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 Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/20/2170

Re: Property at 28 Nith Place, Kilmarnock, KA1 3NJ ("the Property")

Parties:

Mrs Gillian McKenna-Cansfield, Michael McKenna-Cansfield, 185 Hurlford Road, Kilmarnock, KA1 3QB ("the Applicants")

Mr Paul Anderson, 7 Wilson Ave, Kilmarnock, KA3 7AP ("the Respondent")

Tribunal Members:

Melanie Barbour (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and it would make an order for payment of £2500.00 in favour of the Applicants.

Background

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 (seeking an order for payment for failure to lodge a tenancy deposit into an approved scheme) of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 ("the 2017 Rules"). This application was heard with a conjoined application under Rule 110 (an order for wrongful termination). There was a further application for repayment of a deposit which had been made under Rule 111, however that case was continued as the Respondent advised that he did not have a full copy of the lease agreement before him.

2. This application contained,

a. a copy of the rental agreement.
b. evidence of the payment of the deposit.
c. Photographs
d. Copies of text message history between the parties

3. A case management discussion had been held on 1 December 2021. Reference is made to the case management discussion note. A direction was issued at that case management discussion. Only the Applicants submitted any further documentation, namely a full copy of the tenancy agreement which they had received from the landlord. That agreement had been emailed to the Tribunal on 8 December 2020.

4. The Applicants and the Respondent both attended the hearing by telephone conference. Both parties confirmed that they had not lodged any further documentation other than the Applicants lodging the tenancy agreement, the only new papers were pages 2 and 3 of the tenancy agreement which had been originally submitted with the Application.

5. Preliminary matters to be dealt with:-

   Whether or not the Tribunal could proceed to hear this application given that the Respondent advised that he did not have a full copy of the tenancy agreement before him. The Respondent indicated that he did not have it before him at the hearing. He did not dispute that it had been sent to him but advised that there were so many papers he did not have them all before him. A copy of the tenancy agreement was emailed to him during the hearing by the Tribunal clerk. The Applicants objected to a postponement, advising that they were prepared and ready to proceed. The Tribunal considered that in terms of the tenancy deposit application and the application for wrongful termination that the hearing could proceed. We considered that the matters in dispute in those applications could be determined without the Respondent having before him the second and third pages of the tenancy agreement; and if any sections were relevant to those matters then the Tribunal would read those sections to the parties.

6. The Applicants confirmed that the application was to be put into the joint names of Mrs Gillian McKenna-Cansfield and her husband, Michael McKenna-Cansfield. The Respondent had no objection to this amendment. The Tribunal agreed to this amendment.

The Hearing

7. The Applicants advised that when they had moved into the property, they had paid a deposit to the Respondent of £1000. They had received a handwritten receipt which they had lodged as a production with the application. The handwritten note was dated 4 September 2019, and stated *"House Deposit for Nith Place, £1000, Gilliam McKenna, Michael McKenna Cansfield, Paul Anderson (three mobile numbers) and paid".*

8. The Applicants advised that they left the property on 4 October 2020, they had asked the Respondent to return their deposit to them. It had not however been returned.

9. They advised that it had also not been put into an approved tenancy deposit scheme.

10. The Respondent confirmed that he had received deposit of £1000 from the Applicants. He advised that he had kept it in an account and separate from the rent account. He advised that he had not paid it into an approved tenancy deposit scheme.

11. The Respondent advised that he did not know anything about tenancy deposit schemes or, that he was required to deposit the money into an approved scheme.

12. The Applicants advised that they had wanted to know where their deposit was. They advised that they had contacted the Respondent on 27 November 2019 when they had asked the Respondent for "*paperwork*". They advised at that time they had not received anything, neither a tenancy agreement nor any information about the tenancy deposit. They advised that they had rented before and were aware that deposits are to be put into an approved scheme. They referred to text correspondence which they had lodged, including the text of 24 March 2020, when they asked about the tenancy deposit and if it been lodged in a scheme. They advised that the Respondent had not responded to this text request.

13. They advised that the only tenancy agreement they received was in March 2020 after they had again requested it from the Respondent as they required a tenancy agreement to allow them to apply for universal credit. The Applicants advised that when they took entry in September 2019, they had been left the keys at the property and they never saw the Respondent again, until there was a problem.

14. In evidence the Respondent appeared to be unclear about the meaning of the request for information in March 2020 about the deposit. He indicated that the request regarding the deposit was in fact to do with the request made by the Applicants to him, for a further lease agreement which they required in order to make an application for universal credit. The Respondent appeared to say that he had provided a tenancy agreement from September to March 2020; with a further tenancy agreement being issued from March 2020 to September 2020; and he advised that the tenancy then continued on a month to month rolling basis thereafter.

15. The Applicants disagreed that there had been more than one tenancy agreement provided. They referred to a text message on 24 March 2020 at 11.31 when they had had to advise the Respondent the date when the Applicants had moved into the property, 27 September 2019. It was this date that was put into the tenancy agreement which they had received in March 2020.

16. The Respondent disputed this and advised that there had been two agreements one dated September 2019 and one dated March 2020.

17. The Tribunal noted that only one tenancy agreement had been lodged and this was by the Applicants.

18. The Respondent advised that he could not recall the text conservation about the tenancy being placed in a deposit scheme.

19. The Respondent advised that he did not rent out any other properties. He advised that he had rented out that property for about 4-5 years. He had had three different tenants including Mr and Mrs McKenna-Cansfield. He had always taken a deposit from each tenant. He had not placed any of these deposits into an approved scheme.

20. The Respondent advised that this tenancy had commenced on 27 September 2019. He did not dispute that the tenancy deposit was paid on 4 September 2019.

21. He confirmed that the tenancy had ended on 4 October 2020. He advised that the deposit had not been repaid by the Respondent due to issues with the condition of the tenancy. He confirmed that the Applicants had asked for it to be paid back. He advised that the reasons he had not paid it back were due to the condition of the oven; rubbish in garage; condition of garden; keys for the windows were missing; and that the tenant was to have left the property on 1 October but had not left until 4 October, and they had not paid rent for that period. The Respondent advised that when he went to see the property after the Applicants had left, he considered it to be in a disgusting condition. (These matters are disputed by the Applicants and will be considered as part of the Rule 111 application).

22. The Respondent advised that the reason he had not lodged the deposit was because he was unaware of the tenancy deposit regulations. He advised that had the property been in good condition he would have paid the deposit back.

Findings in Fact and Law

23. The Tribunal made the following findings in fact and law:-

    a. That a tenancy had commenced on 27 September 2019.

    b. The Respondent was the landlord, and the Applicants were the tenant.

    c. That the Applicants had paid the Respondent a tenancy deposit on 4 September 2019 of £1000.

    d. That the tenancy had ended on 4 October 2020.

e. That the tenancy deposit had not been lodged with an approved tenancy deposit scheme within 30 working days of the tenancy commencing.

f. The tenancy deposit had not been repaid to the Applicants.

g. The parties were in dispute about whether the Respondent was entitled to retain the deposit due to the condition of the property or any other matter at the end of the tenancy.

Reasons for Decision

24. The Tenancy Deposit Schemes (Scotland) Regulations 2011 set out a number of legal requirements in relation to the holding of deposits, and relevant to this case are the following 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; …
b. …

25. Regulation 9 provides that 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.

26. Regulation 10 provides that if satisfied that the landlord did not comply with any duty in regulation 3 then the first tier Tribunal — must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and may, as it 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.

27. Both parties appeared today. The tribunal considered the Applicants presented their evidence in a credible and reliable manner. We found that the Respondent appeared to be generally honest in a number of respects; namely, that he had received the deposit; he had not at any point paid it into a tenancy deposit scheme; and also had not repaid it to the Applicants. We draw no conclusion at this stage if he genuinely considered that he had good reason to withhold the deposit.

28. The Respondent advised that he was not aware of the tenancy deposit regulations. During the course of his evidence at the hearing in relation to both applications before the Tribunal he also advised that he was not aware of the current statutory requirements for creating a private residential tenancy and also ending one. The Tribunal found it difficult to assess his credibility in relation to his stated lack of knowledge and what would appear to be a fairly reckless

disregard for any obligations statutory or otherwise that a landlord may owe to a tenant.

29. In deciding this application, as a deposit was paid by the Applicants; as the deposit was not secured in an approved scheme at any time during the duration of the tenancy; and as the Applicants made a timeous application within 3 months of the end of the tenancy, then the Tribunal consider that the terms of Regulation 10 are engaged, and it must therefore order that the Respondent pay the Applicants an amount not exceeding three times the amount of their tenancy deposit.

30. The amount to be paid requires to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty. In this case, we consider that a sum of 2.5 times the value of the deposit would be appropriate, namely £2,500.

31. We find that there has been a breach of the tenancy deposit regulations. We consider that it has been a serious breach. Any penalty should therefore be at the higher end of the scale.

32. In considering what penalty to impose, we have had regard to the written and verbal submissions by the Applicants and the verbal submission by the Respondent.

33. We consider that it is in general a serious matter to fail to lodge a tenancy deposit in accordance with the regulations. The Respondent states that he was unaware of his duty to place a tenancy deposit in an approved scheme. We do not consider that this offers him any mitigation. We note that he had rented out properties for 4-5 years and had had had three different tenants, taken deposits from each and never placed any in a scheme. He was not a novice landlord. We also considered that £1000, which was the equivalent to two months rent, was a substantial deposit to hold unsecured. Further, we thought it relevant that the deposit had been unsecured for a period of over 1 year and for the duration of the tenancy.

34. We note that that the tenancy agreement the Respondent provided to the Applicants was not in accordance with the current tenancy regulations. It appeared to the Tribunal that his management of the tenancy was lax and there was a general disregard for any statutory rules governing tenants and landlords. We found that the Respondent paid scant, if any, attention to regulations.

35. It appeared that the Applicants had struggled to obtain a written tenancy agreement, let alone any information about their tenancy deposit. We note that they had texted the Respondent and specifically asked if the deposit had been lodged in an approved scheme. It appeared that the Respondent had failed to respond to this request for information.

36. Importantly at the end of the tenancy no part of the deposit was repaid. The parties are now in dispute about the condition of the property and whether it

should be repaid. This is one of the reasons that the tenancy deposit regulations exist, so where matters are not agreed, a deposit is secured in an independent scheme and parties can have their dispute adjudicated by an independent expert and there is parity between the parties. In this case however, the Applicants had no such protection for their deposit and no ability to have the matter considered by any independent third party as envisaged by the tenancy deposit regulations. We consider that the Applicants were clearly disadvantaged by their deposit not being secured in a scheme.

37. The only issues which the Tribunal considered appeared to mitigate from the seriousness of the matter was that the Respondent had attended these proceedings and had been honest in admitting his failure to comply with the regulations, albeit he did not appear to be wholly concerned about his failure We also note that he stated that he is no longer renting out properties on a residential basis. The Tribunal has been made aware of no other mitigation for the Respondent.

38. We consider that orders in these cases impose a sanction on a landlord. It is hoped that the sanction will make a landlord take note of the breach; rectify future conduct; and ensure that tenancy deposits are secured in accordance with the regulations. They are also a penalty upon a landlord for a failure to comply with the law. We consider that there appears to have been a blatant or reckless disregard by the Respondent in terms of his duties as a landlord including in relation to the tenancy deposit regulations. For all the reasons set out above, we consider that the matter is serious, and a sanction needs to be imposed that will ensure that the Respondent is aware of the seriousness of the matter; and the sanction should therefore be towards the upper end of the scale.

Decision

39. That the Respondent shall pay TWO THOUSAND FIVE HUNDRED POUNDS (£2,500.00) STERLING to the Applicants.

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.

Melanie Barbour **20 January 2021**
Legal Member/Chair **Date**