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 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/20/1010

Re: Property at Room 3, 40 Bentinck Street, Glasgow, G3 7TT ("the Property")

Parties:

Mr Michael Scott, 84 Roffey Park Road, Paisley, PA1 3ET ("the Applicant")

McMillan & Company Residential Ltd, 15 Hillhead Street, Glasgow, G12 8PU ("the Respondent")

Tribunal Members:

Melanie Barbour (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 ("the 2017 Rules") seeking an order for payment due to the landlord's failure to timeously lodge the tenancy deposit with an approved scheme.

2. The application contained,

   (a) Evidence re: receipt of deposit to Respondent from Applicant;
   (b) a copy of the Tenancy Agreement showing commencement date;
   (c) evidence re: My Deposits Scotland Tenancy Protection Certificate showing deposit received on 18 December 2019; and
   (d) Evidence confirming end of tenancy.

3. The Applicant attended the case management discussion. Mr McIver from Messrs Brunton Miller appeared on behalf of the Respondent.

4. Three preliminary matters should be noted:-

   (a) There were another three applications heard at the same time as this one; each application had a different applicant, but related to the same property; the same Respondent; raised the same issue; and the applications had been submitted at the same time. The Applicants while making separate submissions, referred to each other's points in support of their own position, and accordingly, my decisions reflect this.

   (b) There had been reference by the Respondent's representative to the submission of written answers having been lodged; however, written submissions by the Respondent were not before the tribunal or the Applicants in relation to these applications. The legal member and the Applicants did not therefore have sight of them; and they were not considered by the tribunal in coming to its decision. The Respondent's representative made a full verbal submission on behalf of the Respondent during the course of the hearing. For reasons set out in this decision, I consider that I had sufficient information before me to come to a decision on these Applications, the Respondents accepted the breach and provided a verbal submission on the circumstances giving rise to the breach; and the Applicants were provided with a right of response. Rule 2 of the Tribunal Rules set out that the tribunal's overriding objective, is to deal with the proceedings justly, and in doing so this includes, in a manner which is proportionate to the complexity of the issues and resources of the parties; seeking informality and flexibility; and avoiding delay. On the information before me I considered that the applications could be determined in accordance with the Tribunal Rules.

   (c) During the course of the case management discussion there was some discussion by the Applicants about the requirement of additional evidence to support the Respondent's position. The Applicants said they were not challenging or disputing the submission, albeit raised concerns that there was no additional evidence from the Respondent to consider. It is a matter for the Respondent what facts he wishes to put forward and what submission he wishes to make. A case management discussion is not an evidential hearing, and I concluded that an evidential hearing was not required, as facts were not disputed. I am bound by the Tribunal rules. In terms of the Rule 17 (dealing with case management discussions) at a case management hearing, my purpose is to explore the dispute and to ascertain how it may be efficiently resolved; and I am also entitled to make a decision. I took the view that I could come to a decision, given that the Respondent admitted the breach; and there did not appear to be any dispute on the veracity of what the other party had said. For the reasons following, I concluded that I had sufficient evidence before me to determine this matter.

<u>Discussion</u>

5. The Applicants confirmed that they were seeking payment orders against the Respondent. They advised that they had each paid a deposit in respect of their tenancy in around August 2019. They had subsequently taken entry in around September 2019. They had received emails from the Respondent with links to My Deposits Scotland on 18 December 2019 advising that their deposits had been secured. They advised that they had assumed that their deposits would have been secured in accordance with the tenancy deposit regulations; and in accordance with the provisions of the tenancy agreement between the parties. The tenancy agreements had set out that deposits would be secured in a tenancy deposit scheme. From the terms of the emails received regarding My Deposits Scotland it was clear that the deposits had not been secured until 18 December 2019, more than 3 months after their tenancies had commenced.

6. The Applicants understood that a deposit had to be secured within 30 days of being received. The deposits had not been registered with a scheme timeously.

7. They confirmed that they had not chased up the lodging of their deposits with the landlord before 18 December 2019. One of the Applicants had however emailed the Respondents after receiving the email of 18 December 2019 to ask why the deposit had not been lodged timeously, and had been advised that it had been an oversight on the part of the Respondent. The Applicants were shocked at the failure to lodge the deposits on time.

8. They confirmed that the deposits had been returned to them, in full or with acceptable deductions, at the end of their tenancies, there had been no delays and there had been no difficulties getting the deposits returned.

9. The Applicants were seeking payment orders of 3 times the value of their deposits. They submitted that there were rules in place as to how deposits should be held; these rules were to protect tenants. As long as the deposits were not lodged in an approved scheme, they could be put to other use by a landlord. There was risk to the tenants, for example during the Covid pandemic any financial problems suffered by a landlord may have increased, and the risk of the deposit being used by them also increased.

10. The Applicants submitted that the Respondent was an established property company; they had been in business for 20 years; they had multiple properties. In seeking an order for 3 times the value of their deposits they were following advice contained in government websites and also advice contained in advisory websites, such as Shelter. They were shocked by what had happened and wanted to ensure that it did not happen again.

11. The Respondent's representative advised that there was no dispute by the Respondent that the deposits had not been lodged with an approved scheme within the correct timescale. This failure was accepted by the Respondent.

12. The Respondent's representative submitted that there had been no issues regarding the release of the deposits.

13. The Respondent's representative submitted that the Respondent had been in the property industry for a number of years since 1981; and further that they had 38 properties in their portfolio. They were a long established business; they were an experienced landlord.

14. The circumstances leading to the failure to lodge the deposits were regrettable. In relation to the failure to lodge the deposits, this matter had come to light when an audit had been carried out by the Respondent's accountants late last year. During the audit, a discrepancy had been identified and the Respondent realised that some deposits had not been lodged. As soon as this matter was identified, all deposits were lodged with an approved scheme. He advised that there had been a member of staff, who had responsibility for lodging the deposits; the failure had led to disciplinary action being taken against that member of staff. She no longer worked for the Respondent. The Respondent accepted that the failure was nonetheless his responsibility; and he had to ensure that deposits are lodged and the buck stops with him. The Respondent is now taking personal responsibility in ensuring that future deposits are lodged in accordance with the regulations, in order to that such a failure does not happen again.

15. He submitted that the failure had been discovered by the Respondent himself, and rectified by him as soon as he was aware of it. Breaches of the regulations were not the normal way in which the Respondent managed his business.

16. Any sanction, was a penalty and should be seen as a deterrence factor; however the Respondent has already taken steps to address this failure, to ensure that it did not happen again.

17. The Respondent accepts that the deposits were not lodged, however the Respondent's company had a healthy credit balance in its accounts and the deposits were not at risk. He accepted that no evidence had been submitted of accounts but he could submit evidence if necessary. Further he submitted that the deposits were not at risk in the Respondent's accounts, but accepted that their not being lodged in a scheme was a failure to comply with the regulations.

18. The Respondent's representative confirmed that there were another two cases arising out of the same incident before the tribunal, one already determined and another to be heard later today.

19. As the matter was dealt with as soon as the Respondent had become aware of it; and as there had been no re-occurrence, he submitted that any sanction that the tribunal decided to impose should be the lower end of the scale. The Respondent accepted that the breach of the regulations was not acceptable; however the Applicant had not suffered any loss. He submitted that it is not compensation that is payable to an Applicant, but it is a sum imposed as a sanction upon the Respondent. Any sanction had to take account of the facts and circumstances of the case.

20. The Applicants noted that there were another two cases involving the same matter with the Respondent, and suggested that this showed that this breach was

not an isolated incident. The Applicants advised that while appreciating the terms of the explanation as provided by the Respondent's representative, they considered that it did not seem reasonable to suggest that the responsibility for the lodging deposits lay with only one person in the organisation. There appeared to have been no checks or notice of the breach until the audit was completed. They thought this company practice was rather concerning. The Applicants considered that the Respondent's submission attempted to shift the blame, although he says he takes full responsibility. The Applicants did not consider that the health of the Respondent's bank balance was relevant to the matter before the tribunal. They considered that the explanation that it was an "*oversight"* and that *"the ball had been dropped"* was not adequate when the Respondents were a company with years of experience in this area. They suggested that there was no evidence before the tribunal other than the submission by the Respondent's representative to support the assertions made.

Findings in Fact and Law

21. The tribunal made the following findings in fact and law:-

(a) That a tenancy had commenced on 9 September 2019.

(b) The Respondent was the landlord and the Applicant was the tenant.

(c) That the Applicant had paid the Respondent a tenancy deposit on 14 August 2019 of £575.

(d) That the deposit was lodged with an approved scheme on 18 December 2019.

(e) That the tenancy had ended on 9 March 2020.

(f) That arrangements had been made to repay the deposit in full to the Applicant at the end of the tenancy.

(g) That the tenancy deposit had not been lodged with an approved scheme within 30 working days of the tenancy beginning.

Reasons for Decision

22. The Tenancy Deposit Schemes (Scotland) Regulations 2011 set out a number of legal requirements in relation to the holding of deposits, and relevant to this case are the following regulations:-

3.—(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 to the scheme administrator of an approved scheme; …
…

23. Regulation 9 provides that a tenant who has paid a tenancy deposit may apply to the first tier tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.

24. Regulation 10 provides that if satisfied that the landlord did not comply with any duty in regulation 3 then the first tier tribunal — must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and may, as it 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 required under regulation 42.

25. The Respondent accepted that the deposits had not been paid into an approved scheme in accordance with the terms of the regulations. Therefore, the terms of Regulation 10 are engaged and I must order that the Respondent pay the Applicants an amount not exceeding three times the amount of their tenancy deposits. The amount to be paid requires to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty.

26. In these cases, I consider that a sum of £250 in respect of each application would be appropriate.

27. While there has been a breach of the regulations, I do not consider that it has been a serious breach; any penalty should therefore be at the lower end of the scale, albeit, not at the very the lowest end of the scale.

28. In considering what penalty to impose, I have had regard to the submissions of all the parties and to the Applicants' written applications.

29. I consider that it is a serious matter to fail to lodge a tenancy deposit in accordance with the regulations. It is relevant that the Respondent was a long established and experienced property company; and that he was well aware of his duties under the regulations, and therefore should have ensured that deposits were lodged timeously. The system that the Respondent had in place to ensure that a deposit was lodged was evidently not sufficient or adequate. The deposits had sat in a company account for a number of weeks, and this matter only came to light when the Respondent's accountants were undertaking an audit. There appeared to be only one person in the Respondent's company responsible for lodging deposits, and there does not appear to have been adequate supervision/or checking in place to ensure that that employee was carrying out her duties properly.

30. The Respondent had 30 working days from the beginning of each tenancy in which to lodge the deposits, and roughly had therefore until around the middle of October to do so. The time periods when the deposits should have been secured

and were not, was around 8 weeks. This is however, in my opinion, not a very substantial period of time during which the deposits were unsecured.

31. In mitigation, the Respondent accepted the breach in full and has not sought to dispute liability. He has provided an explanation for what happened; that it only came to light when the audit took place. This explanation appears to me to be a credible and reasonable explanation of what happened. In addition, the deposits were lodged as soon as the matter came to light. There was also no issue or delay with the return of the deposits at the end of the tenancies. The Respondent also appears to have taken action to ensure that the matter does not reoccur; he has dismissed the employee and now takes personal responsibility for the lodging of tenancy deposits.

32. While it was in no way the responsibility of any of the Applicants, I do note that the deposits were not lodged as a result of any of the Applicants having to press the Respondent to do so.

33. It appears to me to have been more of a simple failure in the administration of the Respondent's company; as opposed to any reckless disregard or, refusal to comply with the tenancy deposit regulations. While such a failure led to the deposits being unsecured, I consider that is relevant that it was rectified as soon as it became known to the Respondent and no loss has been suffered by any of the Applicants.

34. For all of those reasons, while I consider that the matter is sufficiently serious that a penalty needs to be imposed that is more than minimal; the penalty should be at the lower end of the scale as I do not consider that there has been a blatant or reckless disregard for the regulations, and the breach did not continue for a long period of time. I consider that it has been an administrative error on the part of the Respondent, and this was rectified as soon as the matter was noticed.

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.

05/08/20

M. Barbour

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Legal Member/Chair **Date**