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 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/19/0097

Re: Property at G 0/2, 201 Netherton Road, Glasgow, G13 1BH ("the Property")

Parties:

Miss Gayle Selkirk, Flat 2/2, 18 Stirrat Crescent, Paisley, PA3 1RA ("the Applicant")

Mr John Smith, c/o G and S Properties, 50 Drymen Road, Bearsden, G61 2RH ("the Respondent")

Tribunal Member:

David Preston (Legal Member)

Decision:

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

- **The Respondent had failed in his duty to pay the deposit paid by the Applicant to the scheme administrator of an approved scheme under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"); and**
- **Orders the Respondent to pay to the Applicant the sum of £1000 in terms of Regulation 10(a).**

Background:

1. By application dated 8 January 2019 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 and Regulation 9 of the Regulations the applicant sought an order for payment under Regulation 10.

2. By Notice of Acceptance dated 6 December 2018 a legal member of the First-tier Tribunal with delegated powers so to do, accepted the application for determination

by the First-tier Tribunal and appointed the case to a Case Management Discussion ("CMD").

3. A CMD took place at Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on 20 March 2019. The Applicant attended on her own behalf. The Respondent did not attend but was represented by Ms Sandra Adams of G&S Property Management, 50 Drymen Road, Bearsden, Glasgow G61 2RH.

4. During the course of the application the Applicant had been asked to confirm her intentions. She had indicated that her complaint related to the failure of the landlord to place the deposit with a scheme within the due timescale at the start of the Short Assured Tenancy. She acknowledged that her application had not been made within three months of the end of the Short Assured Tenancy but was of the view that although the form of the tenancy had been replaced with a Private Rented Tenancy, there had been no break in her occupation of the property and that it was in effect a continuation of the earlier lease. She confirmed that she was asking the tribunal to make an award of up to three times the deposit. She said that this was to reflect the landlord's failure twice to secure the deposit.

5. On 11 March 2019 the Respondent submitted written representations by email. These submissions largely related to matters out with the scope of the present application. The Respondent raised issues in relation to the motivation of the Applicant in making the application and made assertions in an effort to discredit the Applicant's statement that she was inexperienced in matters relating to private rented property. At the hearing the Applicant offered demonstrate that she had not previously been a private tenant, having served in the armed forces. The tribunal determined that this was not necessary as the assertions were not relevant to the points at issue.

Discussion:

6. The tribunal noted that the tenancy had been initially constituted by a Short Assured Tenancy Agreement dated 10 August 2017, accompanied by a Form AT5 Notice dated 2 August 2017 along with: a Notice to Quit dated 3 August 2017; and a Section 33 Notice dated 3 August 2017. Ms Adams advised that it was the standard practice of her firm to serve these notices at the commencement of tenancy agreements.

7. On 3 February 2018 a Private Residential Tenancy was entered into between the parties to take over the former Short Assured Tenancy. Ms Adams advised that this had been on advice from their solicitors and had applied to all their tenancy agreements which, as she understood the position on advice was necessary under the Private Housing (Tenancies) (Scotland) Act 2016.

8. Ms Adams accepted that the deposit of £892.50 which had been paid by the tenant at the start of the Short Assured Tenancy had not been paid into an approved tenancy deposit scheme within three months. She further accepted that the deposit had not been paid to an approved scheme until 3 December 2018. She explained

that this had been entirely due to an error on the part of her firm. She said that when the oversight had been brought to the firm's attention, they had immediately paid the deposit to My Deposits Scotland.

9. Ms Adams referred the tribunal to Paragraph 7 of Section 1 (Introduction) of the Code of Practice for Letting Agents which is in the following terms:

> *"If a landlord or tenant (including former landlord or tenant) believes that a letting agent they have let a property through or from has failed to comply with the Code, they must notify the letting agent of this in writing (this includes electronic communications), so the letting agent can take action to resolve the issue…."*

10. Ms Adams said that the firm had complied with this provision in that, having been advised of their error, they had taken action to resolve the issue as provided.

11. Ms Adams asserted that the Applicant had made the application needlessly and that the application had been frivolous and vexatious since it was a waste of time. The deposit had been paid into the scheme as soon as the oversight had been notified to them. She said that the firm had expedited the return of the deposit in full to the tenant within 6 days of the end of the tenancy, which she said was unheard of, although on being questioned she acknowledged that any delay in the return of the deposit would likely be due to delays on the part of the tenant in providing necessary accounts and documentation. She confirmed that the Applicant had provided all necessary information in good time and in good order at her waygoing.

12. The Respondent's position was that the tenant was seeking to profit from the error on the part of the letting agents. She had indicated that she was relying on the failure to lodge the deposit following the initial Short Assured Tenancy. The Respondent argued that the application out of time since the tenancy had ended on 3 February 2018 and the application was not made until 8 January 2019 which was well beyond the three month time limit for making the application. In this regard the Applicant had said that she was inexperienced in private tenancies in respect of which the Respondent made assertions about that experience and alleged that she knew full well what her position was and was seeking to take unfair advantage of the situation.

13. Ms Adams suggested to the tribunal that any order, which she accepted after the discussion was inevitable, should be restricted to a nominal sum.

Reasons for Decision:

14. Rule 17(1)(d) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the Tribunal *"may do anything at a case management discussion which it may do at a hearing, including making a decision".* The Tribunal was satisfied that it had before it all the information it required to make a decision and that it would, therefore do so without a hearing.

15. Regulation 3(1) of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations"), which were in force before the tenancy of the commenced, states that a landlord must, within 30 days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme and provide the tenant with certain information required under Regulation 42 of the 2011 Regulations.

16. Regulation 10 of the 2011 Regulations provides that if the tribunal finds that the landlord did not comply with any duty in Regulation 3, the Tribunal must order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit.

17. The tribunal rejects the argument by Ms Adams that the Code of Practice for Letting Agents ("the Code") has any relevance to this case. This is an application under the Regulations and the duty thereunder is a statutory obligation for the landlord to whom the Code does not apply. The section of the Code referred to is by way of introduction and deals with failures by letting agents to comply with the Code. In such a case, the complainer requires to notify the agent of the alleged failure and provide an opportunity for the agent to take action to resolve the issue before making an application under the Housing (Scotland) Act 2014. This was not such an application. In any event the application is for an order against the landlord and not the letting agents.

18. The tribunal noted that Ms Adams had stated that her firm had been aware of the requirement to lodge deposits, and the failure was as a result of an oversight.

19. The tribunal is required to exercise discretion in deciding what level of order is appropriate, subject to the maximum of three times the amount of the deposit which would be £2677.50. This case has come about as a result of an oversight on the part of the letting agents on whom the landlord is entitled to rely to advise and guide him in his duties as a landlord, but that does not absolve him of his duties under the 2011 Regulations. The agents must ensure that adequate safeguards are in place to ensure that such an oversight cannot occur. The deposited funds must have lain in their accounts for over a year and an accounting process should have identified them sooner and without the need to be told.

20. The deposit was unprotected in terms of the 2011 Regulations for the duration of the tenancy, namely from 3 November 2017 (being three months after the start of the initial Short Assured Tenancy) until 12 December 2018. The tribunal determined that although there were two agreements, there was in fact one tenancy period covering these dates. Ms Adams had said that if it had not been for the new legislation, a straight continuation agreement would have been issued but on advice they had replaced all Assured Tenancies with Private Residential Tenancies. By issuing a Private Residential Tenancy Agreement the tribunal finds that in effect the parties entered an agreement in terms of section 46A of the Housing (Scotland) Act 1988 which provides that the assured tenancy becomes a private residential tenancy. The 'second' tenancy was therefore a continuation of the 'first' one and amounted to one tenancy to cover the period.

21. The tribunal was mindful that there was nothing to suggest that the Respondent's failure had been wilful, or that he had systematically been in default in respect of a number of properties. The tribunal also accepts that the Applicant had not made any enquiry of either the deposit scheme or the landlord prior to the point at which she decided to end the tenancy. if she had done so, the tribunal accepts as likely that the failure would have been rectified at that point. On the other hand, had the tenancy not been ended the failure would have continued. However, the tenancy has now ended, and the deposit has been returned to the Applicant in full. The fact that this happened quickly and without issue reflects on the Applicant's actions in ensuring that everything was in order rather than on any particular efforts by the letting agents.

22. Insofar as the Applicant's alleged motives are concerned, while the 2011 Regulations are in place to protect tenants from unscrupulous landlords, they apply to all landlords and provide all tenants with an absolute right and entitlement to make application for an award in the event of non-compliance. No motive is required and indeed such awards have been legitimately used by tenants who may be in significant arrears of rent at the end of a tenancy to offset such arrears. The tribunal was not impressed at the assertions of the Respondent or his agents about the Applicant's experience or motives, neither of which have any bearing on his statutory duty.

23. In the whole circumstances presented to the tribunal, it considered that while any default of this sort is a serious matter, this failure was not at the most serious end of the scale which would attract the maximum sanction of three times the deposit. It also had regard to the mitigating factors put forward by the respondent and considers that the fair, proportionate and just sanction in this case, having regard to the maximum sanction available, is the sum of One thousand pounds (£1000).

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.

D Preston ..... Chairman

21 March 2019