Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/2164

Re: Property at Dallus Cottage, Cothal, AB21 0HU ("the Property")

Parties:

Mr Warren Lawson, Hazelhurst, Woodside Terrace, Udny Station, AB41 6PJ ("the Applicant")

Mr Francis Watkins, Mrs Sarai Watkins, Fintray Lodge, Cothal, AB21 0HU; Fintray Lodge, Cothal, AB21 0HU ("the Respondents")

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

This is an application dated 20th June 2019 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* ("the 2011 Regulations").

The Applicant seeks payment of compensation in respect of an alleged failure by the Respondents to pay the deposit he originally asserts he provided of £550.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

The Applicant provided with his application copies of various text messages between the parties.

The Respondents have been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 16th August 2019, and the Tribunal was provided with the executions of service.

The Case Management Discussion

A Case Management Discussion was held on 25th September 2019 at Credo Centre, 14-20 John Street, Aberdeen. The Applicant appeared with his partner, Ms Horne, and was not represented. The Second Respondent appeared, and represented her husband, the First Respondent, and she was not represented.

The Respondents' solicitor, Ms Mitchell, had previously e-mailed a letter to the Tribunal on 2nd September 2019, in which she explained the background and her clients' position in considerable detail.

The salient details are that the Respondents had not previously rented out property, and they were unaware of their various legal duties and obligations when they agreed to let out the Property to the Applicant. The lease commenced in early to middle of December 2018, and the Applicant paid a deposit of £550.00 at that time.

The Respondents were unaware at that time of their legal obligations in terms of the deposit, and as a result did not lodge it with an approved scheme. They also did not reduce the tenancy agreement to writing, nor did they comply with their duty to provide the tenant with a document which sets out all of the terms of the tenancy in terms of section 10 of the *Private Housing (Tenancies) (Scotland) Act 2016*.

The Second Respondent candidly accepted that the Respondents had been naïve, and had not made themselves aware of their legal duties and responsibilities before entering into the lease agreement. She also very candidly accepted that they ought to have done so. She explained that the Respondents had taken legal advice after commencing the lease from a firm of solicitors, and the Respondents have produced some of the correspondence from that firm.

The Respondents and their current solicitors disagree with the advice previously given by their former solicitors, which in their opinion was incorrect. Their former solicitors' dealings with the Applicant, and advice given to the Respondents, had exacerbated the situation and caused more difficulties between the parties.

The Applicant broadly accepted the Respondents' position, but informed the Tribunal that he and his partner and family had suffered a lot of stress and upset as a result of what had occurred, and the costs of moving out of the Property and discovering that their deposit had not been lodged in an approved scheme by the Respondents.

Both parties accepted that the Applicant moved out at the end of March 2019, and that this application was brought timeously.

It became obvious to the Tribunal during the course of the Case Management Discussion that each of the parties felt aggrieved at the actings of the other, though it should be noted that both were courteous throughout the hearing.

Both parties clearly felt very strongly about the circumstances surrounding the ending of the tenancy, and were anxious to tell the Tribunal the full background from each of their perspectives to their respective grievances.

Reasons for Decision

This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

> "(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."

The Respondents as landlords were required to pay the deposit into an approved scheme. They accept that they failed to do so.

Regulation 10 of the 2011 Regulations provides as follows:

> "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."

The Tribunal is satisfied that the Respondents did not comply with their duty under regulation 3, and accordingly it must order the Respondents to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and

just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the facts that the Respondents do not run any form of substantial commercial letting business, had no specialised knowledge of housing law or regulations, had no prior experience as landlords, were unaware (as they candidly accepted that they should have been) of the need for the deposit to be placed with an approved scheme, received some questionable legal advice from their previous solicitors, and accepted at the first opportunity before the Tribunal that they were at fault and had contravened Regulation 3 of the 2011 Regulations.

In these circumstances, the Tribunal considers that albeit ignorance of the terms of the 2011 Regulations is no excuse or defence, the foregoing factors do represent mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

However, balanced against these mitigating factors, are the fact that the Respondents entered into the lease entirely unaware of their legal obligations as a landlords with respect to the 2011 Regulations, which regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease, and the fact that the period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (over nine months to today's date).

It is symptomatic of the Respondents' lack of awareness of their legal obligations and duties as landlords that they did not enter into any form of written lease agreement, and did not provide the tenant with a document which sets out all of the terms of the tenancy in terms of section 10 of the *Private Housing (Tenancies) (Scotland) Act 2016*.

Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £1,100.00 (twice the amount of the tenancy deposit) is an appropriate sanction to impose.

In terms of regulation 10(b)(i) of the 2011 Regulations, the Tribunal may, if it considers it appropriate in the circumstances of the application, order the landlord to pay the tenancy deposit into an approved scheme.

It became clear in the course of the Case Management Discussion that there may be a factual dispute between the parties as to whether the Respondents may be entitled to retain some of the deposit as a result of certain claims which they believe they may have upon it.

One of the mechanisms provided for in the 2011 Regulations, is a dispute resolution procedure operated by the approved scheme holding the deposit in terms of Part 6 of the 2011 Regulations. The purpose of this part of the 2011 Regulations is to provide a mechanism to resolve disputes about how much of the deposit should be repaid to the tenant, and how much might be repaid to the landlord, in the event of dispute on that matter.

In the circumstances of this application, the Tribunal considers it appropriate to order the Respondents to pay the tenancy deposit of £550.00 into an approved scheme. Once that has been done, the parties can then utilise the approved scheme dispute resolution mechanism to determine to whom the sums representing the deposit should be repaid, standing the obvious dispute regarding its potential retention.

Decision

For the foregoing reasons, the Tribunal orders the Respondents in respect of their breach of Regulation 3 of the 2011 Regulations:

(1) to make payment to the Applicant of the sum of £1,100.00 in terms of Regulation 10(a) of the 2011 Regulations; and

(2) to make payment of the tenancy deposit of £550.00 into an approved scheme in terms of Regulation 10(b)(i) of 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.

N.K

25/09/19

Legal Member/Chair **Date**