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 Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations") and The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/23/2346

Re: Property at 6/9 Commercial Warf, Edinburgh, EH6 6LF ("the Property")

Parties:

Mr Rafal Sztejna, Flat 13, 5 Lochinvar Drive, Edinburgh, EH5 1GJ ("the Applicant")

Mr Islan Kilic, 32/1 Orwell Terrace, Edinburgh, EH11 2DT ("the Respondent")

Tribunal Members:

Nicola Weir (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment in the sum of £600 should be made by the Respondent to the Applicant.

Background

1. By application received on 16 July 2023, the Applicant applied to the Tribunal for an order for payment against the Respondent in respect of failure to carry out duties in relation to a tenancy deposit. The failure alleged was a failure to lodge the deposit with an approved scheme. Supporting documentation was lodged in respect of the application.

2. On 20 July 2023, a Legal Member of the Tribunal with delegated powers from the Chamber President issued a Notice of Acceptance of Application in terms of Rule 9 of the Regulations.

3. On 21 August 2023, a copy of the Application and supporting documentation was served on the Respondent by Sheriff Officer, together with intimation of the

date, time and arrangements for a Case Management Discussion ("CMD") to take place by telephone conference call on 12 September 2023 at 11.30am. Written representations were to be lodged with the Tribunal by 30 August 2023. Written representations were lodged with the Tribunal by the Respondent by email on 30 August 2023 and circulated to the Applicant. Further representations were lodged by the Applicant in response by email on 7 September 2023 which were circulated to the Respondent on 11 September 2023. The Respondent then lodged further representations in response on 11 September 2023, although these were lodged late in the evening and not therefore circulated to the Applicant until the morning of the CMD.

Case Management Discussion

4. Both the Applicant and Respondent attended the CMD. The Respondent was assisted by his wife, Mrs Kilic, who also attended.

5. After introductions and introductory remarks by the Legal Member, it was noted that both parties had received copies of the other party's written representations and neither party had any objection to the later representations being considered by the Legal Member, although they were technically lodged late. The Legal Member accordingly confirmed that she would consider all the representations lodged prior to the CMD.

6. Reference was made to the terms of the application and supporting documentation and to the further written representations made by both parties. The Legal Member explained to the parties the Tribunal's remit in respect of a Rule 103 application and, in particular, that the test to be applied and the consequences of a breach of the 2011 Regulations in respect of tenancy deposit obligations by a landlord, if established, were as set out in the 2011 Regulations. In particular, it was explained that the Tribunal would not be adjudicating on the dispute which had arisen between the parties at the end of the tenancy as regards the return of the tenancy deposit, the condition of the Property when the tenant had vacated or any other monetary claims which the parties may have against the other arising from the tenancy.

7. It was a matter of agreement that the tenancy between the parties in respect of the Property had commenced on 1 March 2021, that the monthly rental in terms of the Private Residential Tenancy ("PRT") was £800, that a deposit of £800 had also been paid to the Respondent and that, when the tenancy ended around 23 June 2023, the sum of £580 was refunded to the Applicant on 3 July 2023 in partial refund of the deposit. The Respondent confirmed what had been stated in his written representations, that he had not lodged the deposit of £800 in a tenancy deposit scheme at any time during the tenancy, his explanation being that he had not been aware of the legal requirement to do so until the end of the tenancy when the matter was raised by the Applicant. The Respondent therefore conceded that he was in breach of the 2011 Regulations.

8. The Legal Member noted from the Applicant that he stated that the parties had had a verbal discussion when he was viewing the Property before entering into the tenancy during which he stated that the Respondent did say that the deposit

would be placed in a scheme. They did not, however, have any further discussions regarding the matter until the end of the tenancy, when the Applicant asked for his whole deposit back. When this was disputed by the Respondent, the Applicant said he raised the issue of the tenancy deposit scheme but was just ignored. The Applicant thought initially that they could reach common ground regarding the condition of the Property and its cleaning, etc after he vacated but was annoyed that the Respondent took advantage of the fact that he was holding the Tenant's money. The Applicant felt that the Respondent was being greedy and exaggerating the repairs and cleaning required. He did not think this was fair as he had fully cooperated with the Respondent when the Respondent had decided that he needed his flat back. The Applicant maintains that he considers it appropriate for the Tribunal to award the maximum sum possible to him of three times the amount of the deposit, as per the terms of his application. He stated that, as the deposit was not placed in a scheme, he was denied the mechanism available under these schemes to resolve his dispute over the return of his deposit. In the circumstances, he could not do anything about the Respondent refusing to return his whole deposit to him.

9. The Respondent's position was explained initially by himself and then by his wife, as it was stated that, due to the Respondent's language difficulties, it was his wife who had dealt with most of the communications with the Applicant concerning the tenancy. It was disputed that there had been any verbal mention by the Respondent or his wife of the deposit being placed in a tenancy deposit scheme. It was maintained that the Respondent and his wife had been unaware of this requirement relating to deposits until the dispute arose with the Applicant at the end of his tenancy. Mrs Kilic confirmed that they had required the Property back to live in themselves and they had to pay out a lot of money to repair damage to the Property and to have it cleaned when the Applicant moved out. She denied that they had been greedy and does not like being accused by the Applicant of lying and producing fake invoices. She stated that they had tried to be reasonable and had paid back the sum of £580 to the Applicant very soon after he had moved out, even although they had incurred a lot of expense fixing up the Property after the Applicant had vacated. The Respondent confirmed that this was their only rental Property and that the Applicant was their first proper tenant. They had been renting out the Property since 2017 or 2018 but initially as an Air bnb.

10. The Legal Member indicated that she was satisfied that there was a clear breach of the 2011 Regulations, which was admitted by the Respondent, and that, in terms of those Regulations, a payment order would accordingly be made in favour of the Applicant today. She indicated that she would fully consider the representations from both parties and issue a written decision shortly, specifying the amount of the payment order and explaining the reasons for same.

Findings in Fact

1. The Respondent was the landlord of the Property.

2. The Applicant was the tenant of the Property by virtue of a Private Residential Tenancy commencing on 1 March 2021 and ending on or around 23 June 2023.

3. The Applicant paid a tenancy deposit of £800 to the Respondent at the outset of the tenancy.

4. The Respondent did not pay the deposit into a tenancy deposit scheme at any point during the tenancy, in breach of his obligations in terms of the 2011 Regulations.

5. The Respondent admits the breach.

6. The Respondent paid the sum of £580 to the Applicant on 3 July 2023, which sum constituted a partial refund of the deposit of £800.

7. The Applicant was unable to access the dispute resolution procedure operated by the tenancy deposit schemes as the deposit had not been lodged in one of the schemes.

Reasons for Decision

1. The application was in order and had been submitted timeously to the Tribunal in terms of Regulation 9(2) the 2011 Regulations [as amended to bring these matters within the jurisdiction of the Tribunal], the relevant sections of which are as follows:-

*"**9.**—(1) A tenant who has paid a tenancy deposit may apply to the sheriff 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."

Regulation 3 [duties] referred to above, is 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."

The Legal Member was satisfied from the documentation before her and the oral representations from both parties at the CMD that the Respondent was under the duties outlined in Regulation 3 above and had failed to place the deposit of £800 paid by the Applicant into an approved tenancy deposit scheme and provide the Applicant with details of same, contrary to Regulation 3. The Respondent had admitted this, both in his written representations lodged with the Tribunal and orally at the CMD. The Legal Member was therefore satisfied that the application did not require to be continued to an Evidential Hearing and that, in terms of Regulation 10 above that a sanction must be imposed on the Respondent in respect of this breach of the 2011 Regulations.

2. In determining the appropriate amount of the sanction to be imposed on the Respondent for payment to the Applicant, the Tribunal considered carefully the background circumstances and the submissions from both parties on the matter. The Legal Member was of the view that, although the parties disagreed on some of the background facts, they had both engaged in the Tribunal process and gave their submissions in a straightforward and candid manner. The Respondent had also admitted the breach in his first response to the Tribunal. The amount of the sanction should reflect the gravity of the breach. As the deposit here was £800, in terms of Regulation 10(a) above, the maximum possible sanction is £2,400. There is no minimum sanction stipulated in the 2011 Regulations. The Applicant had asked for the maximum sanction to be imposed. The Legal Member considered the length of the tenancy and the fact that for the whole duration of the tenancy (over 27 months) the deposit had been unprotected. The Legal Member also understood the Applicant's frustration when a dispute arose between the parties at the end of the tenancy regarding the condition of the Property and the return of his deposit. His

requests for details of the tenancy deposit scheme were not responded to by the Respondent and then it transpired that the deposit had not been placed in a scheme. This denied the Applicant access to the dispute resolution process which would otherwise have been available to him through one of the schemes, when the dispute arose regarding return of the deposit at the end of the tenancy. On the other hand, the Legal Member was prepared to accept the Respondent's position that he had initially been unaware of the requirement to put the deposit in a scheme. It was noted from the extracts of the tenancy agreement lodged with the Tribunal that the rent clause made mention of the deposit of £800 but not of it being placed in a scheme. The whole tenancy agreement had not been produced and, when asked during the CMD if there was such a clause in the agreement regarding the deposit, the Applicant (who had a copy of the agreement) stated that he could not see one. When considered along with the fact that this was the Respondent's only property that he let out, that he did not have a letting agent and that the Applicant had been his first 'proper' tenant, the Legal Member was persuaded that the Respondent had not acted deliberately or fraudulently in breaching the 2011 Regulations. It appeared from the submissions of the parties and the screenshots of communications between them lodged by both parties, that relations between the parties had been fairly amicable until the end of the tenancy and that, other than the deposit issue, the Respondent had communicated with and managed the tenancy satisfactorily. The Legal Member also noted that, although the whole deposit of £800 was not returned to the Applicant, the Respondent did refund the sum of £580 to the Applicant shortly after the tenancy ended and had sought to explain why the full deposit was not refunded. Weighing all these factors, the Legal Member considered this breach of the 2011 Regulations to be towards the lesser end of the scale but, given that it was a clear breach, covering the full duration of the tenancy and the consequences this had for the Applicant at the end of the tenancy when the dispute regarding the deposit arose, the Legal Member determined that £600 was the appropriate amount of the sanction to be paid 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.

_____ **12 September 2023**

Legal Member/Chair **Date**