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 2011/176 and under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/21/0994

Re: Property at 8 Wilson Court, 73 Hutcheson Street, Glasgow, G1 1SH ("the Property")

Parties:

Lou Henry, Mr John Phillips, 2/2, 308 Maxwell Road, Glasgow, G41 1PJ ("the Applicant")

Elliott Nouillan, Fulshaw Farm, Old Glasgow Road, by Stewarton, KA3 5JR ("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 complied with the obligations regarding payment of a 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 Private Residential Tenancy of the Property by the Respondent to the Applicants commencing on 8 July 2019. The Tenancy came to an end on 5 February 2021.

2. The application was dated 17 April 2021 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £825 was due in terms of the Tenancy, paid to the Respondent (care of his then letting agent,

CPM Glasgow Ltd ("CPM")) around the commencement of the tenancy, but not paid into an approved scheme until on or about 16 June 2020. The application did not specify the level of award sought other than to request "fair compensation for failing to protect the deposit".

The Case Management Discussion

3. On 15 June 2021 at 14:00, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Second Named Applicant (on behalf of both the Applicants). The Respondent was represented by Annette Hanna of Victoria Letting Ltd, his current letting agent.

4. The Applicants confirmed that they insisted on their application. Between their application and brief further submissions at the CMD, they said that they had made enquiries with CPM as to whether their deposit for the Tenancy would be placed with an approved Tenancy Deposit Scheme provider before passing over the deposit at the outset of the Tenancy. They were told it would be placed with Safe Deposits Scotland, and they paid their deposit and assumed it was so protected. They were not concerned about the deposit thereafter though noted when a confirmation about lodging their deposit with MyDeposits Scotland was received on or about 16 June 2020. Thereafter they took no action but at the end of the Tenancy there was a dispute with the Respondent on return of their full deposit. They took advice of this (which was being dealt with through the Tenancy Deposit Scheme adjudication procedures) and were at that time informed of the potential for an application under *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* due to the initial late lodging of the deposit. They decided to raise this application.

5. The Respondent and thereafter his agent had both lodged brief written representations which were expanded on by the Respondent's agent. In short, the Respondent has a number of rental properties and at the time of commencement of the Tenancy used CPM as letting agent for a number of them. (The Second Named Applicant said he believed, from papers sent to him during the Tenancy, that 13 properties of the Respondent were managed by CPM. The Respondent's agent made no comment on this figure.) CPM thereafter ceased to trade (said to be due to refusal of their application for registration as a Letting Agent) and around February 2020 Victoria Letting took over managing a number of properties for the Respondent.

6. The Respondent had, up until that point, relied on his letting agents, such as CPM, to ensure that deposits were properly handled in terms of the 2011 Regulations and did not take steps to check compliance. Following February 2020, the Respondent's agent took over around 60 properties, for various landlords, from CPM. She considered the account documentation and letting papers of CPM and found them lacking. In particular, it was unclear to the Respondent's agent whether deposits had been obtained and, if so, whether they had been placed with an approved Tenancy Deposit Scheme provider. Enquiries were then carried out with the Tenancy Deposit Scheme providers to check. Eventually, in regard to the Property, the Respondent's agent concluded that the

deposit for the Property had not been lodged with an approved Tenancy Deposit Scheme provider and the Respondent, from his own funds, arranged for the Respondent's agent to place the deposit of £825 with MyDeposits Scotland.

7. The Property was not the only tenancy for which the Respondent had to do this through Victoria Letting. The Respondent's agent was not certain how many of the Respondent's properties were effected (as she did not believe that she handled all of the Respondent's properties that had previously been with CPM). The Respondent was said now to have adopted a system of requesting copies of Tenancy Deposit Scheme certificates from his letting agents and reconciling against his records, to ensure that his letting agents were complying with the 2011 Regulations on his behalf.

8. The parties confirmed that neither had any dispute with the factual comments made by the other. Further, both were in agreement that there had been a breach of the 2011 Regulations through the lodging of the deposit with an approved Tenancy Deposit Scheme provider occurring around 10 months late.

9. I asked each of the parties if they had any submissions on the level of award that was appropriate but neither did. I also asked whether either had any submissions on further procedure and, specifically, whether a Hearing was sought or whether they wished a decision made at the CMD. Both sought a decision made at the CMD. No motion was made for expenses.

Findings in Fact

10. The Respondent, as landlord, let the Property to the Applicants under a Private Residential Tenancy dated 8 and 9 July 2019, commencing on 8 July 2019 ("the Tenancy").

11. The Tenancy was brought to an end on or about 5 February 2021.

12. In terms of the Tenancy, the Applicants were obligated to pay a deposit of £825 at the commencement of the Tenancy.

13. The Applicants paid a deposit of £825 to the Respondent's then letting agent, CPM Glasgow Ltd, on or about 20 June 2019.

14. On or about 16 June 2019, a deposit of £825 was placed by the Respondent's new letting agent, Victoria Lettings, with MyDeposits Scotland in regard to the Applicants' Tenancy for the Property.

15. The lodging of the deposit was around ten months later than required in terms of the Respondent's obligations under the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* and the Respondent was in breach of the said Regulations.

16. The Respondent is the landlord of multiple rental properties.

17. The deposit funds sent by the Applicants to CPM Glasgow Ltd in June 2019 were not recovered from CPM Glasgow Ltd and the Respondent arranged for the funds for the lodging of the deposit on 16 June 2020 to be paid from his own funds.

18. The Respondent arranged for the funds to be lodged with MyDeposits Scotland unprompted by any enquiry or steps by the Applicants to raise the issue with him.

19. The Respondent required to fund the late lodging of deposits for other properties for similar reasons to those applying to the Property.

20. At the conclusion of the Tenancy, the Applicants have been afforded access to the adjudication scheme under Tenancy Deposit Scheme in terms of her 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 submissions on further procedure, I was satisfied both that the necessary level of evidence had been provided through the application, further papers, and orally at the CMD, and that it was appropriate to make a decision under regulation 10 of the 2011 Regulations at the CMD.

22. The factual and core legal issues were undisputed between the parties. The Respondent had not placed the sum with an approved provider timeously but had done so long before to the conclusion of the Tenancy (and thus before the Applicants required to rely upon the adjudication procedures). Further, the Respondent had mitigated the Applicants' risk of an unlodged deposit by using his own funds to lodge an equivalent funds with MyDeposits Scotland. All of this was done without dispute as to his obligations, and all unsolicited by the Applicants. The Respondent, with the Respondent's agent, identified an issue arising from CPM ceasing to trade and resolved it quietly and completely. Beyond the core breach of the 2011 Regulations, the sole criticism that I can see laid at the Respondent's feet is the failure to have in place a system of ensuring timeous compliance by his letting agents in July 2019. At that time he relied entirely on his letting agents and, in the case of CPM, that reliance resulted in him falling into default of the 2011 Regulations. I am told he now has such a system in place for checking his letting agents are complying with the 2011 Regulations.

23. In coming to a decision, I reviewed recent decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that "[e]ach case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a 'serious' breach will vary from case to case – it is the factual matrix, not the description, which is relevant." (paragraph 9)

24. In regard to that "factual matrix", Sheriff Ross reviews with approval the reasoning of the Tribunal at first instance in that case (at paragraph 10). Generalised for my purposes, the Tribunal made consideration of:
    - the purpose of the 2011 Regulations;
    - the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    - whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
    - the reasons given for the failure to comply with the 2011 Regulations (in that case, also related to the landlord's representative);
    - whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
    - whether the failure was intentional or not; and
    - whether the breach was serious.

    Applying that reasoning, the Tribunal held – and the Upper Tribunal upheld – an award of two times the deposit. In analysing the "factual matrix" in that case, Sheriff Ross noted:

    > *In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer* [of the letting agent in *Rollett*] *also tends to lessen culpability, as it affects intention. The finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.*
    >
    > *Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals. None of these aggravating factors is present.* (paragraphs 13 and 14)

25. Applying the reasoning to the current case, the purposes of the 2011 Regulations are to ensure that a tenant's deposit is insulated from the risk of insolvency of the landlord or letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, the latter has been achieved by the late lodging of the deposit and the former was cured by the Respondent's paying in of his own funds to MyDeposits Scotland in June 2020. There were multiple breaches by the Respondent across his property portfolio but only because of a single issue – the failure of CPM to attend to matters properly. This reliance on CPM, and their abuse of this trust, lessen the Respondent's culpability. It shows no intention by the Respondent to breach the 2011 Regulations. All steps by him have shown an intention to comply and, when he found that he had not, taking timeous steps to correct the issue. I am satisfied that this case does not disclose a serious breach.

26. The Upper Tribunal considered a case where the Tribunal regarded a low level of culpability in *Wood v Johnston, [2019] UT 39*. The Tribunal at first instance had awarded £50 (though it is not possible from the UT's opinion to determine what this was as a multiplier of the original deposit). Sheriff Bickett noted that parties to the appeal were agreed that "the award is a penalty for breach of Regulations, not compensation for a damage inflicted" (paragraph 6) and, like Sheriff Ross in *Rollett*, analysed the nature of the breach, though in briefer terms. In *Wood*, it was noted that the Tribunal at first instance had made the award in consideration that "the respondent owned the property rented, and had no other property, and was an amateur landlord, unaware of the Regulations. The deposit had been repaid in full on the date of the end of the tenancy." Sheriff Bickett refused permission to appeal and thus left the Tribunal's decision standing.

27. The circumstances in *Wood* match less well to the current case. The Respondent is not an "amateur" and has other properties. Conversely, he did not repay the deposit at the end of the tenancy but did better than that by ensuring belated lodging of the deposit long before the end of the tenancy. I see nothing in the reasoning in *Wood* that suggests that a low sanction could not be applied in the current case, and nothing in *Rollett* or *Wood* to suggest that this case falls in the middle or severe categories.

28. In the circumstances, I regard a low sanction to be appropriate, reflecting the low culpability of the Respondent. Though it is tempting to absolve the Respondent near completely, he is the party solely liable under the 2011 Regulations. As a landlord of multiple properties, he is responsible for the actions of his agents and thus responsible for ensuring they comply on his behalf. There is a reasonable period for compliance with the obligations to lodge a deposit and the Respondent did not do so or take steps to check it was done. Had CPM not ceased to trade, there is nothing to suggest the Respondent would have taken steps to rectify the breach prior to the end of the Tenancy. He is wise now to have a system for checking compliance but he admits that he did not have one at the time. I am awarding £275 under regulation 10 of the 2011 Regulations, being one-third of the deposit and hold this as an appropriate award in consideration of the law and all the facts. I shall apply interest on the sum under Procedure Rule 41A at 8% per annum from the date of Decision as an appropriate rate.

Decision

29. I am satisfied to grant an order against the Respondent for payment of the sum of £275 to the Applicants with interest at 8% per annum running from today's date.

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
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Legal Member/Chair

15 June 2021
_____
Date