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

Chamber Ref: FTS/HPC/PR/19/3089

Re: Property at Flat 1, 17 Lutton Place, Edinburgh, EH8 9PD ("the Property")

Parties:

Miss Madeline Cox, 3F1 22 Melville Terrace, Edinburgh, EH9 1LR ("the Applicant")

Dams Ltd, 27 Telford Road, Edinburgh, EH4 2AY ("the Respondent")

Tribunal Members:

Fiona Watson (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order is granted against the Respondent(s) for payment of the undernoted sum to the Applicant(s):

Sum of SEVEN HUNDRED AND NINETY-TWO POUNDS AND EIGHTY PENCE (£792.80) STERLING

- Background

1. An application was submitted to the Tribunal under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations"). Said application sought an order be made against the Respondent on the basis that the Respondent had failed to comply with his duties to lodge a deposit in a tenancy deposit scheme within 30 days of the start of the tenancy in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

- The Hearing

2. A Hearing took place on 31 January 2020. The Applicant was personally present and represented herself. Mr Ghafoor, a Director of Dams Ltd, was personally present and represented by Mr Nisbet of Nisbets Solicitors. A Case Management Discussion ("CMD") had previously taken place on 4 December 2019 where the Applicant had been personally present. There had been no appearance by or on behalf of the Respondent. It was explained by Mr Nisbet at the Hearing that this failure to attend had been the result of a diary error. Prior to the CMD, the Respondent's agent had written to the Tribunal making representations to the effect that he considered that the application had not been submitted within the timescale required under Regulation 9 of the 2011 Regulations, in that the application must be submitted within 3 months of the end of the tenancy, and was accordingly incompetent on this basis. A Hearing was accordingly fixed.

3. At the Hearing, the Tribunal heard submission from both parties on the competency of the application first of all.

4. The Respondent's agent submitted that under Regulation 9 of the 2011 Regulations, an application in respect of a failure to comply under Regulation 3 of the said Regulations must be made no later than three months after the date the tenancy ended. There are no exceptions and the Tribunal has no discretion. The tenancy had ended on 30 June 2019. The Application was submitted by way of email from the Applicant dated 1 October 2019 and which was date-stamped by the Tribunal on that same date. The email of 1 October 2019 referred to an earlier email of 20 August 2019 which appeared to be forwarded by the email of 1 October 2019 and which purported to be an email making an application under the same Rule and attaching the relevant form and accompanying documentation. Mr Nisbet submitted that all other emails lodged by the Applicant a supporting documentation contained a web-link printed at the bottom of each page. This email did not. He suggested that anyone could fabricate an email. If the email of 20 August 2019 had been sent by the Applicant it would be in the same form and contain the same web-link at the bottom of the page. It did not. This suggested that the email of 20 August 2019 had not been sent at all. There was no one from the Tribunal administration present at the Hearing who could confirm that the email of 20 August 2019 had been received. The only evidence of an application having been received by the Tribunal was the date-stamped email of 1 October 2019 which was submitted out with the 3 month timescale set down in the 2011 Regulations. In order for an application to be made, it must be received. Simply sending the email is not sufficient for the application to have been made. The evidence points to the application having been made on 1 October 2019.

5. The Applicant submitted that she had sent an email on 20 August 2019 to the Tribunal administration attaching an application form and supporting

documentation. She had checked the chamber website to ensure that she kept the email attachments within the 20MB limit so that it would be accepted. The email was not bounced back to her, nor did she receive any response from the Tribunal administration to it. She tried to contact the Tribunal administration on 30 September 2019 to check if the application had been received and but this was a public holiday and no one was available to discuss matters with her. She contacted the office again on 1 October 2019 and was told that no email had been received. She resubmitted the application by forwarding the email of 20 August 2019 and relevant attachments. This was then received by the Tribunal on that date. To the best of her knowledge, the email of 20 August 2019 had been sent successfully. She had received no error notification to suggest the contrary. Regarding Mr Nisbet's submission regarding the web-link contained at the bottom of the other emails lodged, she submitted that the email of 1 October 2019 and which was received by the Tribunal, did not contain such a link but yet was indeed received. She advised the Tribunal that she could access her email sent items on her mobile device and show the Tribunal that this had been sent on 20 August 2019. She submitted that she wouldn't know how to fabricate an email. She sent the email on 20 August within the 3 month time limit under the Regulations. She made every effort to ensure her application met the Tribunal guidelines, including ensuring that her attachments were not larger than 20MB in size. She referred the Tribunal to Regulation 9(2) of the 2011 Regulations which said that an application "must be made" and which does not say that an application must be received.

6. After an adjournment to consider parties' submissions ,the Tribunal reconvened in order to ascertain if the Respondent could show that the email of 20 August 2019 was contained within her sent items in her email account. The Respondent duly showed her sent items on her tablet, and which showed that the email was sent on 20 August 2019. The attachments to said email were shown to be 16MB in size.

7. The Tribunal took a further adjournment to consider matters, before reconvening to advise parties of their decision on the issue of the competency of the application. The Tribunal concluded that they were satisfied that the application had been made timeously, and on 20 August 2019. The email of 20 August 2019 and which contained the Applicant's application form and supporting evidence was contained within her sent items in her email account and which had been produced for the Tribunal. The attachments were 16MB in total size and therefore within the size limits of the Tribunal. Whether or not there was an administrative error on the part of the Tribunal which meant that this application was not processed thereafter, the Tribunal was satisfied that the email had been sent and accordingly the application "was made" by the Applicant. The Tribunal considered the wording of both the 2011 Regulations and the 2017 Regulations.

8. Regulation 9 of the 2011 Regulations states as follows:

9.(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal 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.

9. Rules 4 and 5 of the 2017 Regulations state as follows:

4. An application to the First-tier Tribunal must be in writing and may be made using a form obtained from the First-tier Tribunal.

5.(1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111, as appropriate.

(2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

(4) The application is not accepted where the outstanding documents requested under paragraph (3) are not received within such reasonable period from the date of request as the Chamber President considers appropriate.

10. The Tribunal noted the use of the words an application "*must be made*" in the 2011 Regulations and the words *"An application to the First-tier Tribunal must be in writing and may be made using a form obtained from the First-tier Tribunal…. An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules….as appropriate"* in the 2017 Regulations. By sending an email with the relevant application form attached and supporting documentation, the Tribunal was satisfied that the application had been made by the Applicant. The Respondent's solicitor did not refer to any authorities in reference to his submission that for the application to have been competently made it had to have been both sent and received. The Tribunal was satisfied that evidence had been produced to show that the email of 20 August 2019 had been sent. Whilst it may have been the case that due to either human or mechanical error, the email was not processed by the Tribunal administration at the time it was sent, the Tribunal does not consider that in the interests of justice the Applicant should be penalised for this. To do so would have considerable repercussions

for the Applicant. She would be unable to re-raise her application and her claim would be lost. The Applicant submitted that she had not received an error message, nor had her email of 20 August 2019 bounced back to her as undelivered. The Tribunal had no reason to disbelieve this evidence. The Tribunal accordingly was satisfied that the Application had been made timeously.

11. Thereafter the Tribunal heard submissions from parties in relation to the terms of the Application itself.

12. The Applicant sought an order from the Tribunal on the basis that the Respondent had failed to comply with their duties to lodge a deposit in a tenancy deposit scheme within 30 days of the start of the tenancy in terms of Regulation 3 of the 2011 Regulations.

13. The Respondent's agent confirmed that the Respondent did not dispute that Regulation 3, and consequently, Regulation 42, of the 2011 Regulations had been breached. The Respondent owned a number of residential properties which were let mainly to students. The Respondent was very familiar with their obligations in relation to the 2011 Regulations and other relevant tenancy legislation. Mr Nisbet submitted that the property in question was occupied by five people. One of the tenants had vacated and their deposit was removed from the tenancy deposit scheme and repaid to that individual. When the Applicant moved in, Mr Ghafoor had unintentionally omitted to lodge the Applicant's deposit with a tenancy deposit scheme. He submitted that all other deposits held for other tenancies had been duly lodged within a tenancy deposit scheme and this was an isolated incident. This was not an intentional breach. This was not wilful blindness to the Respondent's obligation but a one-off mistake for which Mr Ghafoor was embarrassed. The deposit had been repaid to the Applicant less £30 deducted for cleaning costs. Mr Nisbet submitted that an appropriate remedy would be an award equating to the sum of the deposit, being £396.40.

14. The Applicant submitted that she had entered into a tenancy with the Respondent which commenced 1 September 2018. A copy of the tenancy agreement was lodged with the application. The Applicant paid a £396.40 deposit to the Respondent prior to the start of the tenancy. She had asked the Respondent prior to paying the deposit where it would be held, and the Respondent advised that it would be lodged with My Deposits Scotland. A copy of the parties' email exchange of 5 and 6 September 2019 in this regard was lodged with the application. Clause 10 of the tenancy agreement between the parties also refers to the deposit being lodged in said scheme. The Applicant submitted that the Respondent is familiar with his obligations as landlord, and even though he was aware of what he should do, he still failed to do it. The Applicant referred to Mr Ghafoor as being a relaxed landlord. She believed she would be paid back her entire deposit, and was upset when the sum of £30 was deducted for cleaning costs. This deduction was not agreed by the Respondent, but she was unable to dispute this via the scheme arbitration service as it hadn't been duly lodged. This deduction has never been repaid to her. The Applicant

had sent emails to the Respondent which had been ignored. She submitted that the Tribunal should award a sum of the equivalent of three times the deposit.

- Findings in Fact

15. The Tribunal made the following findings in fact:

(i) The parties entered into a short assured tenancy which commenced 1 September 2018;

(ii) The Applicant paid a deposit of £396.40 to the Respondent;

(iii) The Respondent failed to lodge the deposit of £396.40 into an approved tenancy deposit scheme under Regulation 3 of the 2011 Regulations;

(iv) The Respondent failed to provide the statutory information to the Applicant under Regulation 42 of the Regulations;

(v) The Tenancy ended on 30 June 2019;

(vi) The Applicant had received return of all but £30 of the deposit from the Respondent.

- Findings in Law

16. The Tribunal made the following findings in law:

16.1 The Respondent was in breach of their duties under Regulation 3 of the 2011 Regulations, which states as follows:

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.

(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.

16.2 The Respondent was in breach of their duties under Regulation 42 of the 2011 Regulations, which states as follows:

***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.

16.3 The Tribunal must grant an order in terms of Regulation 10 which states as follows:

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.

- Reasons for Decision

17. The Tribunal was satisfied that the Respondent was in breach of their duties under Regulations 3 and 42 as aforesaid. This was by the Respondent's own admission.

18. The 2011 Regulations were introduced to provide security for tenants in paying over deposits to landlords and to address an issue with some landlords taking tenancy deposits and then failing to pay them back where they were lawfully due at the end of the tenancy. The 2011 Regulations also provide that parties have access to an independent and impartial dispute resolution mechanism within a scheme to address any deposit deductions which require to be considered.

19. By their failure to lodge the deposit into an approved tenancy deposit scheme, the deposit was not protected for the duration of the tenancy, being 10 months.

20. The Tribunal noted that the Respondent was aware of his obligation to lodge the tenancy deposit with a tenancy deposit scheme, but failed to do so. The Tribunal was satisfied that there was no evidence before it to suggest that this was not an intentional act. However, the Tribunal considered that as the Respondent owned a number of properties which are let out in the private rented sector, simply forgetting to lodge a deposit is not acceptable practice. Whilst the deduction from the deposit was small, the Respondent's failure to lodge the deposit means that the Applicant has been deprived of the ability to dispute this deduction via an independent and impartial dispute resolution mechanism within a scheme. The Tribunal noted that in his submissions, Mr Nisbet commented that the Applicant hadn't reminded the Respondent that the deposit had not been lodged. The Tribunal considered this to be wholly inappropriate. It is not a tenant's responsibility to remind a landlord of their legal obligations. All landlords must be aware of their legal obligations in letting a property in the private sector and ensure that they are adhering to same. The Tribunal was satisfied that the failure to lodge the deposit was not intentional, and that most of the deposit had been returned, and therefore an award at the higher end of the scale would not be appropriate. The Tribunal considered that an award equating to two times the deposit would be appropriate in the circumstances.

- Decision

21. The First-tier Tribunal for Scotland (Housing and Property Chamber) granted an order against the Respondent(s) for payment to the Applicant in the undernoted sum:

    SEVEN HUNDRED AND NINETY-TWO POUNDS AND EIGHTY PENCE (£792.80) STERLING

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.

[redacted]

Legal Member/Chair

31/01/2020

Date