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

Chamber Ref: FTS/HPC/PR/21/1028

Re: Property at 11 Winton Avenue, Eaglesham, G76 0LE ("the Property")

Parties:

Dr Michelle McAllister, 11 Winton Avenue, Eaglesham, G76 0LE ("the Applicant")

Mr Tom Higgins, 4F ROSEMOUNT COURT, NEWTON MEARNS, G77 5TY ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member) and Eileen Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined to grant an order against the Respondent for payment to the Applicant of the sum of £725 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011. The decision of the Tribunal is unanimous.

A Background:

1. On 29 April 2021 the applicant lodged an application under Rule 103 of the Rules of Procedure. A Case Management Discussion (CMD) took place on 2 July 2021, which both parties attended. The CMD note is referred to for its terms, which are held to be incorporated herein.
2. Following the CMD, both parties submitted the following further evidence. All documents are referred to for their terms and held to be incorporated herein.
3. The applicant provided:

a) email 14.7.2021re wrong date on Safe Deposits Scotland (SDS) records and tenancy end date
b) email 16.7.2021 witness list
c) email 21.7.2021 re date of deposit paid
d) email 26.7.2021 resending correspondence from SDS

e) email 31.7.2021 sending copy of new Notice to Leave received from respondent

4. The respondent provided:

a) email 14.7.2021 containing representations dated 5.7.2021, further Notice to Leave dated 20 May 2021, email from SafeDeposits Scotland dated 2 July 2021

b) email 21.7.2021 witness list

c) email 22.7.2021 confirming deposit paid by applicant on 19 January 2021

B The Hearing:

5. Both parties attended. The respondent had initially not joined the call but dialled in when contacted by the clerk. He stated he had been unaware of the hearing. However, the legal member pointed out that the email of the respondent sent to the Tribunal on 22 July 2021 at 15:25 hours was a reply to the Tribunal's email sent to the respondent on 22 July 2021 at 14:35 hours, I sending him the hearing notification. The Tribunal was satisfied that both parties had received the notification of the hearing and dial in details by email on 22 July 2021. Both witnesses were available and willing to give evidence. The Tribunal thus proceeded with the hearing.

6. The Tribunal legal member confirmed with both parties that all documents sent by them had been received and that both accepted that the deposit was paid by the applicant in January 2019 and had been received by SDS from the respondent on 21 April 2021. Both also confirmed that the tenancy remains ongoing. Both also confirmed their agreement with the CMD note, following the CMD on July 2 2021.

7. The Tribunal then proceeded to hear evidence from the parties and the two witnesses on the issue of the discussions which had taken place when the applicant and her mother viewed the property in January 2019.

C The oral evidence:

1. The applicant's evidence was that she had attended the property for the first time accompanied by her mother. She had seen an advert in the Evening Times, which stated the nature and location of the property and the rent of £725. She was keen on the location as she wished to move close to her mother and the field around the corner was brilliant. She recalled the respondent mentioning a property he had in Shawland and referring to other people who had viewed the property. In the property they discussed the view and the rent, although the actual tenancy agreement was not produced. She received this as an email she then signed and returned to the respondent. She recalled that the respondent was going to change the kitchen but she preferred to keep the existing kitchen. She did not recall the applicant offering a week off in rent during the time it would take to replace the kitchen. but remembered a discussion about the level of the rent. In light of this the respondent then agreed to lower the rent to £725. She recalled she really

liked the kitchen. She stated the appliances were not discussed at all at the viewing and they spoke about the view, the wallpaper, the rent and the replacement of the kitchen. She had assumed the appliances were provided with the tenancy. The deposit was not mentioned and was only stated in the tenancy agreement. Her understanding regarding a deposit was that it would be one to 1 1/2 times the rent, which she could pay comfortably due to the rent of £750 and that a deposit would be processed by a letting agent and this was not her responsibility. If she left the place in good condition she would get it back. She was not actively aware that there were registered schemes but knew that it was in a safe place and there would be someone acting as a middle man when it was to be returned. She was not aware that the deposit scheme would write out to a tenant and her experience was that about a month before the tenancy end the letting agent would provide the DAN and pin number to access the deposit. When the applicant was asked how the advert would refer to £725 although she herself had stated that the rent was lowered by the respondent after the discussion about the kitchen, she stated she must have been mistaken as this was the amount she then always paid. She insisted the deposit was not mentioned and the first time she knew about this was when it was stated as £725 in the lease in the 2nd paragraph.

2. The evidence of Mrs Margaret McAllister, mother of the applicant, was that she attended with her daughter to view the property where they met Mr and Mrs Higgins. They went to the kitchen, the living room and viewed the upstairs. She commented on the kitchen wallpaper and remembered that they spoke about the rabbit wallpaper. She did not recollect any mention of the appliances or the deposit. Initially she stated the rent had not been discussed at all. Her daughter had liked the kitchen as it was and did not want it to be replaced. The respondent then had stated he would reduce the rent. When discussing the kitchen she thought that this only related to the cupboards and worktop, not the appliances. She stated that the lease signing arrangements were discussed and an email was mentioned. Given her evidence about the change of the rental charge she then agreed that the rent was discussed.

3. The evidence of the respondent was that he agreed that he had not lodged the deposit as required and would pay any penalty the Tribunal saw fit. He will never let out a property again. There was never any suggestion he would not give the deposit back and in fact he had offered to take it as the last month's rent when he wrote to the applicant on 6 April 2021. The reason he needed the property back is for either one or two of his sons to live in. He did not know about the deposit regulations but thought that the applicant would have known from previous experience as a tenant but did not query it after the 30 days had expired. She only raised it after he had sent the notice that he wished her to move out. He stated that at the viewing of the property the deposit had been discussed. It had not been stated in the advert on gum tree. The applicant had said that she thought they were nice people and she would have no problem getting the deposit back and for him to do what he saw fit regarding the deposit. He explained the reason why the appliances were discussed was that he and his wife bought the property and did not know how old they were. They then rented out the property and he did not want to warrant the appliances as he had no knowledge about their history. Although

he had told the applicant the appliances would remain, she would have to replace them and the replacement would then be hers. This had not been stated in the lease and was just discussed in a conversation. Despite this he and his wife decided about 6 weeks into the tenancy they would as a courtesy replace the fridge freezer and later he did arrange to repair the cooker. He offered to reduce the rent to £725 because the applicant did not wish the kitchen replaced. At that time he had stated the deposit would be the monthly rent. After the applicant had provided referees they came back quickly to him and the lease was emailed to the applicant. When asked by the applicant, he stated he could not recall exactly where everyone was at all times during the conversation. He thought he had not mentioned other people who were interested in the property specifically to the applicant but there were other people interested and there were maybe 2 or 3 viewings. He stated the rent and deposit were not in the gum tree advert, only the nature and location of the property. When asked by the legal member to explain the comment in his email of 14 July 2021 regarding the lease being left "silent" on the deposit despite the deposit being stated under clause 6 of the lease he agreed that this statement was wrong. He stated he only lets out one property. He was asked about a property in Shawlands the respondent thought he had mentioned to her and stated that he has no other property apart from the one he and his wife live in. After his wife had given evidence he added that although there had been a property they had rented out many years ago he had not mentioned this previously as he had only been asked if he currently rented out any other property and he did not rent out any other property at the time. His wife had previously dealt with Clyde Property for the property in Perth.

4. The evidence of Mrs Christine Higgins, the respondent's wife, was that she had been present throughout the viewing. This had been the second viewing and there were two people there before. The applicant had come in and told them she was going to do a project and wished to move close to her mother and the location was important. They looked around and ended up in the kitchen. She recalled the day so well because she and the respondent were going to go to IKEA that day to purchase a new kitchen for the property. They had bought the property and had painted and decorated it and had put carpets down and the old kitchen was not in keeping with the new decor. The appliances and the kitchen replacement were discussed when she and her husband mentioned that they were going to buy a new kitchen that day. There was a fridge magnet with Peter Rabbit on the fridge and the wallpaper and fridge magnet were something the applicant was interested in. She recalled that the discussion included that the deposit was to be £750 but that the applicant had said that "you seem like decent people, do what you want" and they had reduced the deposit to £725. the discussion about the deposit was between her husband and the applicant. All discussions on that day were very nice. It was only after the applicant had received the request to move out there were problems. There had been no issues between the applicant and the respondent. There had been a problem with water ingress which was fixed and all was fine and they had given her money for a couch or chair. They had replaced the fridge/freezer and dealt with an issue with the shower promptly. The problems only started after the applicant had been advised the landlord

wished to get the property back for family reasons. She further stated that at the time the applicant viewed the property it was like a "whirlwind" because the applicant was very keen on the property and it all proceeded very quickly. The mother of the applicant had told her that the applicant was very artistic and keen to put her own touch on things. She and her husband were happy for the applicant to decorate the kitchen and paint it. Mrs Higgins further gave evidence that about 10 years ago she and her husband had a rental property in Perth which was rented out through an agent, Clyde Property and where there had been problems with the tenant not paying rent. They then sold that property. It was only recently they purchased and renovated the property the applicant was living in. The property was advertised on gum tree and only the size and location of the property was in the advert. She recalled that the letting agent dealt with the deposit back then for the property in Perth and had lodged it because she remembers filling in an application form. She did not discuss the deposit arrangements with her husband after the viewing. It was her husband who dealt with the current property and lease, he filled in the paperwork and dealt with the money for the rent and deposit.

5. Both parties stated that they would leave the decision on the level of penalty up to the Tribunal.

D The legal test:

In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.

In terms of Regulation 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.”

In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

E Findings in fact:

1. The deposit of £725 was paid by the applicant to the respondent in January 2019.
2. The parties entered into a lease which was written in the format of a Short Assured Tenancy but was in fact a Private Residential Tenancy over the property and which commenced on 1 March 2019

3. The tenancy agreement in clause 6 sets out the amount of the deposit as £725 and does not make mention of the deposit being lodged with a registered scheme
4. On 6 April 2021 the respondent sent to the applicant a letter stating he required the property back to allow his sons to move in. He gave her 3 months notice. The letter is not a valid notice to leave.
5. On 6 April 2021 the respondent offered to allocate the deposit to the last month's rent.
6. Since then a further document was served on the applicant on 20 May 2021 setting an end date of 6 August 2021.
7. Since then a further Notice to Leave was sent by the respondent's agents T C Young dated 12 July 2021.
8. Following the letter of 6 April 2021 the applicant asked the respondent about the deposit details.
9. At that time the applicant became aware that the deposit should have been lodged with a registered scheme.
10. He contacted SDS on 16 April 2021 and opened a deposit account for the address under DAN number DAN626789.
11. The respondent lodged the deposit of £725 with Safe Deposits Scotland on 21 April 2021.
12. The respondent is a private landlord who is dealing with the tenancy himself.
13. He does not have any other rental properties.
14. A previous rental property in Perth some years ago was rented out by a letting agent who dealt with the respondent's wife.
15. The respondent did not lodge the deposit within the time scales stated in the legislation and did not provide the information stated in regulation 42 of the Regulations.
16. Neither the applicant nor the respondent were properly aware of the Regulations and the obligations of a landlord in dealing with a tenancy deposit.
17. The tenancy is ongoing.
18. The property was advertised as a two bedroom semi detached property on gum tree.
19. The applicant and her mother went to view the property at the start of January 2019 where they met the respondent and his wife for the first time.
20. The respondent and his wife had intended to replace the kitchen in the property but the applicant wished the old kitchen to be left.
21. This resulted in the rent being lowered by the respondent at the viewing from £750 to £725 and the deposit to be lowered as well.
22. The deposit was briefly discussed at the time the applicant viewed the property together with her mother at the start of 2019 in the context of the discussion about the rent and kitchen retention.

F Reasons for Decision:

1. The main facts of the case are mainly not in dispute. The Respondent did not provide any of the information required in Regulation 42 of the Regulations. The tribunal is thus satisfied that the Respondent did not comply with the requirements of Regulation 3 (1) (b) of The Tenancy Deposit Schemes (Scotland) Regulations 2011. The deposit was not paid over to an approved

scheme within 30 working days of the commencement of the tenancy agreement on 1 March 2019. The tribunal is thus satisfied that the Respondent did not comply with the requirements of Regulation 3 (1) (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

2. The deposit of £725 remained unprotected for about 2 years between 1 March 2019 and 21 April 2021.

3. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord and was admitted as soon as the respondent became aware of the application.

4. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.

5. The Tribunal considers that the discretion of the tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015 by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately.

6. This is a clear breach of the Regulations. It was not denied. The tenancy is ongoing. Had the tenancy been ended successfully without the deposit having been paid into a registered scheme, the applicant would not have had access to the dispute resolution mechanism provided by the registered schemes and would have depended on the respondent returning any funds due to her. This is the situation the Regulations sought to avoid.

7. The reason the hearing took place was that the Tribunal required confirmation of when the deposit was lodged, which it received prior to the hearing from both parties and that the Tribunal considered it relevant whether there had been any discussion on the deposit between the parties. The relevance of the discussion about the deposit in the Tribunal's view was that if there had been some kind of agreement it would indicate that the landlord had erroneously relied on that agreement, although obviously the landlord's obligation exists due to the legislative provisions and regardless of any agreement between the parties.

8. The Tribunal had carefully considered the evidence provided at the hearing by the parties and the two witnesses. The Tribunal considered that the evidence of Mrs Higgins was given very frankly and clearly and that she of all people involved appeared to the Tribunal members to have the best and clearest recollection of events. The Tribunal considered that her evidence in particular was given in a manner which made it reliable and credible. The Tribunal considered further that in the evidence given by the applicant and her mother

regarding the circumstances of the meeting in January 2019 and the content of the advertisement of the property there had been some discrepancies and inaccuracies and considered on balance that their recollection of the discussions at the viewing were less reliable due to the passage of time.

9. The Tribunal considered on the civil standard of proof, the balance of probability, that the deposit had been discussed in the context of the kitchen refurbishment and the lowering of the rental due to the applicant's agreement to retain the old kitchen. The Tribunal on balance believed that the advert did not mention the level of rent or deposit and that both these matters were aired at the viewing. The Tribunal on balance found that the applicant had agreed to the level and arrangements about the deposit because she found the respondent and his wife to be nice people and that the lodging of the deposit with a registered scheme had not been mentioned by either party.

10. On the basis of the evidence the Tribunal found that this case was clearly one where the landlord, who was a private landlord and was not renting out more than one property, had failed to inform himself about the duties of a landlord and the legislation applicable to the economic activity of being a landlord in what is an ever changing legislative environment. It must be made clear to the Respondent that if he chooses to let out property on the private rental market, he has an obligation to inform himself about the legal framework in which he operates. The Tenancy Deposit Schemes (Scotland) Regulations 2011 are legally binding and have been in force for 10 years. It is a landlord's responsibility to know what obligations they have and to ensure that these are adhered to in all circumstances

11. The respondent had downloaded an old form of tenancy agreement from the internet and not made enquiries about the up to date legislation and the type of tenancy agreement which should have been used at the relevant time. He had not engaged a letting agent or sought to inform himself through obtaining legal advice. Had he used the correct form of tenancy agreement for a Private Residential Tenancy and in particular the model tenancy provided by the Scottish Government, the matter of where the deposit would be lodged would have been automatically brought to the attention of both parties as it is part of the model tenancy content.

12. The deposit was not lodged for approximately 2 years and would remain so had the applicant not prompted the respondent to take action when she made enquiries after he had asked her to move out.

13. Whilst the maximum of 3 x the deposit value can be awarded, the Tribunal takes some guidance in that regard from the decision by Sheriff Ross in the decision[2019] UT 45 *Darren Rollett and Julia Mackie* which sets out: " **Cases at the most serious end of the scale might involve**: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals." None of these factors were present in this case.

14. The Tribunal takes into account that the failure to lodge the deposit has not been shown to be a case of deliberate defiance of the Regulations. The Respondent is an amateur landlord. The Tribunal was satisfied that he did not maliciously try to retain the deposit funds but had offered these by accepting them as rent even before he became aware that there was a problem with the deposit at all. He clearly had no intention not to return the deposit. The Tribunal unanimously formed the view, having heard the evidence, that the respondent thought that there had been some agreement that the applicant trusted him with dealing with the deposit as ultimately set out in the tenancy agreement. Furthermore, the respondent took action very quickly after the applicant had asked him about the deposit arrangements following him sending out the letter asking her to leave and giving 3 months notice in April 2021. The respondent admitted his failure early in the proceedings and credibly states that this will not be happening again. The Tribunal also believed him when he stated that he will not be renting out property again. Most importantly, the respondent prior to the application being made had lodged the deposit with a registered scheme, which means that at the time the tenancy will come to an end the deposit resolution mechanism will be available to the applicant and the deposit is protected at the time when this is most relevant. The wrong the Regulations seek to address in this case was remedied before the application was lodged. The applicant has the relevant information regarding the lodging of the deposit and the deposit is now protected. The Tribunal took these circumstances into account in assessing a fair and proportionate sanction.

15. In all the circumstances the tribunal considered it fair, proportionate and just to make an order for the sum of £725, which is 1x the amount of the deposit and reflects the seriousness of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.

G Decision:

16. **The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondent for payment to the Applicant of the sum of £725 in terms of Regulation 10 (a) 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.

Petra Hennig McFatridge 26 August 2021

Legal Member **Date**