



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”)

Chamber Ref: FTS/HPC/PR/20/1908

Re: Property at 31 Wardlaw Place, Edinburgh, EH11 1UG (“the Property”)

Parties:

Miss Aurora Virtanen, 13 River terrace, Victoria Road, Chelmsford, CM2 6FW (“the Applicant”)

Emma Gilfillan, C/O Harry McAdam, Five Management, 1 Eva Place, Edinburgh, EH9 3ET (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order against the Respondent in favour of the Applicant in the sum of Seven hundred and fifty pounds (£750) Sterling

Background

- 1 By application to the Tribunal the Applicant sought an order for payment as a result of the Respondents failure to lodge her deposit in an approved tenancy deposit scheme and provide the specified information within the statutory timescales.
- 2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 20 November 2020.
- 3 A copy of the application paperwork together with notification of the date, time and location of the Case Management Discussion was served on the

Respondent by Sheriff Officers. She subsequently confirmed that Mr Harry McAdam would represent her in the proceedings. On 13 November 2020 the Tribunal received written representations from Mr McAdam. In summary, he conceded that there had been a breach of Regulation 3 in that the deposit had not been lodged until 28 November 2019 which was beyond the statutory period. However he submitted that the funds had been held securely in his client account and produced bank statements to verify this. There was therefore no attempt to misuse the deposit in any way.

The Case Management Discussion

- 4 The Case Management Discussion took place on 20 November 2020 by tele-conference due to restrictions imposed by the Covid-19 pandemic. Miss Virtanen appeared personally. The Applicant was represented by Mr McAdam.
- 5 The Legal Member explained the purpose of the Case Management Discussion. She explained that the Tenancy Deposit Scheme (Scotland) Regulations 2011 were clear in that were the Tribunal to make a finding that there had been a breach it would be obliged to make an order for payment of up to three times the amount of the deposit. She confirmed with Mr McAdam that the Respondent did not dispute there had been a breach of the Regulations. The Legal Member therefore advised that the issue for the Tribunal to determine was the level of sanction to be imposed on the Respondent as a consequence of the breach. She then asked parties to explain their respective positions, noting that the Tribunal was required to proceed in a manner that was fair, just and proportionate having regard to the nature of the breach.
- 6 Miss Virtanen stated that she sought the maximum amount of three times the deposit. She noted that the tenancy commenced on 27 August 2019, therefore the deposit should have been lodged on 7 October 2019 to comply with the thirty working day period imposed by the Regulations. However the deposit was not lodged until 28 November 2019. Ms Virtanen noted the terms of the Respondent's representations which referred to technical and administrative issues being the cause of the delay in lodging the deposit. In her view this implied that it was left until the last minute, giving the landlord no time to resolve the problem. Miss Virtanen pointed out that handling money is one of the primary responsibilities of being a landlord. She did not believe that the Respondent intended on misusing the money, however the fact that she was not informed at any time where her deposit was meant that one of the most important responsibilities of the landlord was not fulfilled. Ms Virtanen then outlined some issues with the tenancy, including lack of communication from the Respondent and Mr McAdam and problems at both the commencement and the end of the tenancy. It was the culmination of these issues that had prompted her to make the application to the Tribunal. The

Respondent and her agent had not handled their responsibilities in a professional manner. They did not taken their duties seriously. She had made the application to the Tribunal to ensure they did not behave in the same way towards any other tenant in future.

- 7 Miss Virtanen explained that she had received no information from the landlord or her agent regarding her deposit. She had received that information directly from SafeDeposits Scotland by email on 27 November 2019. She had not received any communication from the Respondent nor her agent at the end of the tenancy and had applied herself to get the deposit back. It had taken her a long time to get her money back. Miss Virtanen confirmed that she sought the maximum amount as a result of the circumstances surrounding the breach.
- 8 The Legal Member then heard from Mr McAdam on behalf of the Applicant. He referred to his written representations in which he had agreed that the deposit as not protected in accordance with the requirements of the Regulations. However he pointed to the excerpts from the client bank account, which he is required to have as a registered letting agent, which showed that the deposit had been safe and there was no attempt to misuse the funds. The money may not have been protected in a scheme but it was safe in his client account. Mr McAdam explained that because of an administrative error the deposit had not been lodged in the scheme within the timescales. As soon as the error was identified the deposit was immediately lodged. Mr McAdam explained that there was no attempt to conceal the requirements of the deposit scheme, it was clear in the terms of the lease arrangement as was the tenant's right of recourse to the Tribunal. Mr McAdam pointed out that the deposit had been returned to Miss Virtanen without question and within timescales. The purpose of the legislation was not to enrich a tenant. This was a genuine error, the deposit was not at risk at any point. The sanction should mark that in some way and Mr McAdam considered a sum amounting to half the deposit would appropriate.
- 9 In response to questions from the Tribunal, Mr McAdam explained that he would ordinarily send out deposit certificates by post to tenants, therefore it should have been sent in this case. His firm manage around 100 properties and he confirmed that this issue had occurred previously, within similar timescales. He explained that a system has now been put in place where lease agreements are retained manually and not filed in a deposit file until they have confirmation from SafeDeposits Scotland. Since putting in this system there haven't been any further cases and it shouldn't happen again. Mr McAdam was apologetic, it had been upsetting to see this happen. There was no malice whatsoever. It was a genuine error and their mistake.
- 10 The Legal Member gave Miss Virtanen an opportunity to respond to what Mr McAdam had said. Miss Virtanen advised that it came down to the fact that it

was known there was an error but neither the Respondent nor Mr McAdam had told her anything about her deposit at any point. She didn't understand how these errors could happen. She noted that a system had now been put in place but stated that it was still concerning that these issues had happened previously to other tenants. She confirmed that she had received nothing from Mr McAdam regarding her deposit, the only correspondence had been from SafeDeposits Scotland.

- 11 In response to questions from the Tribunal Mr McAdam confirmed that it was possible the certificate hadn't been sent to Miss Virtanen. He couldn't confirm absolutely that it had been sent. However he noted again the terms of the tenancy agreement which referred to the deposit scheme. That information couldn't be hidden, nor could the fact that payments had been made to SafeDeposits Scotland.

Relevant Law

- 12 The relevant law is contained within the Tenancy Deposit Scheme (Scotland) Regulations 2011 which provide 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.”

“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 by summary application and 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 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.

“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.”

Findings in Fact and Law

- 13 The Applicant and Respondent entered into a Private Residential Tenancy Agreement which commenced on 27 August 2019;

- 14 The tenancy between the parties is a “relevant tenancy” as defined by Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”).
- 15 Clause 11 of the said Tenancy Agreement places an obligation on the Applicant to make payment of a tenancy deposit in the sum of £750.
- 16 The Applicant made payment of the tenancy deposit in the amount of £750 on 27th August 2019.
- 17 The deposit was lodged with Safe Deposits Scotland, an approved tenancy scheme as defined by section 122 of the Housing (Scotland) Act 2006, on 28 November 2019.
- 18 SafeDeposits Scotland contacted the Applicant to confirm that the deposit had been lodged.
- 19 In terms of Regulation 3 of the 2011 Regulations, the deposit should have been lodged with an approved tenancy deposit scheme and relevant information as defined by section 42 of the Regulations provided to the Applicant no later than 8th October 2019.
- 20 The Respondent is in breach of Regulation 3 of the 2011 Regulations.
- 21 The agreement between the parties terminated on 3 August 2020.
- 22 The deposit was returned to the Applicant in full on 8 September 2020 following her application to SafeDeposits Scotland.

Reasons for Decision

- 23 The Tribunal determined the application having regard to the application paperwork and the verbal submissions from Mr McAdam and Miss Vertanen at the Case Management Discussion. The Tribunal was satisfied that it was able to make a determination of the application at the Case Management Discussion and that to do so would not be prejudicial to the interests of the parties. The Tribunal was further satisfied that the substantive issues were agreed, therefore there was no requirement for a hearing in the matter.
- 24 The 2011 Regulations specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme and provide to a tenant specified information as defined by Regulation 42 within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy.

- 25 The Tribunal considered it could make a finding at the Case Management Discussion that there had been a breach by the Respondent of Regulation 3. This was a matter of fact agreed between the parties. The Tribunal therefore had to consider the provisions of Regulation 10 which requires that an order for payment be made against the landlord where the Tribunal makes a finding that there has been such a breach. Accordingly the Tribunal had to consider what sanction to impose having regard to the particular facts and circumstances of the case.
- 26 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained unprotected for approximately eight weeks, it being a matter of agreement that the deposit had not been paid into an approved deposit scheme until 28th November 2019. The Tribunal further noted that this was not the first occasion that the Respondent's Agent had exceeded the statutory timescales for lodging deposits, Mr McAdam having conceded at the Case Management Discussion that similar situations had occurred in respect of other tenancies he managed.
- 27 The Tribunal also noted that the Applicant had not suffered any detriment through a lack of access to the independent dispute resolution mechanism provided by the approved tenancy deposit scheme which would have been available to her at the end of the tenancy, in the event of any dispute. It had transpired that such independent adjudication was not required as the Applicant had received her tenancy deposit back in full on 8 September 2020, just over a month after the tenancy had ended. However, the Tribunal had to be mindful of the purpose of the sanction available to it, namely to ensure landlords comply in future with the duty to safeguard and protect deposits in circumstances where they have failed to do so.
- 28 The Tribunal accepted that the oversight in the Applicant's failure to lodge the deposit had been a genuine error and found the submissions of Mr McAdam to be credible in that regard. He had been candid at the Case Management Discussion and had outlined the steps he had taken to ensure such a breach did not occur in future. However it was clear that he was an experienced agent, having managed around 100 properties, and that this was not the first incidence of a breach having occurred. There was, in the view of the Tribunal, little excuse for the failure to lodge the deposit prior to the statutory deadline. The Tribunal also accepted Miss Vertanen's position that she had not received any correspondence from the Respondent nor Mr McAdam regarding her deposit. Whilst there was mention of the deposit scheme in the tenancy agreement, this did not extinguish the landlord's obligation to provide the specified information to the tenant required by the 2011 Regulations. The Tribunal was conscious that the deposit had been lodged approximately eight weeks after the statutory deadline, which may not be seen as a significant

delay. However it was the mention by Mr McAdam of other similar breaches and the lack of communication with Miss Vertanen on the status of her deposit that caused the Tribunal significant concern.

- 29 The provisions of Regulation 10 leave no discretion where a landlord is found to have failed to comply and permit an award of up to three times the deposit where a finding of breach is made. The Tribunal did not consider that the circumstances of the case merited an award at the higher end of the scale. However balancing the competing factors in the particular facts and circumstances, the Tribunal considered that a sanction in the sum of £750 would be appropriate, being a sum equivalent to the deposit.
- 30 The Tribunal therefore made an order against the Respondents in the sum of £750.

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.

Legal Member: Ruth O'Hare

Date: 20 November 2020