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/20/1507

Re: Property at 115/4 Piersfield Terrace, Edinburgh, EH8 7BS ("the Property")

Parties:

Ms Denise Dill, 115/4 Piersfield Terrace, Edinburgh, EH8 7BS ("the Applicant")

Mr Mohammad Afzal, 119 Piersfield Terrace, Edinburgh, EH8 7BS ("the Respondent")

Tribunal Members:

Alison Kelly (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an award equivalent to two and a half times the deposit, £1500, should be made against the Respondent.

Background

On 14th July 2020 the Applicant lodged an Application under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules"), alleging that the Respondent had failed to comply with Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 and seeking a payment in the amount of £1800, representing a sum equal to three times the deposit paid.

Lodged with the Application were:

1. Copy Tenancy Agreement
2. Copy Notice to Quit
3. Copy section 33 Notice
4. Emails for each tenancy deposit scheme confirming deposit not lodged

Prior to the Case Management Discussion each party lodged written submissions.

Case Management Discussion

The Case Management Discussion ("CMD") took place by teleconference. The Applicant did not join, but was represented by Mr Andrew Wilson of Community Help & Advice Initiative. He had submitted the application on behalf of the Applicant. The Respondent joined the call, and asked to be represented by his wife, Rissat Afzal. Mr Wilson had no objection, and the Chairperson allowed Mrs Afzal to join the CMD.

The Chairperson asked everyone to introduce themselves. She then explained why the CMD was taking place, what the purpose of a CMD was in terms of Rule 17, and how the CMD would be conducted. She explained that she could make a decision today if she felt she had all the necessary information. She explained that no one was allowed to record the proceedings, and that it was a judicial process. She confirmed with the parties that they understood.

The Chairperson asked Mr Wilson to present the Applicant's case. He said that the case was as per his written submission, and outlined that there was a tenancy agreement between the parties, which had begun before the TDS Regulations came in to force. The tenancy had been brought to an end on 31st May 2020 by virtue of the Notices served, copies of which were lodged. The Applicant remained within the property, having been hampered from finding alternative accommodation by the Covid 19 crisis. At no point has the Respondent lodged the deposit in a scheme, not had he provided the Applicant with the required information, meaning he had committed two offences. The Applicant had asked about the deposit at various junctures, but had always been told it was in a secure account and not to worry. He considered the Respondent's behaviour to be at the high end of the scale.

The Chairperson asked Mr Wilson about several of the statements in his written submission. Firstly, she asked him if he had any evidence to put to the Tribunal regarding the number of rental properties which the Respondent had. His statement said that the Respondent had "multiple" properties. Mr Wilson confirmed that he did not have an exact number as the information was not available online. The Applicant had given him the information and he believed that she has got it from the Respondent. He said that the Respondent could be asked to confirm.

Secondly, Mr Wilson had stated that the Respondent had engaged professional legal services when he had wished to. He said that the Respondent had engaged solicitors in December 2019 to advise him on the current tenancy and issue notices. He started that "Nevertheless, despite having received legal advice, the Respondent did not comply with the requirements of the 2011 Regulations until the current application was raised". The Chairperson asked Mr Wilson if he had any knowledge of what advice the Respondent had sought from a solicitor, and what advice he had been given. Mr Wilson said that he did not. The Chairperson pointed out that he could not therefore make an assumption that the Respondent had received advice regarding the Tenancy Deposit Regulations and chosen to ignore it. Mr Wilson said that it showed that the Respondent could take legal advice when he chose to. The Chairperson was of the view that this was a different contention from the one set down in the written submissions.

The Chairperson confirmed with Mrs Afzal that it was agreed that the deposit was £600, and that it had not been paid in to an approved scheme. She said that they were not aware that the regulations were retrospective and that the deposit needed to be paid in. it had been paid in now.

The Chairperson asked her to confirm how many rental properties Mr Afzal had. After consultation with him she said he had nine. Two of these were HMOs. The Chairperson made further enquiry and she confirmed that five of the properties are subject to deposits and that these tenancies were all entered in to before 2013. She apologised for the omission and said that she was not aware of the Applicant having asked about the whereabouts of the deposit.

The Chairperson confirmed that neither party had anything to add. She then adjourned for 10 minutes to consider the position.

The CMD was reconvened and the Chairperson gave her decision and explained the reasons for it, which are outlined below.

Findings In Fact

1. The parties entered on to a Tenancy Agreement for the property, commencing 1st June 2005;
2. The Tenancy has tacitly relocated on numerous occasions;
3. The deposit paid by the Applicant to the respondent was £600;
4. The Tenancy Deposit (Scotland) Regulations came in to force on 7th March 2011;
5. Since 15th May 2013 all tenancy deposits in Scotland must be held in approved tenancy deposit scheme;
6. The Respondent did not place the deposit in an approved tenancy deposit scheme until 18th August 2020;
7. The Respondent owns nine properties which he lets out;
8. The Respondent holds deposits for five of those properties.

Reasons For Decision

The Applicant's Representative referred to case law in his written submissions. The Regulations give discretion regarding the amount to be awarded, but the case law is helpful in how to apply that discretion.

Reference is made to the case of Russell –v- Tenzin, 20th September 213, Edinburgh Sheriff Court, in which Sheriff Principal Mhairi M Stephen stated that "the strict liability consequences of non compliance allow the court to promote rigorous application of the regulations *pour encourager les autres*. In other words, deterrence".

Reference is also made to Jenson –v- Fappiano, 2015 SCEDIN 6, in which Sheriff Welsh QC stated that judicial discretion is a rational act and that the reasons supporting it must be sound and articulated in the particular judgement.

The Chairperson considered this to be a serious breach of the regulations. The Respondent, by his own admission, has nine rental properties. He is therefore an experienced landlord, and he should be aware of all the legal duties incumbent on him. In addition, the obligation to place deposits in to approved schemes has been live since 2013. This means that the Applicant's deposit has been unprotected for seven years. It does not matter that it may have been held separately in an account all that time, or that there would have been no difficulty in returning it (neither of which is a Finding In Fact as there was no evidence to that effect). The Regulations were brought in specifically to protect tenants. The deposit does not belong to the landlord, it is the tenant's property until an adjudication carried out by an approved scheme decided otherwise. The Chairperson took in to account the fact that the deposit has now been placed in an approved scheme, and therefore did not award the maximum amount.

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.

A Kelly

03/09/20

Legal Member/Chair **Date**