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 Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/CV/20/1279

Re: Property at Bonavista Cottage, New Gilston, Leven, Fife, KY8 5TF ("the Property")

Parties:

Mr Iain Harrison, 5 Rhodes Avenue, Bishop's, Stortford, CM23 3JN ("the Applicant")

Mr Craig Stewart, 33 Craigfoot Walk, Kirkcaldy, KY11 1GA ("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 TWO THOUSAND SEVEN HUNDRED AND FIFTY POUNDS (£2750.00) be made in favour of the Applicant.

1. Background

1.1 This is 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 sought an order for payment of three times the deposit as a result of a breach of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations").

1.2 The application was accompanied by a copies of the written tenancy agreement between the parties, email correspondence between the parties and bank statements purporting to show payment of the deposit.

1.3 The Respondent lodged submissions by email dated 10 September 2020.

2. The Case Management Discussion

2.1 The Case Management Discussion took place on the 24 September 2020 by way of teleconference. The Applicant was represented by Mrs Cameron, solicitor. The Respondent attended personally and was unrepresented.

2.2 There were no further documents to be lodged by any of the parties. Following canvassing by the Tribunal, all parties were in agreement that the application concerned a relevant tenancy within the meaning of Regulation 3 of the 2011 Regulations, the tenancy had commenced in April 2019, that a deposit totalling £1500.00 had been taken from the Applicant, that this deposit was subject to the duties contained within Regulation 3 of the 2011 Regulations, the deposit had not been lodged with any of the available schemes and, following the end of the tenancy on 17 March 2020, the sum of £1280.00 had been repaid by the Respondent to the Applicant.

2.3 The Tribunal was of the opinion that, given the lack of any material factual dispute between the parties, that the application could be determined without a hearing as provided for by Rule 18 of the Rules. The parties were in agreement that this was appropriate. Accordingly, the Tribunal went on to hear from the parties as to whether any order should be granted and, if so, what level of sanction should be applied given the accepted breach of the 2011 Regulations.

2.4 Mrs Cameron advised that, following the end of the tenancy, the sum of £1280.00 had been repaid on 12 May 2020. The Applicant had been advised that a deduction had been made to cover the cost of repainting within the property and carpet shampooing. The deposit had never been lodged with a scheme as was required by the 2011 Regulations. The deposit had gone unprotected throughout the tenancy. The Applicant had been deprived of the opportunity to challenge the deduction made from the deposit through such a scheme. The Respondent could be considered a commercial landlord and ought to have been aware of his obligations under the 2011 Regulations. An order equivalent to three times the deposit was appropriate in the circumstances.

2.5 The Respondent confirmed that he understood the deposit was to have been lodged and this had not been done. He advised that he was not aware that he had been party to the tenancy agreement between the parties until the present application was made. An agent, Caroline Ritchie, had been employed to find tenants for the Property. She had presumably inserted his electronic signature in the written tenancy agreement. Any agreement ought to have named his mother as the landlord. His mother was 75 years of age and in poor health which had been a distraction. Payment of the deposit had been made to her. She had not lodged it. At the time of commencement of the tenancy, she was also the landlord in respect of six or seven other properties. Those tenancies predated the introduction of the 2011 Regulations. He believed would have dealt with the deposit. He was

unaware of the deposit not having been dealt with and could only apologise. He had been preoccupied by his mother's poor health and financial difficulties which, together with the coronavirus pandemic, had also caused the delay in the return of the deposit. The deduction that had been made was lower than he would have been entitled to make given remedial work that was necessary following the tenancy ending. He was also a landlord, renting another six properties and was aware of the obligations under the 2011 Regulations. A sanction of the amount deducted from the deposit would be appropriate.

2.6 Following submissions by the parties, the Tribunal adjourned for a short break to consider the matter. Parties were given a time at which to re-join the teleconference. The Respondent did not re-join after this break and the decision was given verbally in his absence.

3. Findings In Fact

3.1 The parties entered into a tenancy agreement which commenced on 20 April 2019 and ended on 17 March 2020.

3.2 A deposit of £1500.00 was payable in under the terms of the agreement and was paid by the Applicant.

3.3 The deposit was paid to the Respondent's mother and held within her bank account throughout the tenancy.

3.4 The sum of £1280.00 was returned to the Applicant on 12 May 2020.

3.5 The Respondent made a deduction of £220.00 from the deposit.

4. Findings In Fact & Law

4.1 The tenancy agreement between the parties is a relevant tenancy within the meaning of the Regulation 3 of the 2011 Regulations.

4.2 The Respondent failed to pay the deposit to an approved scheme and provide the Applicant with the required information in terms of Regulations 3 and 42 of the 2011 Regulations.

5. Reasons For Decision

5.1 In making the decision, the Tribunal took account of all written material lodged as well as the submissions of the parties at the Case Management Discussion. The Respondent had submitted that he was unaware that he party to any agreement in respect of the Property until the present application was made. The Tribunal found that there was a relevant tenancy agreement between the parties. The Tribunal noted that a title

search named the Respondent as the proprietor. Further, the emails lodged by the Applicant showed that notice to leave had been given to the Respondent in February 2020 and that the Respondent had accepted this without question, with further correspondence between the parties relating to the arranging of an inspection at the end of the tenancy. In any case, the Respondent did not dispute that he was party to the agreement.

5.2 In terms of the 2011 Regulations:-

"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.
(1A) Paragraph (1) does not apply—
(a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
(b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord, within 30 working days of the beginning of the tenancy.
(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.
(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—
(a) the references to deposit were to each instalment of the deposit, and
(b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.
(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. …

9.—
(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit.
(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

10. 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."

5.3 In terms of the present application, it was a matter of agreement that the deposit paid in respect of the tenancy agreement had not been lodged with an approved scheme. Regulation 10 of the 2011 Regulations requires the Tribunal to make an order for payment where there has been such a breach. The only discretion afforded to the Tribunal is the level of sanction imposed, with the maximum being £4500.00 in terms of the present application.

5.4 The Tribunal approached this matter as an exercise of judicial discretion. It was not bound to afford any or more weight to any particular factor, but what was fair and just in the circumstances. The Tribunal had regard to the severity and length of the breach. Further, the Tribunal was mindful of the comments of the Sheriff in the case of *Jenson v Fappiano* 2015 G.W.D 4-89 where it was said that a starting point was not three times the deposit minus any mitigating factors present.

5.5 The Tribunal accepted the submission by the Respondent the deposit had been paid to his mother and he had assumed that she had dealt with it. Further, the Tribunal accepted that he had been preoccupied by the family matters mentioned. There was, however, little else offered in the way of mitigation. The Tribunal did not accept the somewhat convoluted explanation as to the involvement of an agent and the role of the Respondent's mother as mitigation. It was the Respondent who was party to the tenancy agreement. He could be described as an experienced landlord who, by his own admission, was aware of the duties in respect of deposits. The deposit went unprotected throughout the tenancy, albeit it was held in a bank account. The deposit was relatively high in value. The Applicant had been deprived of the opportunity to dispute the deduction that had been made from the deposit. The Tribunal did note that the deduction was a minor proportion of the deposit and that the majority of it had been returned prior to the present application being made. Accordingly, the Tribunal was of the belief that the breach fell in the middle to higher part of the scale and should attract a sanction of £2750.00.

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.

1 October 2020

Alastair Houston
Legal Member/Chair

Date