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 2011/176

Chamber Ref: FTS/HPC/PR/18/1353

Re: Property at 1R Albert Place, Maddiston Road, Brightons, Falkirk, FK2 0JX ("the Property")

Parties:

Mr Derek Knowles, Mrs Katrina Knowles 31 Wallace Brae Rise, Reddingmuirhead, Falkirk, FK2 0GD ("the Applicants")

Crossgatehead Properties Ltd, Crossgatehead House, Balmoral Gardens, Brightons, Falkirk, FK2 0JF ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1. This is an application by the Applicants for an order for payment where landlord has not paid the deposit into an approved scheme under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* in terms of rule 103 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Procedure Rules"). The tenancy in question was a Short Assured Tenancy of the Property by the Respondent to the Applicants commencing on 30 April 2016 and concluding on 30 May 208.

2. The application was dated 31 May 2018 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £400 was due in terms of the tenancy, paid to the Respondent around the commencement of the tenancy, but not paid into an approved scheme until it was paid to Safe Deposits Scotland on 12 February 2018.

The Case Management Discussion

3. On 10 August 2018, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, sitting at STEP, Stirling, there was appearance for both parties. The Applicants were both in attendance and the Respondent was represented by both its directors, Charles Machray and Susan Machray.

4. Further papers and brief written answers had been provided by the Applicants in advance of the CMD. Written submissions and papers had been provided by the Respondent in advance of the CMD. I sought further oral submissions and evidence from all attending as to their respective positions at the CMD.

5. It was a matter of agreement that the deposit had been paid to the Respondent at the commencement of the tenancy but not paid to Safe Deposits Scotland until almost two years later. The Respondent provided various explanations of the oversight, which the Applicants either did not accept or could not comment upon. The Applicants sought an order for payment of up to three times the tenancy deposit (ie up to £1,200). The Respondent sought any payment ordered to be restricted.

6. The Applicants confirmed that, further to correspondence in advance of the CMD, the application should be amended to include Katrina Knowles as joint applicant as she was a joint tenant and thus had equal rights to and under the tenancy deposit. The Respondent accepted the terms of the tenancy stated that Mrs Knowles had been a joint tenant and did not oppose such an amendment. Further, the Respondent confirmed that the address upon which intimation of the CMD was undertaken - Crossgatehead House, Balmoral Gardens, Brightons, Falkirk, FK2 0JF - was its current address and the Applicants confirmed that they were satisfied to see the application amended in such terms. I granted both formal amendments.

7. I sought submissions from both parties as to further procedure. Both submitted that they were satisfied for a decision to be made by myself, sitting alone, without being continued to a Hearing before a full panel of the Tribunal.

Findings in Fact

8. The Respondent, as landlord, let the Property to the Applicants under a short assured tenancy dated 30 April 2016 ("the Tenancy").

9. The initial duration of the Tenancy was incomplete in the lease documentation but, further to Notices to Quit dated 27 April 2018 issued by the Respondent to the Applicants, the Tenancy was brought to an end on 30 May 2018.

10. In terms of the Tenancy, the Applicants were obligated to pay a deposit of £400 at the commencement of the Tenancy.

11. The Applicants paid a deposit of £400 to the Respondent on or about 3 May 2016.

12. Prior to commencement of the Tenancy, the Respondent, at least through its director Susan Machray, was aware of the duty upon landlords to place tenancy deposits into approved schemes, all in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011/176 ("the 2011 Regulations").

13. In or around mid February 2018, the Respondent's director, Charles Machray, approached Taylor Williams, estate agents, to discuss engaging them as letting agents for the Property.

14. During the discussion between Mr Machray and a representative of Taylor Williams, the subject of placing tenancy deposit into approved schemes under the 2011 Regulations was raised.

15. The Respondent placed the Applicants' tenancy deposit into an approved scheme, being Safe Deposits Scotland, in terms of the 2011 Regulations on or about 12 February 2018.

16. Prior to 31 May 2018, the Applicants did not raise with the Respondent the issue of whether their tenancy deposit had been placed in an approved scheme nor did they express any concern as to date of lodging of same.

17. The Respondent is the landlord of two commercial properties and three residential properties. Prior to the Tenancy to the Applicants, the Respondent had not held a tenancy deposit which was subject to duties under the 2011 Regulations.

18. The Respondent is not currently under any duties in terms of the 2011 Regulations in regard to any property of which it is landlord, except in regard to the Tenancy in this application.

19. The directors of the Respondent have not, in any other capacity, ever been a landlord of a property where there was a tenancy deposit subject to the 2011 Regulations, except in regard to the Tenancy in this application.

20. At the conclusion of the Tenancy, the Applicants have been afforded access to the adjudication scheme under Tenancy Deposit Scheme in terms of their tenancy deposit for the Property.

Reasons for Decision

21. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by both parties, and their desire not to have matters considered by a full panel, and given that I was satisfied that the necessary level of evidence had been provided through the application, further papers and submissions, and orally at the CMD, I was satisfied to make a decision under regulation 10 of the 2011 Regulations.

22. The core factual issues in considering any claim under the 2011 Regulations were accepted by both parties in this case. It was acknowledged that a deposit was paid, the sum was agreed, the date of payment of the deposit was agreed, the date of the commencement of the Tenancy was agreed, and the date of lodging of the deposit with Safe Deposit Scotland was agreed. It was further agreed that the application had been raised within the statutory time-limit of three months after conclusion of the Tenancy. The Respondent accepted that it had lodged the deposit long after the 30 working days afforded by regulation 3 of the 2011 Regulations. In the circumstances, in terms of regulation 10, I was mandated to grant an order against the Respondent and required only to consider the amount (being an amount between £0.01 and £1,200.00).

23. There was further general agreement between the parties that they had, at one time, had a close friendship. I did not explore in detail the reasons for the relationship cooling. There was further general agreement that the relationship cooled some time after the Tenancy had been entered. Various dates between November 2017 and February 2018 were referred to by the attendees but I did not explore this in detail either.

24. Mr Machray's principal submission was that he had been quite unwell during 2016 and the lodging of the Applicants' deposit "went out of my head". Evidence by way of exchanges of text messages was offered by him to show that the Applicants were aware of Mr Machray's ill-health and, though it did not seem disputed by the Applicants that Mr Machray had been unwell at times, the Applicants submitted that the text messages also showed Mr Machray was attending to work and leisure activities during the period. Further, the Applicants submitted that Mrs Machray was also a director of the Respondent and could have ensured that statutory duties were complied with.

25. There was a dispute between the Machrays and Mrs Knowles as to a telephone conversation that Mrs Knowles overheard between Mrs Machray and her father; Mrs Machray's father being the previous tenant of the Property. The conversation occurred prior to Mrs Machray's father vacating the Property. Mrs Knowles was certain that the conversation included discussion of when Mrs Machray's father had paid a deposit and thus showed that the Respondent had previously handed deposits which were subject to the 2011 Regulations. The Respondent insisted that the discussion was solely about when rent was scheduled to be paid and that

no deposit was taken from (nor would have been considered) from Mrs Machray's family. Similarly, the Respondent explained that the occupiers of their other two residential properties were employees, so no deposits were ever sought from those tenants.

26. Beyond this disputed evidence, the Applicants accepted that they could not comment on the Respondent's explanation that the lodging of the deposit was undertaken as soon as Mr Machray's discussion with Taylor Williams raised the issue and prompted Mr Machray to realise that he had never lodged the Applicants' tenancy deposit with an approved scheme.

27. On balance, I was willing to accept the Respondent's evidence that the lodging of tenancy deposits was not a matter which they undertook regularly, was overlooked when the lease with the Applicants was first entered into, and was remedied as soon as Mr Machray's memory was prompted by a third party. I do not think the reasons for it being overlooked (whether ill-health or otherwise) is a matter of significance in the general circumstances.

28. Further, I noted the concession by the Applicants that they had not raised the issue of the tenancy deposit prior to the lodging and it was only after it was lodged that they became focused on the (now remedied) breach of duty. The Applicants confirmed that they had raised, and were now successful in, an adjudication to seek return of their deposit through the Tenancy Deposit Scheme's adjudication procedures. They expected to receive full return of their deposit in early course.

29. I am guided by the comments of Sheriff T Welsh QC in *Jenson v Fappiano*, 2015 SC EDIN 6, at paragraph 15 that "the quantification of sanction is not measured by loss or prejudice suffered by the tenant, nor, may I say, should it be measured only ... subjectively. There must be an objective basis and rationale to the sanction." Nonetheless, I do note that the Applicants could not cite any loss or prejudice by late lodging of the deposit. Prior to the lodging with Safe Deposits Scotland, they had not been placed in any state of concern and had not spent any time seeking comfort from the Respondent that the deposit was safe. The Applicants confirmed that they had been residential tenants in their home preceding the Tenancy and had received a certificate from an approved scheme early in that tenancy confirming the statutory basis, etc. for the deposit being held. Nonetheless, they accepted that they had not focused in any way on the Respondent's duties under the 2011 Regulations until after they received the certificate following the lodging in 12 February 2018.

30. As for grounds for sanction of the Respondent, the Applicants relied on three:

- That the deposit had been unprotected for two years;
- That there was a greater than normal risk during this time, as the Respondent's directors had suffered business failures previously; and

- The Respondent had gained the benefit of interest on the £400 for two years.

31. In response to this, the Respondent submitted that the company had enjoyed substantial cash in bank from 3 May 2016 to 12 February 2018, being solvent the entire time. The Respondent's directors accepted a previous business failure in a joinery business, but said it was an entirely different industry, the failure was around 2014, and it had suffered due to the recession and business downturn. Mr Machray could not recall if there was any interest on the account that had held the deposit but thought it likely to be only a few pounds a year, given current interest rates. In his own submissions on sanction, Mr Machray said that he believed the Respondent had been a good landlord and the relationship should be seen in the context that it had been entered into when they were "good friends; best friends".

32. With respect to the parties, I did not regard most of these submissions to be of assistance. There was nothing to suggest that the Respondent had not lodged the deposit so as to assist working capital and/or enjoy interest (the latter being meagre at the present time). There had not been any business failure of the Respondent or suggestion of potential failure. Further the deposit was protected before the time the Applicants came to focus on the issue or require to rely on the adjudication procedure and other protections.

33. I see the most significant issue was the length of the breach which was significant. The Respondent wished me to regard the initial breach as arising out of ill-health. I do think that this is a strong explanation, given the simple act necessary to lodge the money and the evidence – including from Mr Machray's own lodged documents – that his ill-health did not preclude him from undertaking work during the period. Further, the Respondent had Mrs Machray as a fellow director. It seemed to me that this was an oversight, for whatever reason, and once out of the mind of the Respondent it continued to be overlooked until the discussion with Taylor Williams. I was of the view that Respondent thereafter remedied the matter very promptly at that point and this was commendable. Mr Machray said that he would be using Taylor Williams in future and that they would ensure all future compliance with the 2011 Regulations.

34. I reviewed case law on the 2011 Regulations, in particular so as to seek an objective approach to sanction as Sheriff T Welsh QC had sought in the case referred to above. Although the Respondent is a 'professional landlord', I did accept the submissions that this was the first time it had been subject to a duty under the 2011 Regulations. Mrs Machray conceded she had been aware of the duties prior to the Tenancy but they had been overlooked. I did regard the Respondent as entitled to a large degree of leniency as it had resolved the issue unprompted as soon as Mr Machray was reminded of the 2011 Regulation duties. I agree with the pursuer's submissions in *Fraser v Meehan, 2013 S.L.T. (Sh Ct) 119* (at p120) that "The payment is not a form of compensation. It should be

considered a form of sanction and requires to be such amount as will act as a deterrent to landlords." The Respondent already seems deterred and the chance of repetition seems low. The circumstances of this application come close to those in *Jenson v Fappiano*. In that case, Sheriff T Welsh QC refers to the landlord and analyses the breach of duty in the following terms (at paragraph 18):

> "I do not consider this case to be one, such as repeated and flagrant non participation in, or non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale. Nor is it one where the non-compliance amounts to non-participation in the scheme resulting in frustration of the scheme and inconvenience if not downright prejudice of the tenant. I am of the view this case properly belongs at the lower end of the sanctioning scale... This was his first commercial let. Future deterrence is a factor but I am inclined to think he has learned his lesson that if he is going to let out property for money he has to know and comply with the regulations. The deposit was ultimately returned to the tenant through the arbitration service... The respondent's noncompliance deprived the tenant of important information he ought to have had from the landlord whose responsibility it was to deliver it. It deprived him of the assurance that the landlord was above board and his deposit was safe. The regulations were introduced precisely to achieve these purposes. The tenant's deposit was unprotected and exposed to potential risk for about one half of the period of let. To mark the quality of noncompliance and its consequences in this case, I consider it would be fair, proportionate and just to sanction the respondent for noncompliance by awarding the applicant a sum equivalent to one third of the deposit".

35. In the circumstances, in light that the Respondent appears to have had greater knowledge entering into the Tenancy than the landlord in *Jenson*, yet the consequences for the Applicants appear to have been less than for the tenant in that case, I am of the view that an award equal to one-half of the deposit (£200) is a reasonable award under regulation 10.

36. No motion for expenses was moved and in the circumstances I would not have regarded an award of expenses as appropriate in any case.

Decision

37. In all the circumstances, I was satisfied to grant an order against the Respondent for payment of the sum of £200 to the Applicants.

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.

Joel Conn

Legal Member/Chair **Date** 10 August 2018