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/19/3267

Re: Property at Flat 1/1, 1 Doune Quadrant, North Kelvinside, Glasgow, G20 6DN ("the Property")

Parties:

Dr Jack Gordon, Miss Imogen Gordon, c/o South Rowantree, Gatelawbridge, Thornhill, DG3 5EA ("the Applicant")

Miss Anne Tilston, Flat 1/1, 1 Doune Quadrant, North Kelvinside, Glasgow, G20 6DN ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent, having breached her duties in terms of Regulation 3(1)(a), should be ordered to make payment to the Applicants in the sum of FOUR THOUSAND NINE HUNDRED AND FIFTY POUNDS (£4,950.00) STERLING.

FINDINGS IN FACT

1. The Applicants were the tenants, and the Respondent the landlord, of the Property under a Private Residential Tenancy which commenced on 27 July 2018 and terminated on 8 August 2019.

2. The Applicants paid a tenancy deposit of £1,650 ("the deposit") on 27 July 2018.

3. The Respondent first lodged the deposit to the scheme administrator of an approved tenancy deposit scheme on 17 September 2019.

4. The deposit was unprotected for the entirety of the tenancy.

5. The Respondent sought to agree deductions from the deposit without reference to the dispute resolution process of an approved tenancy deposit scheme.

6. By lodging the deposit with an approved scheme on 17 September 2019 and immediately authorising its release to the Applicants, the Respondent sought to conceal her breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

FINDINGS IN FACT AND LAW

1. By failing to lodge the deposit with the scheme administrator of an approved tenancy deposit scheme on or before 7 September 2018, the Respondent breached Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

2. Having regard to all of the circumstances, an appropriate sanction under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 is a sum equal to three times the deposit.

STATEMENT OF REASONS

1. This case called before me for a Case Management Discussion on 13 December 2019 at 11.30am. The Applicants were represented by Mr Gordon, solicitor. The Respondent was neither present nor represented.

2. The Tribunal received a telephone call at 9:43am on 13 December 2019 from G&S Property Management to advise that they were not instructed by the Respondent in this matter. That was followed shortly thereafter by an emailed letter confirming same. That letter indicated that G&S Property Management had not acted for the Respondent since August 2019. I find that suggestion both surprising and incredible given that there is copy correspondence submitted with the application dated 12 and 24 September, and 3 October, all dates 2019, from G&S Property Management in terms of which they were engaging with the Applicants and their Representatives in relation to this matter. However, the Application had been properly served on the Respondent by Sheriff Officers, and I therefore concluded that the non-attendance at late notice by G&S Property Management had no effect on either my ability to consider this matter or any decision that I chose to reach.

Applicant's Submissions

3. Mr Gordon invited me to grant an order for payment of a sum equal to three times the tenancy deposit. In his submission, the facts were clear from the Application and productions submitted in support of it, notice of which had been served on the Respondent:-

a. The tenancy deposit was £1,650, which was a substantial sum;
b. The tenancy had endured for a period just over a year;
c. The Respondent had failed to comply with her duties under the 2011 Regulations in respect of the deposit for the entirety of the tenancy;
d. The deposit had been unprotected during the whole of the tenancy;
e. Notwithstanding the failure to comply with that duty, the Respondent had initially sought to apply deductions to the deposit without reference to a scheme dispute resolution process; and
f. Five weeks after the conclusion of the tenancy, the Respondent lodged the deposit with MyDeposits Scotland, a regulated tenancy deposit scheme, and simultaneously instructed its release in full to the Applicants.

In respect of that last point, Mr Gordon submitted that I could draw a negative inference from the actions of the Respondent (through her agents) that the lodging of the deposit had been a deliberate deceit designed to mislead the Applicants into believing that the deposit had been lodged with a scheme all along.

4. In all of the circumstances, Mr Gordon submitted that an appropriate sanction would be the maximum sanction of three times the tenancy deposit.

Discussion

5. In terms of Rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules"), I may do anything at a Case Management Discussion that I may do at a Hearing, including make a decision. In the circumstances of this case, and having regard to the Overriding Objective in Rule 2 of the Rules, it is appropriate in my view for a decision to be made on this application today.

6. In terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011:-

"**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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

AU

(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions "relevant person" and "unconnected person" have the meanings conferred by section 83(8) of the 2004 Act.

Court orders

9.—(1) A tenant who has paid a tenancy deposit may apply to the sheriff 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 by summary application and must be made no later than 3 months after the tenancy has ended.

Court orders

10. If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff—

(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 sheriff 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.

Landlord's duty to provide information to the tenant

42.—(1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).

(2) The information is—

(a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;

(b) the date on which the tenancy deposit was paid to the scheme administrator;

(c) the address of the property to which the tenancy deposit relates;

(d) a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;

(e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and

(f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

(3) The information in paragraph (2) must be provided—

(a) where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or

(b) in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme."

7. The first question to determine is whether there has been a breach of either Regulation 3(1)(a) or (b). In this case, the application sets out that the deposit was lodged in an approved scheme on 17 September 2019. The Respondent has been given notice of that case against her and has chosen not to appear to dispute that. In any event, from the correspondence produced with the application, it seems clear to me that the deposit was lodged on 17 September 2019. It ought to have been lodged within 30 working days of 27 July 2018. Regulation 3(1)(a) is therefore breached. The information required under Regulation 42 was provided by MyDeposits Scotland on 17 September

2019. That was the same day as it was paid into the Scheme. It therefore seems to me that Regulation 3(1)(b) **has not been breached.** I highlight this because it differs from the view expressed by me during the CMD, but having reviewed again the terms of Regulation 42 after the CMD I am compelled to adjust my findings. This has no effect on my overall decision, as expressed at the conclusion of the CMD.

8. Having concluded that there has been a breach of Regulation 3(1)(a), the next consideration is what an appropriate sanction should be. The determination of a sanction under Regulation 10 is an exercise of judicial discretion. The exercise of judicial discretion was considered in *Jenson v Fappiano* 2015 SCEDIN 6, beginning at paragraph 11:-

"I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

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 judgment.
2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a 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 (*'The Discretion of the Judge'* , Lord Justice Bingham, 5 Denning L.J. 27 1990).

12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf *Tenzin v Russell 2014 Hous. L.R. 17*). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case."

9. In the circumstances of this case, I have reached the view that the breach sits at the extreme end of the scale. The Respondent instructed a professional letting agent to manage the property on her behalf. That notwithstanding, the Respondent failed to lodge a very substantial deposit (equivalent to 6 weeks' rent) with a scheme at any time during the currency of the tenancy. It was unprotected during that time. The Respondent's agent initially tried to deal with the return of the deposit without reference to the scheme. Thereafter, when the Applicants' solicitor attempted to extract information about the scheme that the deposit was in, it was lodged with a scheme and immediately authorised its release. In the correspondence that followed, where the Applicants invited the Respondent, through her agents G&S Property Management, to make proposals to address her breach of statutory duties, the Respondent's agents instead accused the Applicants' agent of extortion and breach of professional duties. That was then, in my view, compounded by the call and correspondence received by the Tribunal from G&S Property Management on the morning of the CMD. In all of the circumstances, I accept Mr Gordon's submission that I may draw a negative inference from the conduct of the Respondent and her agents, and conclude that the late lodging of the deposit was an attempt to mislead the Applicants into concluding that the deposit had been properly and timeously lodged.

10. All of that being so, I consider that an appropriate sanction in this case is the maximum. The sanction ought not only to act as punishment for the breach already committed, but also as deterrent from any future breach. I award a sum equal to three times the tenancy deposit, being the sum of £4,950.

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 Upton

Legal Member/Chair	13 December 2019 **Date**