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 (Scotland)(Schemes) Regulations 2011

Chamber Ref: FTS/HPC/PR/21/0074

Re: Property at 2/2, 108 Stratford St, Glasgow, G20 8SF ("the Property")

Parties:

Mr Tom O'Hara, 2/1 59 Dalmally Street, Glasgow, G20 6RN ("the Applicant")

Mr Alan Liangbiao Hu, 4 Kelvindale Place, Glasgow, G20 8BU ("the Respondent")

Tribunal Members:

Rory Cowan (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that:- (i) the Respondent failed to comply with Regulations 3(1)(a) and (b) of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and (ii) that the sum of £1,080, being a sum equal to three times the tenancy deposit, was an appropriate sanction.

- Background

By Application under Rule 103 dated 11 January 2021 (the Application) the Applicant sought an order for payment against the Respondent for an alleged failure to pay a tenancy deposit into an approved scheme as well as a failure to issue prescribed information to him. In support of the Application, the Applicant produced various documents including a copy of the tenancy agreement dated 26 August 2020, copy correspondence and communications between the Applicant and the Respondent that dealt with (among other things) the issue of the deposit. In response, the Respondent issued a written response dated 2 February 2021. A Case Management Discussion was held on 18 March 2021 and continued until 6 May 2021 to allow the Respondent to appear.

A further Case Management Discussion (CMD) took place on 6 May 2021 and conducted by way of conference call. The Applicant appeared. He was represented by his mother Nikki O'Hara. The Respondent also appeared and represented himself. Whilst he indicated that English was not his first language, he was able to follow and understand the proceedings and participate. He also acknowledged that he had received the Application and associated papers.

- The Case Management Discussion

The nature of the Application was discussed with the parties and, in particular, what the Tribunal was potentially empowered to do should there be a finding that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the 2011 Regulations). Both parties indicated that they understood what was to be discussed and what the Application related to. It was specifically explained that the Tribunal could not, as part of the Application, make any order for the deposit to be paid to either party or adjudicate in relation to any dispute in relation to damage caused to the Property.

Mrs O'Hara stated that the Applicant had given notice to leave the Property on 1 November 2020 which she stated had expired on 28 November 2020. No copy of that notice was provided to the Tribunal. She also indicated that the Applicant left the Property on that date. The deposit had been paid to the Respondent in cash on 26 August 2020 and that, despite requests to the Respondent, the deposit had not been returned to the Applicant. She stated that she was of the view that it had not been lodged with an approved tenancy deposit scheme as required by the 2011 Regulations. She also indicated that the Applicant had also initiated proceedings against the Respondent in terms of Rule111 to seek return of the deposit from the Respondent.

In response the Respondent acknowledged that he had received the deposit of £360 from the Applicant. He also confirmed that it had not been paid into a tenancy deposit scheme as required by the 2011 Regulations. He indicated that he had not known about the requirement to do so. He also confirmed that he had not issued the prescribed information as required by regulation 3(1)(b). The Respondent also confirmed that he still held the deposit and that it had not been returned to the Applicant. The Respondent's position was that he had not known about his duties under regulation 3(1)(a) and (b) of the 2011 Regulations. The Respondent also indicated that the reason why the deposit had not been returned was that it was his view that the tenancy was not at an end as they had agreed to a lease of one year. It was noted that the lease between the parties purported to be a Short-assured tenancy despite having commenced on 26 August 2020. It was explained to the Respondent that by that date any new residential tenancy granted to an individual as their only or principal home would be a Private Residential Tenancy. That being the case, the Applicant could not be held to any contractual term and could give notice to bring the lease to an end by giving the required notice at any time. The default position being 28 days' notice. Whilst it may be a matter of discussion whether the lease had been validly terminated by the Applicant, that was not what was being argued nor was it relevant to the question of whether the deposit had been protected in time. The Tribunal took the view that there did not require to be a finding in fact in that regard standing the admissions made.

The Respondent confirmed that he only owned the Property and did not let out any other properties. He acknowledged that he had been letting out rooms in the Property for “more than 2 years” and that he had been a registered landlord since March 2019. He also acknowledged that initially the Property had been let to the Applicant along with one other person although another had been introduced later. Mrs O’Hara made the point that at one point 3 unrelated adults were occupying the Property and that there was no HMO licence for same. The Respondent acknowledged that this was the case “sometimes”. The Respondent indicated that he currently lives in rented accommodation himself and that he was doing so for health reasons as his rented property was on the ground floor.

The Respondent was asked about the terms of some of the correspondence that had been lodged with the Application. It was noted that, in his response dated 2 February 2021 the Respondent stated that he had not received the 2 letters dated 11 January 2021 from the Applicant. He did acknowledge that he had received the various emails and texts dated between 9 and 14 November 2021 which specifically raised the issue of the deposit and whether it had been protected. When asked why the deposit had not been protected at that point when it had been “flagged” to him, he indicated that his focus had been on resisting the Applicant “leaving early” (based on his erroneous belief as to the enforceability of the 12-month term) and the financial problems the Respondent would suffer as a result. He then indicated that the Applicant had damaged the cooker within the Property and the repair of same had cost £210. Mr O’Hara responded by saying that one of the reasons why the Applicant had left the Property was due to “Health and Safety concerns”. She also stated that the Applicant has suffered stress and “angst” as a result of the failure to return the deposit.

- Findings in Fact and Law

1) The Respondent is the heritable proprietor of 2/2, 108 Stratford St, Glasgow, G20 8SF.
2) The Applicant was a tenant of the Responent in terms of a tenancy agreement that commenced on 26 August 2020.
3) That under the terms of the tenancy agreement, the Applicant paid to the Respondent the sum of £360 on 26 August 2020 by way of security deposit.
4) That the security deposit of £360 has not been paid into an approved tenancy deposit scheme. And has failed to comply with regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
5) That the Respodent has not issued the information to the Applicant as required by regulation 3(1)(b) and as prescribed by regulation 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
6) That the Respondent still holds the security deposit of £360.
7) That the Respondent received the emails and texts from Mrs O’Hara regarding the protection of the deposit dated between 9 and 14 November 2020 and was aware of their terms.
8) That an appropriate penalty is a sum equivalent to three times the level of the deposit being £1,080.

- Reasons for Decision

The Respondent admitted that he had not complied with his obligations under regulation 3(1)(a) and (b) of the 2011 Regulations. His position being that he was unaware of those obligations. As has been stated before in similar such cases, ignorance of the law is no defence to such an application. The only real issue therefore for the Tribunal in the face of such an admission is to consider the level of the appropriate sanction. The level of such a penalty is a matter of discretion for the Tribunal taking into account the particular circumstances of the case. Whilst the Respondent indicate that he had not been aware of the duty to pay a deposit into an approved scheme, what concerned the Tribunal was that by early to mid-November 2020 the Applicant, or more correctly Mrs O'Hara, had emailed and sent him texts asking about the deposit, stating the requirement to protect same and asking where it had been protected. Despite this, the Respondent did not seek to lodge the deposit with a scheme even though late. The explanation given by the Respondent was self-serving and took no account of his duties in relation to the deposit. He was more concerned with trying to hold the Applicant to a purported contractual term that, as a matter of law, he was not entitled to hold the Applicant to and persisted with that explanation in front of the Tribunal. Of further concern is that the deposit is still being held by the Respondent in circumstances where it is clear he seeks to retain at least part of same in relation to damage he claims has been caused by the Applicant to the cooker within the Property. Whilst the Tribunal gives no view on the prospects or otherwise of that potential claim, what is clear is that, by failing to lodge the deposit, the Applicant has been deprived of the protection the 2011 Regulations were designed to give tenants and the ability to challenge any such a claimed deduction through a deposit scheme's adjudication service. Whilst the Respondent may not be the most experienced of landlords, he had been, by his own admission, a landlord for a period in excess of 2 years. He has let the Property to others in addition to the Applicant and ought to be aware of his responsibilities as a landlord including those relative to deposits. Overall, the tribunal was of the view that the Respondent's failures to comply with his duties under the 2011 Regulations were not trivial or inadvertent. Whilst the Respondent may not have been aware of his duties when the deposit was taken by him, by November 2020 he ought to have been. His position that the lease had not been terminated confounds this in that, despite taking such a view, his "focus" was to retain the deposit after November 2020 rather than paying it into an approved scheme and to do so for the benefit of his own financial interest. Taking this into account and all the circumstances of the Application, the response and the parties' oral submissions, the Tribunal was of the view that this was an example of a case where the Respondent's culpability was at the highest level. The appropriate sanction therefore would be to make an award at the level of 3 times the deposit.

The Tribunal also considered whether it was appropriate to make an order under regulation 10 (b)(i) or (ii). Standing the Applicant's position that the tenancy is at an end and that he has vacated the Property combined with the fact that an application for repayment of the deposit has been raised by the Applicant in terms of Rule 111, the Tribunal took the view that such an order was not required.

- Decision

The Tribunal orders that the Respondent pay to the Applicant the sum of £1,080 being a sum equivalent to three times the deposit.

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.

Rory Cowan

Legal Member/Chair **Date** **6 May 2021**