Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/2021

Re: Property at 1 Cessnock Road, Troon, KA10 6NJ ("the Property")

Parties:

Mr Jeffrey Ward, 1913 N Kessler Street, Wichita, KS 67203, United States ("the Applicant")

Mr Lewis Boyd, 1 Cessnock Road, Troon, KA10 6NJ ("the Respondent")

Tribunal Members:

Sarah O'Neill (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determines that the respondent has failed to comply with the duty in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to a) pay a tenancy deposit to the scheme administrator of an approved scheme and b) provide the tenant with the information required under Regulation 42 of the said regulations. The tribunal therefore makes an order requiring the respondent to pay to the applicant the sum of £4800.

Background

1. By application received on 28 June 2019, the applicant's representative, Mr Martin Watt, Relocation Agent, Dwellworks, submitted an application on his behalf under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017('the 2017 rules'). The applicant was seeking the return of the £1600 deposit paid by the applicant and compensation in respect of the respondent's failure to comply with regulation 3 (1) (a) and (b) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the 2011 regulations').

2. The application included the completed application form on behalf of the tenant; a copy of the tenancy agreement between the parties; a letter from the tenant authorising Mr Watt to act as his representative; and a letter from Mr Watt on behalf of the applicant to the respondent dated 13 March 2019, giving 28 days' notice of termination of the tenancy agreement.

3. An email was received from Mr Watt on 2 August 2019, enclosing proof of payment of the deposit and an email from SafeDeposits Scotland, confirming that they did not hold the applicant's deposit. Further emails were received from Mr Watt on 6 and 7 August 2019, enclosing emails from the two other approved tenancy deposit schemes, Letting Protection Scotland and MyDeposit Scotland, confirming that they did not hold the applicant's deposit.

4. The application was accepted on 16 August 2019. Notice of the case management discussion (CMD) scheduled for 2 October 2019, together with the application papers and guidance notes, were served on the respondent by sheriff officers on behalf of the tribunal on 28 August 2019. The respondent was invited to make written representations in relation to the application by 16 September 2019. No written representations were received from the respondent.

The Case Management Discussion

5. A CMD took place on 2 October 2019 at Russell House, King Street, Ayr KA8 0BQ. The applicant was represented by Mr Watt, who gave evidence on his behalf. The respondent was not present and was not represented. The tribunal was satisfied that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date, time and place of a CMD had been duly complied with. The tribunal delayed the start of the CMD by 10 minutes, in case the respondent had been detained. He did not appear, however, and no telephone calls, messages or emails had been received from him. The tribunal therefore proceeded with the CMD in the absence of the respondent.

Findings in Fact

6. The tribunal made the following findings in fact:

- The applicant and his wife, Mrs Kimdao Ward, entered into a private residential tenancy agreement with the respondent in respect of the property from 3 September 2018.
- The respondent was the landlord of the property in terms of the tenancy agreement.
- The rent payable under the tenancy agreement was £1600 per month.
- Paragraph 10 of the tenancy agreement provided for a tenancy deposit of £1600 to be paid by the applicant and Mrs Ward to the respondent prior to or at the start of the tenancy. The same paragraph clearly stated that the landlord must lodge the deposit with an approved tenancy scheme within 30 days of the tenancy start date. It also stated that the deposit would be lodged with SafeDeposits Scotland.

- The tenancy deposit was paid to the respondent by County Homesearch International (Dwellworks' legal name in the UK) on behalf of the tenant by bank transfer on 30 August 2018.
- The deposit was not lodged with SafeDeposits Scotland or either of the other approved schemes.
- The applicant did not receive from the respondent the information required in terms of regulations 3 and 42 of the 2011 regulations within the specified timescale.
- The applicant's tenancy came to an end on 10 April 2019.
- The tenancy deposit was not repaid by the respondent to the applicant following termination of the tenancy.

Reasons for the Decision

7. Mr Watt told the tribunal that Dwellworks was a relocation agent which had arranged the tenancy for the applicant while he was working in the UK, on behalf of an American company. The tenancy deposit had been paid on his behalf by Dwellworks, acting on behalf of that company. He said that he had been in contact with the respondent prior to submitting the application, in the hope of securing the return of the deposit without the need for an application to the tribunal. The respondent had been travelling abroad at that time, but Mr Watt believed he had then returned home. The deposit has not been returned.

8. Mr Watt said that, once he had received permission from the applicant to make an application to the tribunal on his behalf, he had then contacted the respondent again. He had advised the respondent of his intention to submit the application and pointed out the potential sanction available to the tribunal in the event of such an application. As he was conscious that the three month deadline for making the application was 10 July, he then submitted the application. He said that he had heard nothing from the respondent since the initial contact he had with him at the end of the tenancy.

9. The tribunal determined on the basis of all the evidence before it, and in the absence of any evidence to the contrary from the respondent, that the respondent had failed to comply with the duties under regulation 3 (1) (a) and (b) of the 2011 regulations. The tribunal was therefore required to make an order requiring the respondent to make a payment to the applicant.

10. The tribunal then considered the amount which the respondent should be ordered to pay to the applicant in terms of regulation 10 of the 2011 regulations. In considering the appropriate level of payment order to be made, the tribunal had regard to a number of factors. It noted that the respondent was, or at least should have been, aware, of the requirement to lodge the deposit in an approved scheme, as this was clearly referred to in the tenancy agreement.

11. There was no evidence before the tribunal as to whether the respondent was an experienced landlord and/or let out other properties. Mr Watt said that the property had been marketed by a letting agent, but that all of his dealings with the property had been directly with the respondent. No letting agent was mentioned on the tenancy agreement, but in any case the duty under regulation 3 is an absolute duty on the landlord, regardless of whether they are a 'professional landlord' or not.

12. The tribunal concluded that the respondent appeared to have deliberately or recklessly failed to observe his responsibilities, and had failed to admit his failure to do so, or to engage with the tribunal process at all. The breach of duties was serious, and the respondent had offered no excuse for the breach, or argued that there were any mitigating circumstances. The applicant had lost the opportunity to claim the deposit back through an approved scheme, or to challenge any proposed deduction from the scheme.

13. The tribunal also noted that the deposit had not been returned to the tenant. While the tribunal noted that the actual loss to the tenant himself had not been significant, as the deposit had been paid on his behalf by the relocation company, nevertheless the sum involved was high, and had not been repaid.

14. In all the circumstances, the tribunal considered the need to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach (Sheriff Welsh *in Jenson v Fappiano* 2015 GWD 4-89). The tribunal considered that the breach was serious, and noted that no mitigating circumstances had been put before it. Having regard to the recent Upper Tribunal decision by Sheriff Ross in *Rollet v Mackie* (UTS/AP/19/0020), the tribunal considered that some of the factors present indicate that an award at the higher end of the scale would be justified. These include a deliberate or reckless failure to observe responsibilities; high financial sums involved; and actual losses caused (if not directly to the tenant in this case).

15. Taking all of the above considerations into account, the tribunal grants an order for £4800, representing three times the amount of the tenancy deposit paid.

Decision

The tribunal determines that the respondent has failed to comply with the duty in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to a) pay a tenancy deposit to the scheme administrator of an approved scheme and b) provide the tenant with the information required under Regulation 42 of the said regulations. The tribunal therefore makes an order requiring the respondent to pay to the applicant the sum of £4800.

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.

S O'Neill

_____ 2/10/19

Legal Member/Chair **Date**