important to the assessment of sanction is the fact that the Respondent has admitted his non-compliance. The Tribunal noted that it was a matter of agreement that the deposit in this case was returned to the Applicants (after deduction of a repair cost of £46) within one month of the end of the tenancy.

19. The Tribunal is aware of an upper Tribunal decision (reference UTS/AP/19/0023) where the Upper Tribunal has indicated that it is appropriate for the First-tier Tribunal to differentiate between landlords who have numerous properties and run a business of letting properties and landlords who have only one property which they own and let out. The Upper Tribunal indicated in that decision it would be inappropriate to impose similar penalties on such landlords. In the present case the Respondent indicated he owned two residential properties for private lease. In the past he has always used the services of a professional letting agent. The agent that the Landlord had engaged for these services had ceased business shortly after the commencement of the tenancy set up with the Applicant. At that time the Landlord had , by email dated 19th February 2019, requested his agent to transfer the deposit paid by the Tenants to an approved deposit scheme with which the Landlord was registered. That request had not been actioned by the Landlord's former agent. At the hearing the Respondent accepted that he had not sought to follow this matter up after his email of 19th February 2019. The Respondent accepted that, as the Landlord of the property, he had a duty to comply with the terms of the 2011 regulations. However, given all the

circumstances, the Tribunal recognised that the Respondent had not intended to flagrantly breach the 2011 regulations.

20. The Tribunal accepted that the landlord had made some attempts to ensure the deposit was lodged with an approved scheme and the Tribunal accepts the submission made by the Respondent that this failure does not fall at the most serious end of the potential scale of the breaches. At the same time, the Tribunal also notes that the regulations were designed to be a sanction or a punishment against landlords. That view has been expressed in numerous cases throughout the years.

21. Balancing all these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £1100 (being the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

22. For the foregoing reasons, the Tribunal orders the Respondent in respect of its breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £1100 in terms of Regulation 10(a) of the 2011 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.

Andrew Cowan **11th August 2020**

Legal Member/Chair **Date**