Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under regulation 9 of the Tenancy Deposits Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3428

Re: Property at 48 Carrick Knowe Road, Edinburgh, EH12 7AH ("the Property")

Parties:

Ms Joanne McIntosh & Mr Nick Bartie, both residing at 86/1 Harvesters Way, Edinburgh, EH14 3JJ ("the Applicants")

And

Mr Grant McKeeman, residing at 135 Corstorphine Road, Edinburgh, EH12 5SG ("the Respondent")

Tribunal Members:

James Bauld (Legal Member)
Eileen Shand (Ordinary Member)

Decision

1. **The First-tier Tribunal for Scotland (Housing and Property) Chamber ("the Tribunal") determines that the Respondent should be ordered to make payment to the Applicants of the sum of SEVEN HUNDRED AND SEVENTY POUNDS (£770.00).**

Background

2. The application was lodged with the Tribunal on 21 October 2019. The application was initially lodged only by Ms McIntosh the First Named Applicant. Mr Bartie who was a joint tenant of the property was added as an Applicant at the hearing which took place on 25 February 2020. In the application the Applicants seek a payment order in terms of regulations 9 and 10 of the

Tenancy Deposits Scheme (Scotland) Regulations 2011 ("the Regulations") in respect of an alleged failure by the Respondent to comply with those regulations.

3. A case management discussion took place on 14 January 2020 and on that date the Legal Member hearing the case management discussion decided the application should be remitted to a hearing. A hearing was fixed to take place on 25 February 2020 and appropriate intimation of that was made to all parties.

4. The hearing on 25 February 2020 was attended by Ms McIntosh, the original Applicant, along with Mr Bartie who was the joint tenant. It was agreed that Mr Bartie could be added as a joint Applicant. The Respondent Mr McKeenan attended along with a Mr Ewan Macleod. Mr Macleod was described as the person who had assisted Mr McKeenan with the tenancy. No objection was taken by the Applicants to Mr Macleod being present during the hearing.

Findings in Fact

5. The Applicants and the Respondent were respectively the tenants and landlord under a tenancy agreement in respect of the property.

6. The tenancy commenced on 1 April 2017 and was a short assured tenancy in terms of the Housing (Scotland) Act 1988. It was a relevant tenancy for the purposes of the regulations.

7. The agreed rent for the property was £950 per month.

8. The Respondent took a deposit of £770 from the Applicants.

9. The tenancy ended on 30 July 2019 when the Applicants removed from the property and returned the keys to the Respondent. The Respondent did not lodge the tenancy deposit which had been taken until 30 July 2019.

10. The deposit has subsequently been returned to the Applicants.

The Hearing

11. The hearing commenced by the Tribunal explaining to parties the basis of the application, the relevant law relating to the application and setting out the overriding objective of the Tribunal to deal with proceedings justly. There appeared to be no dispute between the parties that a deposit of £770 had been taken by the Respondent at the commencement of the tenancy and that this had not been lodged until 30 July 2019, a period of some 27 months after the commencement of the tenancy.

12. The Tribunal explained the terms of the regulations to the landlord. The Tribunal explained to the landlord that the regulations required landlords to pay tenancy deposits into an approved scheme within 30 working days of the commencement of tenancy. In this case the landlord had clearly failed to do so. The duties in the regulations are twofold. There is a requirement to pay the deposit to a scheme administrator and a requirement to provide the tenant with specified information regarding the deposit. The Respondent has failed in both duties.

13. The Tribunal explained to the Respondent that in terms of the regulations, where there is a breach of these duties, the Tribunal is obliged in terms of the regulations to make an award. Regulation 10 of the regulations makes it clear that if the Tribunal is satisfied that there was a failure to comply with the duties then the Tribunal "must order" the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. The landlord eventually agreed and understood that in this case the only matter to be determined by the Tribunal was the amount of the payment to be ordered in terms of regulation 10.

14. The Tribunal hearing was thereafter conducted on a reasonably informal basis and parties were allowed to explain the background to the commencement of the tenancy and the taking of the deposit.

15. The landlord explained that the deposit which had been taken of £770 had been reduced from an originally agreed deposit because the tenants had undertaken to purchase and install a garden shed within the property. No such shed was ever purchased or installed. The landlord indicated that with regard to lodging of deposits generally, he had lodged a deposit for a previous tenancy in the property and, after the termination of this tenancy, had lodged a tenancy deposit for the new tenancy. With regard to this deposit he indicated that he had simply forgotten to do so. It was a simple mistake. He indicated he was a printer and was used to dealing with deadlines. The only explanation which seemed to be tendered to the Tribunal was that there was still some dubiety about whether the deposit of £770 would be the final amount of the deposit or whether any additional sums would be added if the tenants did not acquire the garden shed. However, the landlord was unable to explain to the Tribunal why he had not remembered to lodge the deposit for a period of 27 months. It was apparent to the Tribunal that Mr Macleod had been in contact with the tenants on behalf of the landlord for a period of time after the payment of the deposit and it must have been clear to the landlord that no further moneys were going to be paid. Accordingly, at some point over the first few months of the tenancy, it should have been clear to the landlord that he had the deposit and required to lodge it.

16. The landlord indicated that he had made no gain from failing to lodge the deposit. When the tenancy was being terminated and parties were in discussion regarding that termination, he immediately lodged the deposit with the appropriate scheme and return of the deposit was dealt with through that scheme's arbitration process. It seemed to be agreed between the parties that the entire deposit of £770 was repaid to the tenants and the landlord indicated at the Tribunal and through his previous written submissions that his representative had failed to attend the appropriate hearing where the return of the deposit was to be discussed.

17. During the conduct of the hearing, the landlord indicated that he believed that the making of an award against him would be unfair. The Tribunal referred the landlord to a number of previous decisions made by the Sheriff Courts when these disputes were dealt with by the courts prior to the transfer of the jurisdiction to the Tribunal. In the case of *Stuart Russell and Laura Clark v Samdup Tenzin (December 2013)* , Sheriff Principal Stephen referred to the "strict liability consequences of non-compliance". She indicated this allowed the court to "promote rigorous application of the regulations". She indicated the purpose of the regulations was "deterrence". In the case of *Cooper v Marriott (March 2016)*, Sheriff Welsh indicated that the scheme was intended "to regulate and control by rules and sanctions important aspects of the property rental market". He indicated it was not a scheme "principally introduced to compensate the tenant for harm done although the net result of the application of sanction may seem like the tenant is being compensated". Further, in the case of *Fraser and Pease v Meehan (August 2013)* Sheriff Mackie at Edinburgh Sheriff Court noted that the amount to be paid "cannot be said to be compensatory". She noted that the relevant part of the regulations is headed "sanctions" and stated that the amount to be paid is in the form of a sanction or a penalty. She indicated that the awards to be made were designed to "punish" the landlord's behaviour and to "express condemnation of or indignation at the enormity of the offence. A tenant's receipt of such an award may be regarded as a windfall".

18. The tenants also provided their views to the Tribunal. They confirmed the position that some of the originally agreed deposit was to be retained by them in order for them to purchase and install a garden shed. However they could not find a shed within that price range and did not do so. They were not aware the deposit had not been lodged and did not become aware of that until they were in the process of leaving and there was an exchange of text messages between Ms McIntosh and Mr Macleod. Ms McIntosh indicated that she became upset by the tone of the messages from Mr Macleod. Mr Bartie then indicated that he then tried to contact Mr McKeeman directly as he could see these messages were upsetting his partner. He indicated that he had known

Mr McKeeman through contact with his business and he attempted to deal directly with Mr McKeeman to resolve matters without success.

19. The Applicants had also produced to the Tribunal emails which had been sent to Ms McIntosh by the solicitor acting for the landlord. In one of those emails, the solicitor expressed to Ms McIntosh his views on the likely award to be made if an application was made under the regulations and indicated that any sum awarded would "pale into insignificance when compared to the sums which our client will seek from you". The email also indicated that "legal costs loom large here both in terms of raising an application under the 2011 regulations and in defending the separate proceedings which our client would raise against you".

20. The Tribunal raised the content of this email with the Respondent. The Tribunal indicated to the Respondent that the views expressed by the solicitor were not shared by the Tribunal and pointed out to the Respondent that any action which might be raised by him against the Applicants would require to proceed through the Tribunal. The Tribunal generally does not award expenses and accordingly the suggestion that "legal costs loom large here" would appear to be inaccurate and may well have been regarded by the Applicants as mildly threatening in tone and intended to dissuade the Applicants from making this application.

21. The Tribunal then asked whether parties were willing to attempt to resolve this matter without the Tribunal making a decision. It was clear from previous correspondence than an offer of settlement had been made and parties were asked whether they were willing to have discussions even at this stage with regard to a settlement. The Tribunal did take a short break to allow parties to consider that possibility but they were not able to do so.

22. The hearing then continued and the Tribunal expressed the view that any award which would be made would not be at the maximum level allowed by the regulations. Given the deposit was £770, the maximum award open to the Tribunal would be £2,310. The Tribunal asked parties to indicate what level of award they thought would be appropriate. The landlord indicated he thought

the award should be at the lower end of the scale perhaps around the £300 figure. Indeed during the hearing he had offered that amount to the Applicants and indicated that if they accepted that he would undertake not to pursue any further action against them for what he regarded as other sums which were outstanding to him in respect of damage to the property and repairs required after determination of the tenancy.

23. The tenants did not accept that many of the sums allegedly being sought by the landlord would be due but there was concession with regard to one item.

24. The Applicants were asked to express a view on the appropriate award by the Tribunal. They indicated that they thought the appropriate award would be the deposit itself being £770. It should be noted that the Tribunal had explained to parties that the Tribunal had a discretion to award any amount from £1 to £2310 subject to the Tribunal having expressed a view that they would probably not award at the very top end of that scale.

25. The hearing was then concluded and the Tribunal indicated to parties that the Tribunal would consider its position and issue its decision.

Reasons for Decision

26. This application related to the failure of the Respondent to place a tenancy deposit within an approved tenancy deposit scheme. The regulations have been in force for a significant number of years. The regulations require landlords to pay deposits into an approved scheme within 30 working days of the commencement of the tenancy. In this case it was clear the landlord had failed to so. Accordingly there was a breach of the appropriate part of the regulations and the Tribunal was required to make an award.

27. The Tribunal accepts this case was a relevant tenancy in terms of the regulations that a deposit was taken and that the landlord failed to pay that deposit into an appropriate tenancy deposit scheme within the relevant time

frame. Accordingly the only matter to be determined by the Tribunal is the amount of the payment to be ordered in terms of regulation 10.

28. Accordingly the Tribunal required to determine the amount of the award to be made. The Tribunal notes that the regulations were introduced to safeguard deposits paid by tenants. They were introduced against a background of landlords abusing their position as the holder of deposit moneys. The regulations were intended to ensure that deposits were placed outwith the reach of both the landlord and the tenant and to ensure that there was a dispute resolution process accessible to both parties at the end of the tenancy which placed them on an equal footing. The regulations indicate that the Tribunal must make an award of a payment to the tenant of an amount not exceeding three times the amount of the tenancy deposit. There have been numerous decisions from the Tribunal and from the Sheriff Courts in similar cases. It is clear from the cases that the Tribunal has a wide discretion in determining the amount of the award to be made.

29. The Tribunal is aware of an upper Tribunal decision (reference UTS/AP/19/0023) where the Upper Tribunal has indicated that it is appropriate for the First-tier Tribunal to differentiate between landlords who have numerous properties and run a business of letting properties and landlords who have only one property which they own and let out. The Upper Tribunal indicated in that decision it would be inappropriate to impose similar penalties on such landlords. In this case the Respondent indicated he owned only one residential property. He does not use the services of a professional letting agent. The Tribunal accepted that the landlord had made a genuine error in failing to lodge the deposit with a scheme and the Tribunal accepts the submission made by the Respondent that this failure does not fall at the most serious end of the potential scale of the breaches. The Tribunal also notes that the regulations were designed to be a sanction or a punishment against landlords. That view has been expressed in numerous cases throughout the years.

30. Having considered the application and the views of the parties and taking into account that this deposit was not lodged for a period in excess of two years the Tribunal takes the view that the award which should be made should be at the

level required by the tenant and it should be at the level of £770. The Tribunal does not take the view in this instance that it should make a higher award than that requested by a party.

31. Accordingly the Tribunal determines to make an award of £770 payable by the Respondent to the Applicants.

Decision

32. The Tribunal awards payment in the sum of SEVEN HUNDRED AND SEVENTY POUNDS (£770) to be paid by the Respondent to the Applicants.

Right of Appeal

33. **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.**

James Bauld

9 March 2020

Legal Member/Chair **Date**