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 Section 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/22/1285

Re: Property at Copper Beeches, Ardgilzean, Elgin, IV30 8XT ("the Property")

Parties:

Mr Lodewyk Johnson, MV Tranen, Poplar Dock Marina, London, E14 5SH ("the Applicant")

Mr Michael Ramsay, Seaview, Findhorn, Forres, IV36 3YE ("the Respondent")

Tribunal Members:

Nicola Irvine (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and it made an order for payment against the Respondent in favour of the Applicant in the sum of £2,200.

Background

1. The Applicant submitted an application on 5 May 2022 under Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

2. The Applicant sought an order for payment on the basis that the Respondent was said to have breached the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

3. This case has previously called for case management discussions (CMDs) on 3 October 2022 and 13 January 2023. Reference is made to the Notes issued following those CMDs.

Case Management Discussion – 20 March 2023

4. The CMD took place by conference call and both parties participated in the discussion. The Respondent opposed the application on a number of grounds as set out below. The Respondent made reference to an excerpt from the Scottish Government website which he submitted to the Tribunal by email on 13 January 2023. The excerpt listed a number of exceptions to the rule that landlords must secure tenant deposits in an approved scheme. The exceptions relied upon by the Respondent are listed below at paragraphs b to f.

    a. <u>The application was timebarred</u>

    The Respondent's position was that the application had been lodged outwith the 3 month time period as required in terms of Regulation 9(2) of the 2011 Regulations. The Applicant stated that he vacated the property on 9 or 10 February 2022. The Respondent said that he would have to check the details of "whats app" messages exchanged between the parties. The Tribunal however noted from the papers supporting the application that an excerpt of whats app messages has been produced. In those messages, the Applicant indicated that he vacated the property on 9 February 2022. The Tribunal noted that the application was submitted to the Tribunal on 5 May 2022 and was accepted on 9 May 2022. The Tribunal was therefore satisfied that the application was made within the 3 month time period provided for in Regulation 9(2) of the 2011 Regulations.

    b. <u>The property is a holiday home</u>

    The Respondent contended that the property is a holiday home because he leaves two rooms in the property empty so that he and his family can stay at the property. The Tribunal noted that the agreement between the parties which is headed "Interim Lodger Agreement" makes no mention of a holiday home. There was no indication that the property was situated within a holiday resort. At the time of the Applicant's occupation of the property, there was 4 unconnected persons living at the property. The Tribunal was satisfied that the property was not a holiday home.

    c. <u>The property is supported accommodation</u>

    The Respondent's position was that the property is supported accommodation because there is a mortgage over the property. There was no information before the Tribunal to suggest that any occupant of the property received care, support or supervision which was linked in any way to the property. The Tribunal was satisfied that the property was not supported accommodation.

    d. <u>The Respondent was also a resident in the property</u>

The Tribunal noted from the CMD on 3 October 2022, the Respondent conceded that he was not resident in the property during the Applicant's occupation of the property. The Respondent confirmed at this CMD that he was not resident in the property but explained that he would have been resident, had it not been for covid restrictions. The Tribunal observed that the fact of the matter was that the Respondent was not resident throughout the Applicant's occupation of the property and therefore this exception did not apply.

e. <u>The property is subject to control orders</u>

The Respondent asserted that the property was subject to a control order because a decree had been granted against him at the instance of Clydesdale Bank plc in November 2019 for repossession of the property. The Tribunal explained to the Respondent that a decree granted in favour of a lender, following a breach of standard security conditions, is not a control order. This exception does not apply.

f. <u>Transitory ownership – where the property has been repossessed by a mortgage lender.</u>

The Respondent maintained that since a decree was granted in favour of the heritable creditor against him in November 2019, this exception applies. The Tribunal disagreed. Although the Tribunal has not had sight of the decree, the Respondent confirmed that the lender has not repossessed the property. This exception is therefore not engaged.

5. The Respondent advised that he took deposits from other tenants and did not secure those deposits in an approved scheme. The Respondent's position is that he does not believe that he is required to do so. He went onto explain that none of the Applicant's deposit should be repaid to him owing to damage to the property and the Applicant's excess energy use.

6. The Applicant explained that this is the first time there has been any mention of damage to the property or excess energy use. In any event, the Applicant advised that he remains in contact with other tenants who were resident at the property during the same period he was, and he understands that none of them have had their deposit repaid. The Applicant explained that he has other claims against the Respondent for overpaid rent and repayment of the deposit. The Tribunal indicated that these matters are not relevant to the present application.

Findings in Fact

7. The parties entered into a private residential tenancy which commenced 14 October 2021.

8. The Applicant paid a deposit of £1,100 to the Respondent.

9. The Respondent did not secure the Applicant's deposit in an approved scheme.

10. The Respondent has not repaid the Applicant's deposit or any part of it.

Reason for Decision

11. Notwithstanding the heading of the agreement between the parties (Interim Lodger Agreement), it was clear to the Tribunal that a private residential tenancy had been created. A room within the property was let to the Applicant as his principal home and he had access to shared accommodation along with other tenants. None of the exceptions listed in Schedule 1 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") applied.

12. 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: -

    Duties in relation to tenancy deposits
    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; and (b) provide the tenant with the information required under regulation 42.

    Sanctions
    9.– (1) A tenant who had paid a tenancy deposit may apply to the [First-tier Tribunal] 1 for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit. (2) An application under paragraph (1) must be made […]2 no later than 3 months after the tenancy has ended.

    10. If satisfied that the landlord did not comply with any duty in regulation 3 the [First – tier Tribunal] 1 – (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] 1 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.

13. It was an agreed fact at the CMD that the Applicant paid a deposit of £1,100 to the Respondent at the outset of the tenancy. It was also a matter of agreement that the Respondent did not secure a deposit for the Applicant in an approved scheme. The Tribunal having determined that none of the exceptions relied upon by the Respondent applied, the terms of regulation 10 were engaged, and the Tribunal must order that the Respondent pay the Applicant an amount not exceeding three times the amount of his tenancy deposit. The amount to be paid required to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty.

14. The Tribunal considered that its discretion in making an award requires to be exercised in a manner consistent with the case *Jenson v Fappiano (Sheriff Court) (Lothian & Borders, Edinburgh) 28 January 2015.* It must be fair, just and proportionate and informed by taking account of the particular circumstances of the case.

15. The Tribunal considered 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 of reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals."*

16. The Tribunal noted the Respondent's denial of fault on the basis that he maintained that he did not require to secure the Applicant's deposit, or indeed any other tenants' deposits. It was also noted from the Applicant's supporting papers that the local authority had visited the property on 9 February 2022 and found that the Respondent was not resident, and all five bedrooms were rented out to individuals who were not related. The view taken by the local authority was that the property was a house in multiple occupation which was, and remained as at 7 March 2022, unlicensed.

17. For all the reasons set out above, the Tribunal considered that the penalty should not be at the lower end of the scale; there was however, no evidence of fraudulent intent and the sum involved was relatively modest. In respect of the failure to comply with the 2011 Regulations, a sanction of TWO THOUSAND TWO HUNDRED POUNDS (£2,200.00) is appropriate in this case.

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.

N. Irvine

Legal Member/Chair **Date** **20 March 2023**