Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/PR/23/1469

Re: Property at 31 Station Road, Ratho Station, Edinburgh, EH28 8PT ("the Property")

Parties:

Mr Dean Stark, Ms Leighann Marshall, 10 Hillwood Rise, Ratho Station, Newbridge, EH28 8PZ ("the Applicant")

Ms Monica-Anne Thirlwall, Mr David Reid, Top House, 5 Brooklyn Terrace, Coxley, Wells, Somerset, BA5 1QZ; Top House, 5 Brooklyn Terrace, Coxley, Wells, Somerset, BA5 1QZ ("the Respondent")

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) determined to make an order for payment in the sum of One thousand pounds (£1,000) Sterling

Background

1 By application dated 5 May 2023 the Applicants applied to the Tribunal seeking an order for payment as a result of the Respondents failure to lodge their deposit in an approved tenancy deposit scheme.

2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned.

3 The Tribunal subsequently received written submissions from Andrew Wilson of Edinburgh Housing Advice Partnership (EHAP) and Community Health and

Advice Initiative (CHAI) on behalf of the Applicants and from the Respondents.

The Case Management Discussion

4 The Applicants were both present and represented by Mr Wilson. The Respondents were both present and confirmed that Mr Reid was primarily addressing the Tribunal on their behalf.

5 The Legal Member explained the purpose of the Case Management Discussion and the legal test to be applied. She asked the parties to address her on their respective positions. Their submissions are summarised below. For the avoidance of the doubt, this is not a verbatim account of what was discussed at the Case Management Discussion but a summary of those matters relevant to the Tribunal's determination of the matter.

6 Mr Wilson made reference to his written submissions. He confirmed that the Applicants sought the maximum sanction of three times the deposit on the basis that the deposit had been unprotected for the entire term of the tenancy, more than six years. The tenancy agreement had in fact made reference to the deposit scheme. Mr Wilson alleged that the Respondents had attempted to prevent the Applicants from making an application to the Tribunal in the wording of a letter returning the deposit, which stated that the refund would constitute agreed full and final settlement of the tenancy. There was no such agreement. The Respondents were, or should, have been aware of the 2011 Regulations. The breach was a wilful disregard of their obligations.

7 Mr Wilson then made reference to the Respondents written submissions, stating that he did contest the voracity of what had been written there. The behaviour of the Respondents, particularly Mr Reid, had changed in the latter stages of the tenancy, to the detriment of the Applicants. Mr Reid had stated that he had the right to enter the property whenever he wanted, without notice. Mr Wilson noted that the Respondents did not dispute that the deposit had not been lodged in a scheme, and this was the third time they had let the property. The tenancy agreement stated that the deposit had to be lodged in a scheme. Mr Wilson didn't believe that the Respondents had not read the agreement. Mr Wilson noted that the Respondents had made reference to the condition of the property at the end of the tenancy as being poor. This was disputed by the Respondents. There had been a dispute over what remedial works the Applicants would require to carry out in order to obtain their deposit back. The Respondents were asking for ordinary wear and tear to be addressed. This was not the tenant's responsibility.

8 Mr Wilson noted that the Respondents had referred to the Applicants as opportunistic for making an application to the Tribunal. However they had simply exercised their right to make an application. Mr Wilson again made reference to the fact that the property had been let three times without

deposits being lodged. Once may have been believable but to do so three times indicated a landlord who paid no heed to their legal obligations. Mr Wilson confirmed that the deposit had been returned to the Applicants in full however there had been a demand from the Respondents for work to be carried out, with the implication being that the deposit would not be returned if the work was not complete. Mr Wilson referred to Whatsapp messages that had been lodged. When the Applicants raised the question of the deposit scheme the Respondents had gone quiet. Mr Wilson confirmed that there had previously been a good relationship between the parties, however this had deteriorated when Mr Reid got involved. The Applicants found Mr Reid's conduct to be intimidating. Mr Wilson confirmed again that the Applicants sought the maximum sanction of three times the deposit. He was aware that the Tribunal had to look at mitigations, however in this case there were none.

9 Mr Reid addressed the Tribunal. He advised that the property had been let three times, but not under the same conditions. Mr Reid confirmed that he and his family had occupied the property between 2000 and 2007. It had then been let in 2008 prior to the introduction of the deposit scheme rules. The Respondents saw this as a long term investment and a possible home for their children in the event that they decided to return to the area. Mr Reid confirmed that the property is, and was, the only property owned, let or managed by the Respondents. However it was no longer a beneficial investment and the Respondents wished to sell, thereby leaving the private rented sector.

10 Mr Reid advised that the Respondents had a reputation locally of being fair and reasonable landlords. They had rented the property directly to the Applicants, having known the family. They had overlooked some diligence checks as a result and allowed a rent free early entry period. They did not use a letting agent as they were merely following the process they had followed before when renting the property. If they had used a letting agent it was unlikely that the Applicants would have been able to take on the lease due to Mr Stark's negative credit rating. The Respondents had trusted the Applicants due to their knowledge of the family. They told the Respondents that they could manage the rent and the Respondents accepted that.

11 Mr Reid confirmed that when the property was let, a standard lease was used. He had downloaded an updated version from the internet when the property was leased to the Applicants. He confessed to not fully checking the terms of the agreement. At the end of the tenancy the property was in a poor condition. He had travelled from England to inspect the property with a surveyor and an estate agent. They had agreed with his assessment of its condition. He had then provided the Applicants with a list of what was required, which included cleaning, completion of decoration and removal of rubbish. Mr Reid had met with LeighAnn and her mother and had confirmed that provided the works were done the deposit would be returned in full. Mr Stark had then returned

and became argumentative. The conversation deteriorated at that point and it became a confrontational meeting. However Mr Reid was simply trying to be fair about what needed done and the return of the deposit. He was not being negative, it was a positive thing. It was then agreed via Whatsapp messages at a later date that the parties would have no further contact.

12 Mr Reid acknowledged that the Respondents had erred in not lodging the deposit with a scheme. He apologised for that error. The Respondents were not professional landlords and did not have their finger on the pulse of the letting landscape. However he pointed out that at all times the deposit was kept in a separate account. At no time was it mixed with personal finances or anything of that nature. It was protected. There had been no detrimental impact on the Applicants. They had received their deposit back quicker than if it had been placed within a scheme. There was no malice intended. Mr Reid explained that there had been a lot of distraction around the time the property was let to the Applicants. The Respondents had left a month after, when the deposit was due to be paid, to go to Australia for a family wedding. The Respondents felt they had been fair and had trusted the Applicants. They felt let down by the situation.

13 The Case Management Discussion concluded and the Legal Member confirmed that the decision would be issued in writing.

Relevant Law

14 The relevant law is contained with the Housing (Scotland) Act 2006 and the Tenancy Deposit Scheme (Scotland) Regulations 2011. Section 120 of the 2006 Act provides as follows:-

"120 Tenancy deposits: preliminary

(1) A tenancy deposit is a sum of money held as security for—

(a) the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b) the discharge of any of the occupant's liabilities which so arise.

(2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

15 The 2011 Regulations provide 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."

"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."

"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."

Findings in Fact

16 The Respondents resided in the property between 2000 and 2007.

17 The Respondents let out the property in 2008 as an investment. The property has been let three times. The property is the only property let by the Respondents.

18 The Applicants entered into a tenancy agreement with the Respondent dated 13 September 2016. The tenancy commenced on 30 September 2016.

19 The Respondents did not engage a letting agent when the property was let to the Applicants. The Respondents had knowledge of the Applicants' family.

20 The Respondents downloaded a template for the tenancy agreement from the internet. The Respondents did not fully read the terms of the agreement.

21 In terms of Clause 15 of the said tenancy agreement the Applicants agreed to make payment of a tenancy deposit in the sum of £1000. Clause 15 further states that the deposit will be lodged in an approved tenancy deposit scheme.

22 The Applicants paid the tenancy deposit of £1000 on or around 14 September 2016.

23 The Respondents failed to pay the deposit into an approved deposit scheme.

24 On 17 January 2023 the Applicants gave notice to the Respondents that they wished to terminate the tenancy as at 28 February 2023. The Respondents agreed to said notice.

25 The Respondents sent the Applicants a list of items to be addressed prior to the return of the deposit.

26 On 26 February 2023 Leighann Stark send Monica Thirlwall a message via Whatsapp requesting no further contact after the deposit had been returned.

27 On or around 2 March 2023 the Applicants emailed the Respondents photos of the property.

28 On 5 March 2023 the deposit was returned to the Applicants in full via bank transfer.

29 By letter dated 5 March 2023 the Respondents confirmed that they would agree with the request from Leighann Stark via Whatsapp on 26 February 2023 and that there would be no further action or communication between the parties.

30 The Respondents intend to sell the property.

Reasons for Decision

31 The Tribunal determined the application having regard to the application paperwork, the written representations from the parties and the verbal submissions at the Case Management Discussion. The Tribunal was satisfied that it was able to make a determination of the application at the Case Management Discussion and that to do so would not be prejudicial to the interests of the parties. It was noted that the substantive facts of the matter were agreed.

32 The 2011 Regulations specify clear duties which are incumbent on landlords of relevant tenancies in relation to tenancy deposits. The tenancy in this case was a relevant tenancy for the purpose of the Regulations.

33 Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy. It was a matter of agreement between the parties that the deposit had not been paid into a scheme. The Respondents were therefore in breach of Regulation 3.

34 Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. Further, under Regulation 10 in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case. The 2011 Regulations do not set out what sum should be paid, other than setting a maximum of three times the deposit. It is therefore a matter of judicial discretion. The maximum in this case would be £3000, which is what is sought by the Applicants.

35 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the relevant factors before it. The Tribunal took into account the fact that the deposit had been unprotected for the entire term of the lease. Whilst the Respondents had stated that it was kept in a separate account, this did not provide any mitigation on their part. It was clear that there had been at the very least some discussion regarding the return of the deposit at the end of the tenancy, and a requirement for works to be completed by the Applicants. If a dispute had ultimately arisen the Respondents would have been the sole arbiter in the absence of a deposit scheme as to what sums would be returned to the Applicants. This was clearly an aggravating factor. Similarly the Respondents ignorance of their duties under the 2011 Regulations, and their failure to fully read the terms of the tenancy agreement, offered no mitigation. Ignorance of the legal requirements of letting a property does not provide any excuse.

36 However the Tribunal did place significant weight on the fact that the deposit had been returned to the Applicants in full, five days after the termination of the tenancy. The Applicants had not suffered any detriment in that regard. The Tribunal also placed weight on the fact that the Respondents were not professional landlords, having only let one property, and were intending on leaving the private rented sector. The Tribunal did not consider there to be any malice in the Respondents' error, despite the Applicants' stating that this

was a wilful breach of the Regulations. The Respondents had fully admitted the breach and had apologised for it. The Tribunal did therefore consider there to be mitigating factors in this particular case, which would justify an award at the lower end of the scale. Given the maximum sanction of £3000, the Tribunal considered that the sum of £1000 would represent a fair and proportionate sanction, having balanced the relevant factors in this case.

37 For the avoidance of doubt the Tribunal made no findings in respect of the alleged conduct of both parties. What is clear is that the parties did have an amicable relationship at one time, but that the relationship deteriorated towards the end of the tenancy. The Tribunal did not agree that the letter of 5 March 2023 from the Respondents was an attempt to prevent the Applicants from making an application to the Tribunal. It appeared to be a response to the Applicants' request for no future contact. Furthermore, the Tribunal did not consider the Applicants to be opportunistic in making this application, which, as pointed out by Mr Wilson, they were entitled to do under the 2011 Regulations.

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.

Ruth O'Hare

29 August 2023

Legal Member/Chair	**Date**