Housing and Property Chamber
First-tier Tribunal for Scotland

Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16, Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/18/0598

Rule 103 - Application for an Order for Payment where Landlord has not paid the deposit into an Approved Scheme

Re: 32J Spittal Street, Stirling, FK8 1DU ("the Property")

Parties:

Paul McAlpine, 58 Upper Mill Street, Tillicoultry, FK13 6AY ("the Applicant")

Brain O'Reilly, 60 Turnberry Gardens, Cumbernauld, Glasgow, G68 OAZ ("the Respondent")

Tribunal Members:

Shirley Evans (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent failed to comply with his duty as a Landlord in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011("the 2011 Regulations") as amended by The Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 by failing to pay the Applicant's Tenancy Deposit to the scheme administrator of an Approved Tenancy Deposit Scheme, grants an Order against the Respondent for payment to the Applicant of the sum of Five Hundred Pounds (£500) Sterling.

Background

1. By application dated 10 March 2018 the former tenant/applicant applied to the First-tier Tribunal for Scotland (Housing and Property) Chamber for an order for payment where a landlord has not paid a deposit into an approved scheme

in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011("the 2011 Regulations"). The applicant also lodged a copy of a short assured tenancy between himself, and Brian McAlpine as tenants and the Respondent for the period 1 June 2014 – 1 June 2015. He also lodged a copy of a short assured tenancy agreement with the Respondent for the period 1 June 2015 – 1 June 2016, an exchange of text messages with the Respondent dated 24 November 2017 and emails from Letting Protection Scotland dated 9 January, 8 February and 9 April 2018.

2. On 26 April 2018 the Tribunal issued a Notice of Acceptance of the Application under Rule 9 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations").

3. On 2 August 2018 the Tribunal enclosed a copy of the application and invited the Respondent to make written representations to the application by 27 August 2018. The Tribunal advised both parties on 2 August 2018 that a Case Management Discussion under Rule 17 of the Regulations would proceed on 3 September 2018. This paperwork was served on the Respondent by Robert Quinn, Sheriff Officer, Glasgow on 3 August 2018 and certificate of execution of service was received by the Tribunal administration.

4. The Respondent made written representations in an email to the Tribunal on 20 August 2018 in which he accepted that he had not paid the deposit into an approved scheme. He fully accepted he had failed in his responsibility as a Landlord.

Case Management Discussion

1. The Tribunal proceeded with the Case Management Discussion on 3 September 2018. The Applicant was personally present. The Respondent was also personally present.

2. As the Applicant had not seen a copy of the Respondent's written representations in advance of the Case Management Discussion the Tribunal gave the Applicant an opportunity to read through the email of 20 August 2018. Both parties were asked whether they felt they could proceed with the Case Management Discussion and both confirmed that they were happy to do so.

3. The Respondent explained to the Tribunal that he was an accidental landlord and that he had let out the Property since 2008. He was not a member of any Landlord group and was not aware of the statutory scheme of the 2011 Regulations until after the tenancy ended when he received an email from the Applicant enquiring where the deposit was held. He had placed the deposit into his own personal bank account.

4. The Applicant explained he had lived at the Property between 1 June 2014 – 1 January 2018. He had originally entered into a Short Assured Tenancy Agreement with Paul McAlpine, his brother. A third party had originally intended to move into the Property as well, but he withdrew his interest. The deposit of £780 was paid at the start of this tenancy in June 2014.

5. The Applicant explained that he continued to live in the Property. The Tribunal established and it was a matter of agreement between parties that a second short assured tenancy was entered into for the period 1 June 2015 – 1 June 2016. The original deposit paid was used in relation to the second tenancy. The tenancy continued on a monthly basis after 1 July 2016 until the date of termination on 1 January 2018. This was a matter of agreement between parties.

6. Both parties acknowledged that after the Applicant had made enquiries with the Respondent on 4 January 2018 about the return of the deposit, the Respondent paid the deposit into Letting Protection Service ("LPS").

7. On 9 January 2018 the Applicant received notification from LPS that the Respondent had paid £780 into their tenancy deposit scheme LPS confirmed in an email dated 9 April 2018 that the deposit had actually been paid on 9 January 2018.On 8 February 2018 LPS refunded the Applicant £550 of the deposit and allowed the Respondent to retain the remaining £230.

8. The parties both acknowledged that there was a dispute as to the amount of deposit that should be returned to the Applicant which they resolved between them. The Tribunal explained to the parties that it had no jurisdiction to determine the division of the deposit as that had already been determined by LPS. The Tribunal however could make a determination under the 2011 Regulations in relation to the Respondent's failure to pay the deposit into an approved tenancy deposit scheme in terms of the 2011 Regulations.

9. The Applicant explained that he felt that he had been disadvantaged as he was nervous about using the moderation service of LPS to challenge the deductions which the Respondent claimed should be made from the deposit. He was anxious that if he did so he would be out of time to make an application to the Tribunal in relation to the Landlord's failure to lodge the deposit. As a result he had felt under pressure to reach an agreement with regard to the deductions with the landlord but claimed that there should only have been £100.50 deducted from the deposit. He was not aware of his full rights under the scheme in e.g. the time limit for the return of the deposit after the termination of the tenancy.

Findings In Fact

During the course of the Case Management Discussion it was clear that the factual circumstances were not in dispute. The following were a matter of agreement between parties –

10. The Respondent was the Landlord of the Property and one other property. He was what he termed an "accidental" landlord. He had let out the Property since 2008. He was not aware of his obligations under the 2011 Regulations. He fully accepted he was in breach of the Regulations.

11. The Applicant had lived in the Property between 1 June 2014 – 1 January 2018. During that time there had been two written short assured tenancy agreements; the Applicant and Brian McAlpine were joint tenants of the Property in terms of a short assured tenancy between 1 June 2014 – 1 June 2015. After the initial short assured tenancy had terminated on 1 June 2015, the Applicant and the Respondent entered into a short assured tenancy from 1 June 2015 – 1 June 2016 in relation to the Property.

12. Under both tenancy agreements, the Applicant agreed to pay a deposit of £780. This was paid to the Respondent on or about 1 June 2014.

13. No further deposit was paid. The deposit originally paid in relation to the first tenancy was then applied and transferred to the second tenancy.

14. The Respondent did not pay the deposit into an approved scheme and paid the deposit into his own personal bank account.

15. After the 1 June 2016, the second tenancy continued until it terminated on 1 January 2018.

16. On 4 January 2018 the Applicant asked the Respondent for the return of the deposit. The Respondent then became aware of his obligations under the 2011 Regulations and paid the £780 deposit into LPS, an approved tenancy deposit scheme, on 5 January 2018. The Applicant received notification that the deposit had been paid to LPS on 9 January 2018.

17. The Applicant felt nervous about using the modification service offered by LPS in relation to the return of the deposit. He was anxious that if he did so he would not have time to make an application to the Tribunal for the Respondent's failure to pay the deposit to an approved scheme.

18. The Respondent had tried to get LPS to release the funds to parties early.

19. LPS then determined that the return of the £780 deposit should be divided between the Applicant and the Respondent. The Applicant received £550 on 8 February 2018 from LPS. The Respondent received £230.

Reasons For Decision

20. For the purpose of Regulation 9(2) of the 2011 Regulations the Tribunal found that the application was made in time within 3 months of the tenancy termination. The 2011 Regulations were intended, amongst other things to put a landlord and a tenant on equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them with regard to the return of the deposit to the landlord or tenant or divided between both, at the termination of a tenancy.

21. The Respondent fully accepted responsibility for his breach of Regulation 3 of the 2011 Regulations. The amount to be paid to the Applicant is not said to refer to any loss suffered by the Applicant. Accordingly, any amount awarded by the Tribunal in such an application cannot be said to be compensatory. The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach. The Regulations do not distinguish between a professional and non-professional Landlord such as the Respondent. The obligation is absolute on the Landlord to pay the deposit into an Approved Scheme.

22. In assessing the amount awarded, the Tribunal has discretion to make an award of up to three times the amount of the deposit, in terms of Regulation 10 of the 2011 Regulations. The Tribunal considered that the Respondent's failure was not wilful. The Tribunal noted that the Respondent had correctly admitted his breach of the Regulations in this regard. The Tribunal also noted that the Respondent had then paid the deposit into an approved tenancy deposit scheme, namely LPS, after the tenancy had terminated. At that stage the deposit was protected and enabled LPS to adjudicate between parties on the return of the deposit and the division of payment as between the parties. In that regard the Applicant could not have been said to have been prejudiced by the Respondent's failure during the course of the tenancy to pay the deposit into an approved scheme. Nevertheless, the Tribunal considered that the length of time that the failure to comply with the 2011 Regulations being from 1 July 2015, when the deposit should have been paid into a scheme in terms of Regulation 3 of the 2011 Regulations until 1 January 2018, a period of over two and a half years, was a significant breach. Further the Tribunal took into account that the Applicant had been nervous about using the modification service of LPS as he was anxious about various time limits. He had been put to some inconvenience and felt under pressure to resolve matters with the landlord as a result.

23. Despite this, the purpose of the 2011 Regulations had not been defeated and LPS had ultimately made a decision with regard to the division of the deposit at the termination of the tenancy.

Decision

24. In all the circumstances, the Tribunal was not inclined to order the maximum amount of three times the Tenancy Deposit. The Tribunal considered that a fair, proportionate and just amount taking into account all the circumstances of the case to be paid to the Applicant was Five Hundred Pounds (£500) Sterling and accordingly made an Order for Payment by the Respondent to the Applicant.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

S Evans

Shirley Evans
Legal Member/Chair

3 September 2018
Date