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

Chamber Ref: FTS/HPC/PR/20/0861

Re: Property at The Workshop Cottage, Clachan of Glendaruel, Argyll and Bute, PA22 3AA ("the Property")

Parties:

Mr Robert Hayes, 20 Kilmun Court, Kilmun, Argyll and Bute, PA23 8SF ("the Applicant")

Paul Morley & Son Joinery & Building Contractor, Mrs Dawn Morley, The Old Steading, Clachan of Glendaruel, Argyll and Bute, PA22 3AA ("the Respondent")

Tribunal Members:

Fiona Watson (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order is granted against the Respondent(s) for payment of the undernoted sum to the Applicant(s):

Sum of FOUR HUNDRED AND FIFTY POUNDS (£450) STERLING

- Background

1. An application was submitted to the Tribunal under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. Said application sought an order be made against the Respondent on the basis that the Respondent had failed to comply with his duties to lodge a deposit in a tenancy deposit scheme in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

- The Case Management Discussion

2. A Case Management Discussion ("CMD") took place on 17 August 2020 by way of tele-conference. Both parties were personally present. The Applicant submitted that he had entered into a tenancy agreement with the Respondents which commenced 1 July 2009. He had paid a deposit of £300 to the Respondent at the commencement of the tenancy. The deposit had not been lodged in a tenancy deposit scheme and therefore the respondent was in breach of his obligations under the Regulations. The Respondent submitted that due to the passage of time, he could not recall a deposit being paid. There was no paperwork to suggest it had been paid and they would not have used the lease as a receipt for any payment of deposit. It was accepted that the lease referenced the sum of £300 to be paid as a deposit at Clause 1.7, but there was no recollection of whether this had been paid or not.

3. The Case Management Discussion was adjourned and a Hearing assigned to determine whether or not a deposit was paid and if so, what appropriate sanction should follow for any failure to lodge same in a tenancy deposit scheme, in terms of the Regulations. The Tribunal also issued a Direction to the Applicant to lodge a bank statement, or other form of proof of payment, to show payment of the deposit on or before the commencement of the tenancy agreement.

- The Hearing

4. A Hearing took place on 5 October 2020. Both parties were personally present. The Applicant had advised the tribunal by email of 29 September 2020 that he had attempted to obtain copy bank statements as per the Direction of 17 August 2020, but that these still had not been issued in time for the hearing. A copy of an email exchange with the bank was produced showing that attempts had been made for the bank statements to be sent out. On the morning of the Hearing, the Applicant confirmed that he had received the bank statement over the weekend. After discussion with the parties, the Tribunal adjourned the hearing to allow the bank statement to be sent to parties and consideration to be taken of same. The hearing would be re-convened an hour later. The Respondent confirmed this was sufficient time for them to consider the statement and that they did not wish the Hearing to be adjourned to another date.

5. Upon the hearing being re-convened, the Applicant sought an order from the Tribunal for repayment of his deposit of £300 together with compensation for the failure of the landlord to lodge the deposit in a scheme. He submitted that he had paid his first month's rent of £300 and his deposit of £300 in cash to the landlords on the commencement of his lease on 1 July 2009. This was paid to the landlords in their office. He could not recall whether or not he was not given a receipt and submitted that the landlords told him that he could use the second page of the lease, which detailed the deposit amount, as a receipt. His bank statement showed a cash withdrawal of £600 on 29 June 2009. The Lease on the second page detailed that a deposit was payable of £300. This deposit was not lodged in a tenancy deposit scheme and on that basis the Respondent had failed to comply

with their duties to lodge a deposit in a tenancy deposit scheme in terms of Regulation 3 of the 2011 Regulations.

6. The Respondents submitted that they did not receive a deposit. They did not recall a deposit being paid. They have no record of receiving it. They would not have used the lease as a receipt and as the lease was signed in their office, they would have issued a paper receipt which is a procedure of theirs to always issue receipts for payments received. They have operated their building business for 46 years and would never take money from anyone without issuing a receipt. They submitted that the credibility of the Applicant should be questioned. They have submitted evidence to the Police regarding documentation which they alleged has been fabricated by the Applicant.

7. The Respondents submitted that whilst the Deposit clause in the lease did indeed state that £300 was payable (and that this was handwritten on the lease by Mrs Morley) there were quite a few things in the lease which were not adhered to i.e. They did not carry out regular inspections despite there being a clause in the lease stating they would do so. They submitted that they were very lax in their management of the tenancy. They had four other rental properties for which they used a managing agent. The managing agent handles deposits and rental payments for them and simply credits net rent to their account each month. They take no responsibility for any administration in relation to those leases. This particular property is situated next door to their business premises and therefore they chose to handle this particular tenancy themselves. They have never charged a deposit for any lease over this property. Mr Morley's grandmother lived in the property for 16 years and died in 2000. Thereafter, a friend of theirs leased the property from 2001 to 2008 and they did not take a deposit from him either. When the Applicant moved in in 2009, there was no deposit taken from him either.

8. When asked why they would write on the lease that the deposit was £300 but not take it, Mr Morley confirmed that this was Mrs Morley's handwriting but they do not remember why it would have been inserted into the lease but that they wouldn't have taken a deposit as they had not issued a receipt. Mr Morley could however recall receiving the payment of £300 from the Applicant for payment of the first month's rent. Due to the passage of time there was on record of a receipt for that either. When asked by the Tribunal regarding how carefully he had read the lease prior to issuing to the Applicant, Mr Morley submitted that he had not read the lease very carefully at all. The leasing of the Property was simply a side-line for them. They rent it out themselves only because it is located next door to their business premises. He could not remember where he obtained the lease itself from. It may have come from the agent who manages their other properties, or may have come from a friend of theirs who leases properties in Dunoon. It was a copy of a copy and therefore quite difficult to read.

- Findings in Fact

9. The Tribunal made the following findings in fact:

(a) The parties entered into a tenancy agreement which commenced 1 July 2009;

(b) The Applicant paid a deposit of £300 to the Respondent;

(c) The Respondent failed to lodge the deposit of £300 into an approved tenancy deposit scheme under Regulation 3 of the 2011 Regulations;

(d) The Respondent failed to provide the statutory information to the Applicant under Regulation 42 of the Regulations;

(e) The Tenancy ended on 14 January 2020;

(f) The Deposit had not been returned to the Applicant.

- Findings in Law

10. The Tribunal made the following findings in law:

10.1 The Respondent was in breach of their duties under Regulation 3 of the 2011 Regulations, which states as follows:

3 (*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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a)in respect of which the landlord is a relevant person; and

(b)by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions "relevant person" and "unconnected person" have the meanings conferred by section 83(8) of the 2004 Act.

10.2 The Respondent was in breach of their duties under Regulation 42 of the 2011 Regulations, which states as follows:

42.—*(1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).*

(2) The information is—

(a)confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;

(b)the date on which the tenancy deposit was paid to the scheme administrator;

(c)the address of the property to which the tenancy deposit relates;

(d)a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;

(e)the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and

(f)the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

(3) The information in paragraph (2) must be provided—

(a)where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or

(b)in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme.

10.3 The Tribunal must grant an order in terms of Regulation 10 which states as follows:

10. If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff—

(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 sheriff 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.

- Reasons for Decision

11. The Tribunal was satisfied that the Respondent was in breach of their duties under Regulations 3 and 42 as aforesaid. Whilst the tenancy agreement commenced prior to the introduction of the 2011 Regulations, the obligation to lodge a deposit taken under a pre-existing tenancy agreement was retrospective in terms of Regulation 47 of the 2011 Regulations.

12. The tenancy agreement between the parties at Clause 1.7 stated "*Deposit: refundable subject to the terms and conditions contained herein."* Next to that sentence it was handwritten *"£300".* It was admitted by Mrs Morley that she had handwritten this figure into the lease. At Clause 1.6 it was stated "*Agreed rent: per calendar month payable monthly in advance"* Next to that sentence it was handwritten *"£300".* It was admitted by Mrs Morley that she had handwritten this figure into the lease as well. The Applicant had provided a bank statement showing that the sum of £600 was withdrawn on 29 June 2009. It was accepted by the Respondents that the sum of £300 had been paid in cash in respect of the agreed rent. Whilst it was not accepted by the Respondents that the sum of £300 had been paid in respect of the deposit, it was clearly stated in the lease which formed the contractual basis between the parties relationship, that the sum of £300 was due. The fact that this was handwritten by Mrs Morley showed a clear intention by Mrs Morley to take a deposit from the Respondent. The Tribunal was not persuaded by the Respondents' submissions that the absence of a paper receipt meant that no deposit had been paid. It was clear that due to the passage of time, memories of payments could not explicitly be recalled by the Respondents. However, the Tribunal was satisfied on the evidence before it and submissions made by the Applicant, that a deposit was paid in line with the Applicant's contractual obligations to do so under the lease. The Tribunal considered that any reasonable landlord, where they decided not to take a deposit despite the terms of the lease requiring one, would either amend the necessary clause in the lease or, at the very least, score this out of the lease if no longer applicable. The Respondents did not do so.

13. The Tribunal were also not satisfied by the Respondent's submissions that as the leasing of this property was simply a side-line for them, they hadn't taken the time to read the lease properly prior to issuing to the tenant. The tenancy agreement forms the contractual basis of the parties' relationship and the Tribunal considered that the Respondents should have taken a more serious approach to the letting of same. They had access to a managing agent which they used for their other properties and therefore could have utilised their services for same. However, the Respondents had clearly taken enough time to read the lease that they intentionally hand-wrote the sums due to be paid in respect of both rent and deposit.

14. The 2011 Regulations were introduced to provide security for tenants in paying over deposits to landlords and to address an issue with some landlords taking tenancy deposits and then failing to pay them back where they were lawfully due at the end of the tenancy. The 2011 Regulations also provide that parties have access to an independent and impartial dispute resolution mechanism within a scheme to address any deposit deductions which require to be considered.

15. By their failure to lodge the deposit into an approved tenancy deposit scheme the deposit was not protected for a period of approximately eight years. The Tribunal considered this to be a significant period of time for a deposit not to have been held securely. However, the Tribunal was not satisfied on the basis of the submissions made that this was an intentional failure by the Respondents, nor that there was any malice involved in their failure to lodge same with a scheme. The Tribunal were therefore not satisfied that an award at the higher end of the scale would be appropriate.

- Decision

16. The First-tier Tribunal for Scotland (Housing and Property Chamber) granted an order against the Respondent(s) for payment to the Applicant in the undernoted sum:

FOUR HUNDRED AND FIFTY POUNDS (£450) STERLING

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.

_____ **5 October 2020**

Legal Member: Fiona Watson **Date**