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 Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/20/1555

Re: Property at 5 Meadow Crescent, Kirkwall, Orkney, KW15 1HA ("the Property")

Parties:

Mr Leigh Gould, Mrs Angelina Gould, Breck by south, Birsay, Orkney, KW17 2ND ("the Applicant")

Ms Dana Craigie, 174 Walker Crescent, Culloden, Scotland, IV27NB ("the Respondent")

Tribunal Member:

Petra Hennig-McFatridge (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined to grant an order against the Respondent for payment to the Applicants of the sum of £500 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

A: BACKGROUND:

1. The case history of this application is set out in the Case Management Discussion (CMD) notes of 6 November 2020 and 1 December 2020, which are referred to for their terms.

2. Both Ms Gould and Ms Craigie participated in both CMDs. Mr Gould did not participate.

3. The Tribunal had issued Directions on 18 August 2020, 6 October 2020, 6 November 2020 and 1 December 2020. These are referred to for their terms.

4. Following the CMD on 1 December 2020 the Tribunal considered that the essential facts of the case were not in dispute, further time should be given to both parties to lodge further specific documents and if this did not disclose any discrepancies the case could be dealt with on the basis of the evidence available. Both parties agreed that this would save them both having to take off time from work and they would prefer to have the matter dealt with on a further short written procedure.

5. A further Direction was issued and both parties given the opportunity to lodge further documents and to state if they considered a further CMD or hearing would be required.

6. The Applicant lodged a letter on 14 December 2020 including text messages regarding the payment of the deposit in 2018 and the information from SafeDeposits Scotland regarding the lodging of the deposit dated 2 February 2020. The Respondent's last correspondence was sent on 1 December 2020 and included text messages between the parties about the wrong entries with SDS, an article from Press and Journal about an assault on a person in Orkney and a copy of her previous representations of 7 November 2020.

7. Neither party indicated subsequently that a further CMD would be required.

B: EVIDENCE

1. At the CMD on 6 November 2020 Mrs Gould advised that she had become aware of the issue of the deposit not being held under the correct details when she asked about the deposit after the Respondent had told the Applicants that they should move out. She then received a text or email message from SafeDeposits Scotland with the wrong name linked to the DAN number. This was the document lodged with the application. The Mrs Fiona MacInnes referred to in the email may, as far as she is aware, was a former tenant.

2. Thereafter SafeDeposit Scotland confirmed the date of the deposit lodged in the correct name as 5 February 2020.

3. At the start of the next CMD on 1 December 2020 the legal member set out the purpose of the CMD and then took the parties through the previously raised questions as set out in the Directions previously issued to establish whether or not the facts of the case are disputed and whether either a further CMD or a hearing would be necessary.

4. The Applicant stated that the Respondent had sent her messages which made her assume the deposit had been correctly dealt with. However, something had gone wrong. She had no previous experience in the use of the deposit schemes and thus was not aware that a certificate should have been issued to the Applicants with the registration details. It was only at the time when it was clear the tenancy would come to an end that she realised the deposit was not held correctly. The deposit was used for the last month's rent

and ultimately the Applicants had been advised by the SafeDeposits Scotland it would not be worth pursuing the few days rent the Applicants did not consider were due and thus the deposit was released in full to the Respondent. The matter of alleged damage to the property was not relevant to the application. She had found an article about the Respondent and an incident at Glasgow Airport for which the Respondent was charged. She considered it possible that the Respondent had had some sort of a breakdown.

5. The Respondent stated she thought she had dealt with the deposit at the time the tenancy started. She knew the money was lodged in the deposit scheme. It must have slipped her mind at the time as she had a mental breakdown in that year due to the assault on her which is narrated in the newspaper articles she submitted. Once she realised in February 2020 that the deposit was not held with the correct details by SafeDeposits Scotland she advised the Applicants and took steps to remedy this. She tried to change the existing account to the new details. Ultimately she had to close the former tenant's account and lodge the deposit afresh under the correct details. This was concluded on 5 February 2020. She had had an agreement with the previous tenant regarding the deposit. She cannot remember what precisely she did to the deposit account at the start of the Applicant's tenancy but thought she had transferred the account from the old to the new names.

6. At the CMD on 1 December 2020, the Applicant had provided screenshots of text messages between the parties she stated show the statements regarding the deposit and how this would be handled at the start of the tenancy. Unfortunately the screenshots could not be read as the printout on file only showed parts of the images.

7. The Respondent had attempted to lodge her records from Safety Deposits Scotland to evidence the history of the deposit held with them. Unfortunately again this zip file with evidence did not reach the Tribunal inbox as it seems the format could not be processed.

8. The following documents were lodged in respect of this case:

a) Scottish Private Residential Tenancy Agreement for tenancy commencing 5 October 2018 with Inventory
b) Notice to Leave for the property dated 17 February 2020
c) Message SafeDeposits Scotland (SDS) 2 February 2020 to Leigh Gould's email for DRN 363342128 but stating as the addressee Fiona MacInnes
d) SDS Deposit Certificate dated 5 February 2020 for the property showing protected deposit of £850 in the name of Angelina and Leigh Gould under DAN536162
e) Email SDS to Applicant confirming emails from SDS to the Applicants in relation to DAN253635 addressed to Fiona MacInnes send in February 2020 were triggered by landlord changing tenant's email to that of Mr Gould and the deposit under that DAN number predated the tenancy of the Applicants

f) Letter 31 January 2020 from Respondent to Applicants advising of intention to sell property
g) Email from Applicant to Tribunal confirming end date of tenancy and date for returning keys as 27 May 2020.
h) Email from Respondent 6.11.2020 regarding state of the property, photographs at moving in and moving out,
i) Respondent's documents headed Overview of Dispute and Attempts to Resolve
j) Correspondence regarding the moving out process and email from Applicants to Respondent dated 4 May 2020 confirming the Applicants were content for the deposit to be released to the Respondent for the last month's rent
k) Document from Respondent detailing expenses after property was vacated.
l) Emails 7 and 17 November 2020 from Respondent regarding newspaper articles about an assault and her description of a mental breakdown in 2018 and confirmation £800 held in SDS for previous tenancy until details were changed.
m) Email Respondent 1 December 2020 with text exchange regarding rectification of SDS account copy of previous emails
n) Email Applicant with copy of SDS information and text messages from 4 September 2018, 20 September 2018 and 27 September 2020. The message of 27 September 2018 states "Great Angelina, I will get it transferred to the deposit scheme when I am back. Hope your move goes well..."

C THE LEGAL TEST:

1. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—(a)may make a decision without a hearing if the First-tier Tribunal considers that—(i)having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and (ii) to do so will not be contrary to the interests of the parties;

2. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.

3. In terms of Regulation 10 “if satisfied that the landlord did not comply with any duty in Regulation 3 the First tier Tribunal
   (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 First tier Tribunal 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.”

4. In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

D: FINDINGS IN FACT

Based on the documents and the discussion at the CMDs the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The deposit of £850 was paid by the Applicants to the Respondent on or around 27 September 2019.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 5 October 2018
3. The Applicants moved out on 26 May 2020 and returned the keys to the Respondent's solicitor on 27 May 2020
4. In early February 2020 the parties entered into discussions about the end of the tenancy.
5. The request for details of the tenancy deposit made by the Applicants on or around 2 February 2020 prompted the Respondent to access the Safe Deposits Scotland account for the property.
6. She then noticed that the deposit held for the property was still the deposit of £800 lodged for the former tenant of the property, Fiona MacInness under DAN253635.
7. The deposit held with SafeDeposits Scotland from the start of the tenancy until 5 February 2020 was £800 and not £850 and was in the name of the former tenant..
8. Between 2 February 2020 and 5 February 2020 the Respondent took steps to correct the account details with SafeDeposits Scotland.
9. The Respondent then ultimately lodged the deposit for the tenancy with the Applicants correctly with SafeDeposits Scotland on 5 February 2020 under DAN536162.
10. At the end of the tenancy the deposit was held by SafeDeposits Scotland and the release of the deposit was dealt with through the dispute resolution and release mechanism of the scheme administrator.
11. Following the end of the tenancy the deposit was released by SafeDeposits Scotland to the Respondent in full.
12. The Applicants did not insist on a determination by the scheme administrator's adjudication service for the few days of rent they considered they were not due .
13. The tenancy agreement in clause 2 provides the landlord registration number for the Respondent.
14. The tenancy agreement in clause 10 prescribes that the amount of the deposit is £850
15. The tenancy agreement in clause 10 states that the scheme administrator for the deposit is SafeDeposits Scotland and provides their address
16. The tenancy agreement in clause 10 sets out the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy
17. The Respondent used a firm of solicitors for the tenancy agreement but handled the funds for the deposit herself.
18. The deposit of the previous tenant had been dealt with informally between the Respondent and the previous tenant. The deposit had remained under the name of the previous tenant with SDS.

19. On or around 24 January 2018 the Respondent was assaulted and the perpetrator of that assault received a custodial sentence. The incident subsequently negatively affected the mental health of the Respondent.

E: REASONS FOR DECISION:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the two CMDs and without a full hearing on the basis of the information provided by both parties.

2. It was admitted by the Respondent and also clear from the documents lodged that in this case a deposit of £850 was paid to the Respondent at the start of the tenancy and that the full deposit was not properly lodged under the correct name until 5 February 2020 when SafeDeposits Scotland finally issued the certificate under DAN536162 for the full amount of £850.

3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.

4. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.

5. The Tribunal considers that the discretion of the tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015 by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "*repeated and flagrant non participation in , on non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale*"..It was held that "*Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances*..."

6. In the case before the Tribunal there is a clear breach of the Regulations. For the period from around 27 September 2018 until 5 February 2020 the deposit was not protected under the correct name and only £800 of the £850 deposit were lodged with SDS. The deposit was thus not lodged within 30 working days as required by Regulation 3.

7. The Tribunal is satisfied that the deposit had been essentially unprotected for about 16 months. Even taking into account that £800 as deposit for the

property were lodged with SDS but in the name of the former tenant, this sum was £50 less than the deposit paid by the Applicants and during that time a theoretical risk remained that the deposit would be asked back by the previous tenant in whose name the account was held .

8. As an aggravating factor to be taken into account, the Tribunal further considered that the Respondent was clearly aware of the Regulations as there is a specific reference in clause 10 of the Tenancy Agreement to the obligation to lodge the deposit within 30 working days and the scheme SafeDeposits Scotland is explicitly chosen as the scheme which will be used. The Respondent clearly had used SDS for a deposit for the previous tenancy and in the text message of 27 September 2018 the Respondent had clearly promised the Applicants to lodge the deposit with the scheme once she returned home.

9. On the other hand, the Tribunal also recognises that the funds up to the amount of £800 were in fact held by SDS during the tenancy until 5 February 2020 and not in the Respondent's own account and that the Respondent, once the matter came to light when it was raised following the issuing of the Notice to Leave, immediately took steps to rectify her error and lodged the deposit correctly before the tenancy ended.

10. The Tribunal further considers it relevant that at the end of the tenancy, which is the time when decisions about the return of the funds are made, the deposit was protected and the Applicants had access to the dispute resolution scheme of SDS. Ultimately the main goal of the Regulations, that the funds were not held by the landlord and thus both parties have access to the dispute resolution mechanism, were thus achieved in this case prior to the end of the tenancy. It was the Applicants who chose to let the deposit be released to the Respondent for the last month of rent.

11. The Tribunal also took into account that the failure to lodge the deposit has not been evidenced to be a case of deliberate defiance of the Regulations. Rather the Tribunal concluded that the Respondent forgot to change the deposit details after the start of the tenancy for the Applicants and simply left the deposit for the previous tenancy in SDS, only realising this when the matter was then canvassed in February 2020.

12. Although the Respondent may have been going through a difficult time in her life in 2018 as she stated, this does not mean as a landlord she does not have to adhere to the duties set out in the Regulations.

13. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £850 would thus be £2,550. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal does not consider that the failure to comply with the Regulations In this case warrants a penalty at the high end of the scale. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum

of £ 500, which reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

Decision:

14. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicants of the sum of £500 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**

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.

Petra Hennig McFatridge	**21 January 2021**
Legal Member	**Date**