Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/0761

Re: Property at 3F1 13 Springvalley Terrace, Edinburgh, EH10 4QB ("the Property")

Parties:

Mr Seamus Johnstone MacLeod, Ms Rachel Davis, 3F1 13 Springvalley Terrace, Edinburgh, EH10 4QB ("the Applicant")

Mr David Stephen Connolly, 17 Braid Avenue, Edinburgh, EH10 4SR ("the Respondent")

Tribunal Members:

Alastair Houston (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of EIGHT HUNDRED AND SEVENTY FIVE POUNDS (£875.00) STERLING be made in favour of the Applicants.

1. **Background**

1.1 This was an application under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules") whereby the Applicants were seeking an order for payment of £2625.00 under Regulation 10 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations"). This equated to three times the monthly rent payable under the tenancy agreement between the parties.

1.2 The Applicant had initially lodged an application that named Cox & Co Ltd, letting agents, as the Respondents and made reference to them being punished for breaching the Letting Agent Code of Practice. Following subsequent requests from the Tribunal for further information,

amended applications were lodged convening Mr Connolly as the Respondent and restricting the remedy sought to an order for payment under Regulation 10 of the 2011 Regulations.

1.3 The Applicant had lodged copies of a certificate from Safe Deposits Scotland, an email from Cox & Co Ltd and a copy of the written tenancy agreement in support of the application. The Respondent had lodged a written response to the application and had submitted to the Tribunal a significant volume of copies of emails between Cox & Co and Mr Seamus Macleod.

2. The Case Management Discussion

2.1 The Case Management Discussion took place on 13 June 2019. Mr Seamus Johnstone attended personally with his representative, Mr Gordon Maloney of Living Rent Edinburgh. The Respondent appeared personally.

2.2 Parties confirmed to the Legal Member that they were in agreement that the duties within Regulation 3 of the 2011 Regulations applied. A deposit of £875.00 had been taken in connection with a tenancy agreement which had commenced on 26 October 2019. That deposit should have been lodged by an approved third party scheme within 30 working days, and the Applicants provided with the prescribed information. The deposit was only lodged with a scheme on or around 25 February 2019.

2.3 Given the agreement between the parties in respect of the factual background, the Legal Member expressed the belief that a hearing was not necessary. Parties were in agreement with this and were content to have the application decided at the Case Management Discussion, as is permitted by Rule 18 of the Rules. Parties also confirmed that the tenancy between them had come to an end as of 13 May 2019.

2.4 Mr Maloney made submissions on behalf of the Applicants. The maximum award under Regulation 10 of the 2011 Regulations should be made. He highlighted that the deposit had not been lodged within the timeframe specified within the 2011 Regulations. It was only lodged as the Respondent changed letting agents. If there had not been a change in agents, then it was suspected the deposit would never have been lodged and may have been retained in respect of spurious claims. It was the job of the Tribunal to hold a landlord to account. There had been additional disagreements between the parties. The approach of Cox & Co Ltd in dealing with these disputes highlighted the risk to the Applicants of the deposit being unprotected. Mr Maloney did not have any authorities or past decisions of the Tribunal to refer to.

2.5 Mr Macleod confirmed that he had only received notification that the deposit had not been lodged with a scheme within 30 working days of the commencement of the tenancy when he received notification of it having been lodged with Safe Deposits Scotland. He requested that he be

allowed to lodge certain documents, including an inventory, with the Tribunal. These documents pertained to the dispute over repairs. The Legal Member declined to allow this as, irrespective of these documents being late, in the opinion of the Legal Member any dispute over the carrying out of repairs to the Property was irrelevant.

2.6 The Respondent made reference to his written response he had submitted. Beyond this, he accepted that the former letting agents, Cox & Co Ltd, had made an error and had not lodged the deposit as was required under the 2011 Regulations. Cox & Co Ltd had confirmed with him that it was in their client account at all times. The tenancy had ended and the full deposit had been returned to the Applicants. Any potential loss the Applicants could have suffered as a result of the deposit being unprotected was irrelevant. No loss had actually been incurred and the maximum award permitted by the 2011 Regulations was not appropriate. The Respondent confirmed he owned ten properties and had previously used Cox & Co Ltd as letting agents for those in Edinburgh and the surrounding area. The first he knew of the issue was when Tribunal documents were served upon him.

2.7 In reply, Mr Maloney submitted that a letting agent's client account was not sufficient protection. A tenant did not require to suffer loss as a result of a breach of the 2011 Regulations, rather any loss would be relevant in determining the gravity of the breach.

3. Reasons for Decision

3.1 The Tribunal has the power to award up to three times the deposit in cases where there has been a breach of the 2011 Regulations. In coming to a decision, the Legal Member was guided by the Sheriff Court case of *Jenson v Fappiano*, 28 January 2015. It was not the case that the maximum award should be made automatically, rather the case should be decided in a fair manner and any award should be proportionate.

3.2 In the present case, the Legal Member is of the opinion that any sanction must be linked to the severity of the breach of the 2011 Regulations. Furthermore, there were a number of mitigating factors which resulted in the breach being at the lower end of the scale. The deposit was unprotected for less than three months after the deadline for its lodging with a scheme expired. It was lodged whilst the tenancy was continuing between the parties. The Applicants received the protection of the deposit having been lodged at the end of the tenancy. Whilst remaining in the client account of a letting agent the deposit could not be said to be protected, the potential loss to the tenant is heavily outweighed by the fact there was no loss suffered by the Applicants. Accordingly, the Legal Member believed that an award equivalent to the deposit, being £875.00, would be an appropriate sanction in the present case.

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.

[redacted]

Legal Member/Chair

13/6/19

Date