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/21/0527

Re: Property at 2 West Port Court, Bridge Street, St Andrews, KY16 9FB ("the Property")

Parties:

Vanshika Sood, Miss Ana Clara Caetano, Miss Grace Leemputte, 2 West Port Court, Bridge Street, St Andrews, KY16 9FB ("the Applicants")

Dr Carol Macmillan, 17 Ellieslea Road, West Ferry, Dundee, DD5 1JH ("the Respondent")

Tribunal Members:

Valerie Bremner (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should pay the Applicants the sum of two thousand pounds (£2000) having found that the Respondent has breached the duties set out in Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Background

1.This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations and Rule 103 of the tribunal rules of procedure in respect of an alleged failure to comply with the duties required of a landlord under regulation 3 of the 2011 regulations.
2. The application was first lodged with the Tribunal on 6 March 2021 and accepted by the Tribunal on 7 April 2021. A case management discussion was fixed for 4 June 2021 at 2pm for this application and the related application for the same parties HPC/CV/21/0789.

The Hearing/Case Management Discussion

3.All three Applicants attended the case management discussion on 4 June 2021 and represented themselves. The Respondent also attended the Case Management discussion and represented herself.

4. At the case management discussion on 4 June 2021 the Tribunal had sight of the application, three tenancy agreements, a bank statement, emails between the parties, a letter from the Applicants to the Respondent dated 5 March 2021 and information about deposit protection for tenants together with a template of information required in terms of Regulation 42 of the 2011 Regulations with certain information on it. The Respondent had submitted extensive submissions in response to the application and the related application with reference number HPC/CV/21/0789. Both parties had submitted representations and communications between the parties, photographs, and text messages most of which related to the other application HPC/CV/21/0789.

5.The Applicants had lodged additional representations and information with the Tribunal on 3 June 2021 in relation to both applications. The Respondent had responded to these representations but her response had not been seen by the Tribunal nor the Applicants at the start of the case management discussion. The Tribunal considered whether the Applicants' representations and any subsequent response by the Respondent should be considered, both of these having been lodged very close to the case management discussion and after the deadline for written representations which was 27th May 2021. The Applicants advised that they had not been aware of the deadline for submission of written responses and they had been on holiday and had returned to their accommodation on 29 May but had required to spend some time packing in order to leave the property on 31 May. It was suggested by them that they had submitted the representations in response to those sent in by the Respondent dated 25th of May and that this was the first opportunity they had had to respond. The Respondent indicated that her responses were late simply because she was responding to the Applicants' late responses. Both sides wished the Tribunal to have regard to their representations lodged on 3rd June. The Tribunal decided it was appropriate to allow both sets of representations to be considered but adjourned the case management discussion for a short period to allow for the Respondent's representations of 3rd June to be seen by the Tribunal chair and also by the Applicants.

6. In their representations the Applicants had submitted information from other tenants of the Respondent in relation to tenancy deposits. The Respondent had addressed this in her representations made on 3 June 2021. The Tribunal raised the question of whether this information was relevant to the current application and whether it would be fair to consider this information. The Applicants indicated that they wished to have the Tribunal consider this information as they said that this showed a pattern of behaviour on the part of the Respondent in relation to tenancy deposits. The Respondent's position was that it would be unfair to consider this information as part of the application, given that she disputed some of it and this was not a Hearing and the third parties concerned were not present to be questioned on the information. The Tribunal considered whether this information was relevant or collateral to the issues. The Tribunal noted that at least some of this information appeared to relate to 2019,

after the period of time during which the Respondent was required to comply with Regulation 3 of the 2011 Regulations, the basis of this application. The Tribunal also considered whether this information would add to the proof of matters but felt that it would not do so as in her representations the Respondent had in fact admitted the breach of duties under Regulation 3. In addition the Tribunal considered that it would not be fair to consider this information as at least part of it was disputed by the Respondent. The Tribunal therefore took the view that this information was collateral and not relevant to the application before the Tribunal and indicated that it would not be considered. The remaining information lodged late by both parties was seen and considered by the Tribunal.

7. In her written representations the Respondent had referred to an accident she had suffered in March 2018 and the repercussions for her of this accident and how this was linked to the failure to comply with the duties in terms of the application. She had lodged a medical report confirming the injury she had suffered but had asked that this be kept confidential. The Tribunal had not copied the medical report to the Applicants. The Tribunal raised this issue at the case management discussion with permission of the Respondent and confirmed with the Applicants that the report had been seen by the Tribunal but not copied to them. They were already aware of the Respondent's position as regards an accident she had suffered as it had been referred to in written representations and the Applicants were content to proceed without seeing a copy of the report.

8.At the case management discussion parties agreed that the Applicants had been tenants at the property for a continuous period since 21 July 2018. They had been provided with annual tenancy agreements and each year the Applicants appeared to have signed notices to quit the property. The Applicants indicated that they had been required to submit notices to quit but the Respondent indicated that this had been done at their request for the purposes of the Applicants' visa position. In any event there was no dispute that they had been been tenants of the property continuously since 21 July 2018. it was also agreed that on 15th February 2018 they had paid to the Respondent a deposit for the property in the sum of £2400.It was explained to the Tribunal by the Respondent that this was the time of year which agreements were made for ongoing student letting in St Andrews even although students would not occupy the property until later in the year. In the initial private residential tenancy between the parties the monthly rent payable appeared to be £2325 but in the subsequent two agreements the rent appeared to be £2370.It was also agreed between the parties that the Respondent had permitted the applicants to enter into subleases at the property over the summer periods during the time they had been tenants of the property. It was also agreed that the Applicants had indicated that they wished to leave the property at the end of May 2021 and that they had vacated the property at that time.

9.The Respondent accepted that she had failed to comply with the requirement to lodge the deposit within an approved scheme within 30 working days of the start of tenancy and also that all of information in terms of Regulation 42 of the 2011 Regulations had not been supplied to the Applicants in this application.

10.The Tribunal having been satisfied that there was a breach of the duties in Regulation 3 of the 2011 regulations proceeded to hear parties' representations as to the amount of sanction that should be imposed in this application.

11. The Applicants requested that the Tribunal impose the maximum sanction ie. three times the deposit paid. Their position was that they had understood their tenancy deposit paid in February 2018 had been protected within an approved tenancy deposit scheme. They pointed to documents which they had lodged which they indicated they had received in September 2018 from the Respondent at the time that they moved into the property. They pointed to the fact that as international students this was their first time entering into a tenancy in Scotland and that they had accepted these documents at face value. It was pointed out that the first page of the information provided in September 2018 indicated 'Your landlord or agent has safeguarded your deposit with My deposits Scotland, a government approved tenancy deposit scheme". The Applicants said they had relied on this as proof that the deposit was protected. They felt that this document was intended to deceive them. They had enquired about the deposit in March 2021 as they knew they were leaving a few months later. At that stage it came to light that the deposit had not been protected and the deposit paid had been returned to them by the Respondent in full.
12.The Applicants pointed to the fact that they had paid the deposit in February 2018 to an account held by the Respondent which was called "JECC investments". The Applicants indicated that they felt that not only had the deposit not been protected but that the Respondent was earning interest on the money whilst it was in this account. They highlighted the fact that they believed that the deposit had been unprotected for a period of around three years.

13. The Applicants also referred in their submissions on sanction to the fact that the Respondent had indicated that after her injury in March 2018 she had been unable to work for a period of around eight months. They queried whether she remained at that time a fit and proper person to conduct business as a landlord and noted that the Respondent had several other tenancies. While they accepted and understood that she had suffered an accident and submitted that they were deeply sympathetic regarding that matter and did not dispute that this injury meant that she fell into the category of being disabled, they submitted that the Respondent should have had someone else dealing with her tenancies at this time in order to ensure that deposits were protected.

14. The Respondent had accepted in advance of the case management discussion that she was in breach of the duty to secure the Applicants' deposit within an approved scheme within 30 working days of the start date of the tenancy. She confirmed at the case management discussion that she accepted that the second duty to provide information under Regulation 3 had also been breached. She explained that she had suffered a serious accident in March 2018 after the deposit of the Applicants had been paid to her. She explained that her normal practice was to pay deposits into the scheme within 28 days of the start of the lease. It was common for deposits to be paid several months in advance. After her accident and the problems this caused her and what she described as a memory deficit, she was not aware that the deposit had not

been paid into the approved scheme and described that she had no reason to check this. She explained that while she would have been accessing the scheme provider's electronic portal during this time, she had no reason to access the part which related to deposits being held by them , rather she would be looking at a separate part of the portal for lodging deposits for new tenancies.

15.As far as the payment of the deposit into an investment account was concerned she explained that this was a working business account which did not pay interest and was simply used by her in the context of her business. She reiterated she had gained nothing from the payment of the deposit into that account. Further she said she had nothing to gain by not paying the deposit into a scheme as the scheme was helpful and resolved disputes which usually arose at the end of a tenancy when letting to students.

16.The Respondent explained that as soon as the Applicants wrote to her regarding the deposit in March 2021 she discovered that the deposit had not been appropriately paid into a deposit scheme and at that stage she said she had a choice. She could have paid it into the deposit scheme but she felt it was appropriate to return the deposit to the Applicants immediately even although they were ongoing tenants and she might have been entitled to deduct sums from the deposit at the end of the lease.

17.In her representations the Respondent had referred to "reasonable adjustments" and the Equality Act 2010. The Tribunal clarified with her that she was not suggesting that the duties in terms of the 2011 Regulations did not apply to her given her disability, but that she was requesting that her circumstances around the time when the deposit was paid by the Applicants be taken into account in determining the level of sanction to be imposed.

18. As far as the documents sent by the Respondent to the Applicants in September 2018 was concerned, the Respondent's position was that she kept these downloaded in a separate file and used these for all new tenants to give them an indication of the deposit scheme that was being used and the information they could expect to receive. Whilst the Applicants had pointed to the statement on the first page which suggested that the deposit had already been protected, the Respondent referred to the fact that later on in the information it is made clear that the tenancy deposit provider scheme would provide a certificate when the deposit was lodged together with the relevant information required by Regulation 42, which was not already mentioned by the Respondent in the Regulation 42 template which had been produced and was partially completed. The Respondent's position was that there had been no intention to deceive the Applicants by sending this information which was also sent along with information on the landlords repairing obligations in relation to the property.The Respondent requested the Tribunal to impose a sanction below the maximum to take into account the reasons why the deposit had not been protected and her personal circumstances which had been affected shortly after the payment of the deposit and had been ongoing for some time.

19. The Tribunal took the view that had sufficient information to make a decision and that the proceedings had been fair.

20. The Tribunal imposed a sanction of £2000 on the Respondent in relation to the breach of duties under Regulation 3 of the 2011 Regulations.

Findings in Fact

21. The parties entered into a tenancy agreement at the property commencing on 21 July 2018.
22. This tenancy is a relevant tenancy within the meaning of Regulation 3 of the 2011 regulations.
23. The Applicants paid a deposit of £2400 to the Respondent in respect of the property in February 2018.

24. The Applicants remained as tenants of the Respondent at the property until 31st of May 2021 when the tenancy came to an end.
25. In September 2018 the Respondent sent material to the Applicants relating to a particular tenancy deposit scheme provider together with a partially completed template of the information required in terms of Regulation 3 of the 2011 Regulations.

26. In March 2021 the Applicants queried with the Respondent regarding their deposit as they were intending to leave the property a few months later.
27. At that stage the Respondent discovered that the tenancy was not protected within an approved tenancy deposit scheme and returned the deposit in full to the Applicants.
28. The deposit paid by the Applicants had been paid into a business account used by the Respondent which is not an interest-bearing account.
29. In March 2018 the Respondent met with an accident as a result of which she sustained serious injury which meant that she was not able to return to work for a period of around eight months.
30. The Respondent's memory was affected by this accident and she was unaware until March 2021 that the deposit had not been paid into the approved scheme and that the information to be provided to the Applicants had not been provided within the required timeframe.
31. The Respondent accepted in advance of the case management discussion on 4 June 2021 that the deposit paid had not been paid into an approved scheme.

32. At the case management discussion on 4 June 2021 the Respondent accepted that the duty to give information in terms of Regulation 3 had also been breached. A template with some of the required information had been sent to the Applicants in September 2018. This did not contain all the required information and was sent outwith the 30 working days from the beginning of the tenancy agreement.

Reasons for Decision

33.The Tribunal having found there was a breach of the regulations, it then fell to the Tribunal to consider what sanction should be made in respect of the failure to protect the deposit and give all the information required in terms of Regulation 3 of the 2011 Regulations within the required timeframe. The Tribunal had regard to the case of ***Russell - Smith and others v Uchegbu [2016] SC EDIN 64***. In particular the Tribunal considered what was a fair proportionate and just sanction in the circumstances of the

case having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend on its own facts and in the end of the day the exercise by the tribunal of its judicial discretion is a balancing exercise.

34. The Tribunal weighed all of the factors and found it to be of significance that the deposit had been unprotected for a period of over two years. Although the Respondent had received the deposit in February 2018 the Regulations required that it be protected within 30 working days of the start of the tenancy. The deposit paid by the Applicants ought to have been paid into an approved scheme by 31 August 2018. The Respondent submitted information to the Tribunal regarding an accident she had had in March 2018 after the deposit had been paid by the Applicants. She explained that this had left her at that stage with a deficit in her memory and set out that this meant she had no reason to check that the deposit had been paid into an approved scheme because she assumed that this was in place and had no reason to think otherwise. She explained that this had remained the case and she had no reason to check the approved tenancy deposit scheme provider portal. She explained that when the Applicants had written regarding the deposit in March 2021, she had at that stage discovered that the deposit had not been protected. At that stage she said she had made a choice and had decided that the best course of action was to return the deposit in full to the Applicants, knowing that this meant she would not have access to any of the funds should they be required at the end of the tenancy.

35.The Tribunal accepted that this had not been a wilful failure to comply with the duties in terms of Regulation 3 and in particular noted that the Respondent had been unable to work for a period of some months during 2018 as a result of an injury sustained in an accident. While it seemed reasonable for her to suggest that she assumed that everything was in order, given the nature of her injury and the memory deficit she described, the Tribunal did consider that it would have been prudent for checks to be made on all the deposits held at that time by the Respondent who had a number of tenancies that stage. The Tribunal also accepted the Respondent's position that the bank account into which the deposit had been paid did not carry interest and that she had no incentive to avoid payment of the deposit into an approved scheme.

36.As regards the provision of material from a tenancy deposit scheme to the Applicants in September 2018 when they took up occupation at the property, the Tribunal accepted that this had not been done with the intention to deceive the Applicants. However the Applicants are international students and this was their first experience of a tenancy in Scotland and accordingly it was entirely likely that they would assume that these documents meant that their deposit was protected and they would not necessarily have known that they should have received a tenancy deposit scheme certificate acknowledging that the deposit was being held in a scheme. Whilst the Respondent explained that she did this in every tenancy by way of giving information to tenants, the Tribunal was of the view that whilst this might be well-intentioned, it could misdirect tenants who had no experience of leasing property as had occurred in this application.

37.The Tribunal also noted that the Respondent had returned the deposit in full to the Applicants when the failure to protect the deposit had been noticed in March 2021. Although the Regulations indicate that the landlord must ensure that the tenancy

deposit is protected until the end of the tenancy and returned to tenants in terms of the Regulations at that stage, the Tribunal accepted the respondent's explanation for return of the deposit to the Applicants.

38.The Tribunal accepted that the respondent had acted in good faith and had been affected by her accident which had occurred in March 2018. The Tribunal did not consider that this was a case in which the maximum sanction was required given that this did not appear to be a deliberate breach of the Regulations. The Respondent had not sought to mislead the Tribunal and had accepted the breaches of duty. There were substantial reasons as to why the Respondent's usual practices had gone awry in this tenancy due to the accident she had suffered and its effects for months thereafter. Nevertheless the Applicants had relied on information which the Respondent had given to them in September 2018 which in the view of the Tribunal created a reasonable belief in their minds that the deposit was protected and that everything was in order. The deposit paid by the Applicants was substantial but in all of the circumstances the Tribunal took the view that the appropriate sanction on the Respondent was the sum of £2000, given the mitigating factors set out by the Respondent, the fact that some of the required information had been provided in September 2018 (albeit late in terms of the Regulations),the fact that the deposit had been returned and the fact that the Respondent had accepted the breach when weighed against the length of time that the deposit was unprotected.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should pay the Applicants the sum of two thousand pounds (£2000) having found that the Respondent has breached the duties set out in Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

Valerie Bremner

4/6/21

Legal Member/Chair **Date**