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/20/2338

Re: Property at 1/3 Bruntsfield Gardens, Edinburgh, EH10 4DX ("the Property")

Parties:

Mr Paul Hartmann, 3F3 5 Comiston Terrace, Edinburgh, EH10 6AJ ("the Applicant")

Mr Fraser MacDonald, Villa L'Oursiere, BP 675, St Cergue, 1264 Vaud, Switzerland ("the Respondent")

Tribunal Members:

Helen Forbes (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment should be granted against the Respondent and in favour of the Applicant in the sum of £750

Background

1. By application received in the period between 6th November and 4th December 2020 and made under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules"), the Applicant applied for an order in terms of Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"). The Applicant lodged a copy of the tenancy agreement between the parties, copy notification from Safe Deposits Scotland and copy redacted bank statement.

2. By emails dated 11th and 31st January 2021, the Respondent lodged written representations.

The Case Management Discussion

3. A Case Management Discussion ("CMD") took place by telephone conference on 8th February 2021. Both parties were in attendance.

4. The Applicant set out his case as reflected in the application, namely that the parties entered into a tenancy agreement in respect of the Property which commenced on 1st November 2011. A deposit in the sum of £375 was paid by the Applicant to the Respondent on 3rd March 2010, as the Applicant was then residing in the Property as part of a HMO tenancy agreement, with five residents. The tenancy that commenced in 2011 names three occupants collectively as the tenant, but there were four occupants.

5. The Applicant was informed by Safe Deposits Scotland ("SDS") that his deposit was lodged on 22nd July 2020. The Applicant left the Property at the beginning of October 2020.

6. As far as the Applicant was aware, the Respondent was aware of the Regulations as a previous tenant had brought this to his attention at the end of their occupation. She had questioned where her deposit was held at that time.

7. The Respondent raised the issue of whether or not the application was competent as a previous tribunal had found that the tenancy agreement that commenced in 2011 did not continue by tacit relocation, and ended in 2012. Thereafter the Applicant had a common law tenancy. Because of this decision, the Respondent was unable to recover in full outstanding rent arrears. It was his position that, if the tenancy ended in 2012, the Applicant was time barred from raising this application, as it had to be raised within three months of the tenancy ending.

8. The Applicant's position on the matter of whether or not the tenancy ended, and whether this affected the deposit, was that he was unaware throughout his occupation of any change to the tenancy agreement, and that, whatever the situation, his deposit remained with the Respondent throughout.

9. Given the legal nature of the argument made by the Respondent, the Tribunal offered to adjourn to allow parties to consider this point and take advice, should they so wish. Parties agreed they would prefer to continue to a decision without adjourning to another date.

10. The Respondent said that one of the original occupants, LH, took a pivotal role from 2011 to 2020, taking responsibility for collection and payment of rent, and that she 'looked after the deposit.' There had been much coming and going of occupants/tenants and no records had been kept since 2010. When LH left in 2020, she informed the Respondent that £375 of the deposit belonged to the Applicant. At that stage, the Respondent lodged the deposit with a tenancy deposit scheme, Safe Deposits Scotland.

11. Responding to questions from the Tribunal as to why he had not lodged the deposit within 30 days of the tenancy commencing, as required by the regulations, the Respondent said it was an error on his part. He had several discussions with LH on behalf of the tenants regarding involving a letting agent to manage matters, but the tenants did not want this as it would increase the rent. The Respondent said he had not kept up with the tenancy regulations, though he appreciated that he should have done so. He had enjoyed renting out the Property to good tenants and had tried to be as helpful as he could, enjoying amicable relations with the tenants until the departure of LH. The deposit had changed over the years as people came and left and the Respondent said he was not always aware of who had what share of the deposit. As soon as he became aware, he lodged the deposit with SDS.

12. Given that the Respondent agreed that he had breached the Regulations, subject to the Tribunal's decision on the preliminary issue of whether or not the application was competent, the Tribunal turned to the matter of the amount of payment to be awarded. The Tribunal offered parties the opportunity to adjourn to another date should either of them wish to take advice and prepare submissions on the amount of payment to be awarded. Parties were in agreement that they would prefer to have a decision following the CMD, rather than adjourn to another date.

13. The Applicant submitted that an order in the sum of three times the deposit should be made. The money had been available to the Respondent throughout the Applicant's occupation of the Property, which appeared to be against the Regulations.

14. The Respondent said he was aware that he had not kept up with the Regulations, and that he should have done so. He let the Property at a sub-market rent and wanted the occupants to be able to enjoy living there. He rented one other property, from around 2000 to 2015. It was let through a letting agent who dealt with all financial matters. The Respondent was not closely involved and said he was not aware of the details regarding the tenancy deposits for that property. He did not intentionally retain the Applicant's money, and had no intention to benefit from retaining the money. As soon as he became aware of it, he lodged the money with SDS. He accepted that a previous tenant may have mentioned the tenancy deposit scheme to him. Her deposit was returned at the end of her occupation. No one had asked him to put the money in a scheme. Had they asked, he would have done so. He was living abroad from around 2001.

Findings in Fact

15.

(i) The parties entered into a tenancy agreement in respect of the Property that commenced in or around 2010.

(ii) A tenancy deposit of £375 was paid to the Respondent by the Applicant on 3rd March 2010.

(iii) The parties entered into a short assured tenancy agreement that commenced on 1st November 2011.

(iv) The deposit was not lodged with an approved tenancy deposit scheme within the 30 days required by the Regulations.

(v) The deposit was lodged with an approved tenancy deposit scheme on 22nd July 2020.

(vi) The Applicant left the Property in or around October 2020.

(vii) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

Reasons for Decision

16. Dealing with the issue of whether or not the application is competent, the Tribunal did not make any findings in relation to whether or not the 2011 tenancy agreement between the parties continued over the period of occupation. The Tribunal took the view that, even if the 2011 tenancy agreement came to an end in 2012, and the Applicant thereafter had a common law tenancy, as decided by the previous tribunal, the deposit remained with the Respondent, effectively transferring from tenancy to tenancy, as it did in 2011, when the short assured tenancy commenced. It was open to the Respondent in 2011 to return the deposit paid in 2010, if, indeed, he considered it was only relevant to that particular tenancy, and he did not do so, effectively accepting that the deposit should remain with him despite the change in tenancy agreement. The Tribunal, therefore, found that the deposit was held by the Respondent as a deposit pertaining to whatever tenancy agreement was in place between the parties from 2010 until the tenancy ended in 2020. The application was, therefore, made timeously within three months of the tenancy agreement between the parties ending in October 2020. The application is competent.

17. The Applicant's deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy as required by Regulation 3. The deposit remained unprotected for a period of ten years.

18. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised in the manner set out in the case *Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015* by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal must consider the facts of each case appropriately.

19. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020 which states: *'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.'*

20. The Tribunal considered this to be a serious matter, with the deposit unprotected for a significant length of time, in effect, almost throughout the duration of the tenancy.

21. The Tribunal took into account the mitigating circumstances put forward by the Respondent, including the fact that he was living abroad and had, in effect, delegated much of the management of the Property to LH. However, the Tribunal felt that there had been a failure by the Respondent to recognise his responsibilities as a landlord. It was not up to the tenants to ask to have their deposits lodged in an approved scheme. In addition to keeping up to date with necessary legislation, the Respondent ought to have kept full records of deposits. The Respondent agreed that the matter of tenancy deposit schemes was brought to his attention by another occupant at an earlier stage. The Tribunal was concerned that this did not prompt the Respondent to lodge the deposit with a tenancy deposit scheme at that time. Furthermore, the Respondent could not fail to be aware of the existence of the Regulations if he was letting out another property with letting agents, who would be required to bring it to his attention as part of their agreement. In all, the Tribunal felt that the Respondent had shown a disregard for his responsibilities as a landlord.

22. The Tribunal did not find that this was a case at the most serious end of the scale that would justify an award of three times the tenancy deposit. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £750 to the Applicant, which is two times the tenancy deposit.

Decision

23. The Tribunal grants an order against the Respondent for payment to the Applicant of the sum of £750 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

H Forbes

8th February 2021

Legal Member/Chair **Date**