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/21/1375

Re: Property at 30 Holm Gardens, Bellshill, North Lanarkshire, ML4 2PB ("the Property")

Parties:

Miss Amelia Rafay, 2/1, 96 Saracen Street, Glasgow, G22 5AU ("the Applicant")

Mr Rashid Mahmood, 71 Love Drive, Bellshill, North Lanarkshire, ML4 1BY ("the Respondent")

Tribunal Members:

Rory Cowan (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that:- (i) the Respondent failed to comply with Regulations 3(1)(a) and (b) of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and (ii) that the sum of £700, being a sum equal to the original tenancy deposit, was an appropriate sanction.

- Background

By Application under Rule 103 dated 2June 2021 (the Application) the Applicant sought an order for payment against the Respondent for an alleged failure to pay a tenancy deposit into an approved scheme as well as a failure to issue prescribed information to her. In support of the Application, the Applicant produced various documents including a copy of the tenancy agreement dated 1 February 2020, copy correspondence and communications between the Applicant and the Respondent that dealt with (among other things) the issue of the deposit. In response, the Respondent issued a written response received 4 August 2021. A Case Management Discussion (CMD) was assigned to take place on 20 August 2021 and was conducted by way of conference call. In the afternoon of 20 August 2021, the Respondent emailed the Tribunal administration seeking to postpone the CMD to

allow his wife (not a party) to participate in the CMD. Due to the lateness of the request, the CMD proceeded, and the issue of a postponement was discussed at the CMD. The Applicant appeared and represented herself. The Respondent also appeared and represented himself.

- The Case Management Discussion

The nature of the Application was discussed with the parties and, in particular, what the Tribunal was potentially empowered to do should there be a finding that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the 2011 Regulations). Both parties indicated that they understood what was to be discussed and what the Application related to.

The issue of the Respondent's postponement request was then discussed. The Respondent indicated that he wished to have his wife included in proceedings mainly because she was a joint owner of the Property, but also because she may have had "different conversations and emails" with the Applicant about the tenancy. He indicated that, as a joint owner, his wife should be brought into the Application so that she could be jointly liable for any penalty that might arise. He indicated that, although they had both been involved in the tenancy set up, his wife had taken more to do with it and was more familiar with such matters and the law generally. He had been more involved in the day-to-day management of issues such as repairs.

In response, the Applicant indicated that she did not want to seek to amend the Application to include the Respondent's wife. It was not known if she was a joint owner, but she was not listed in the lease agreement as a landlord, only the Respondent was. She also indicated that, although she had spoken to the Respondent's wife, the Respondent was the person she dealt with more often.

Before deciding the issue, the Tribunal asked the Respondent to confirm his position regarding the Application and whether or not he accepted that the deposit had been paid by the Applicant and whether of not it had been paid into an approved tenancy deposit scheme. The Respondent indicated that the deposit had been paid and that it had not been protected, nor had any prescribed information been provided to the Applicant.

That being the case, it did not seem to the Tribunal that there would be any purpose in postponing the CMD to allow the Respondent's wife to become involved. She was not a party and was not detailed as the landlord in the tenancy agreement. Further, breach of the 2011 Regulations had been admitted and, after discussion, it appeared that the Respondent accepted that there was nothing his wife could usefully add to his own submissions.

In terms of the Application, the Respondent's position was that he admitted that the deposit of £700 paid by the Applicant to him had not been protected and no information required by regulation 3(1)(b) and as prescribed by regulation 42 of the 2011 Regulations had been provided to the Applicant either. Something that was not clear in the written responses lodged by him which, in part, sought to criticise the Applicant and her conduct. His position was that, he did not know of the requirement to do so. He also stated that, although he was the landlord per the tenancy

agreement and had been present when the agreement had been signed, his wife had taken more to do with the setting up of the tenancy and that he had not read the section in the tenancy agreement that dealt with the deposit (the Scottish Government's Model Tenancy Agreement had been used and signed by the parties). He indicated that the Property was the first and only property that he had rented and the Applicant had only been his second tenant for the Property. He had been unfamiliar with his obligations as a landlord with regards to the deposit. The previous tenants had been in the Property for about 6 to 8 months prior to the Applicant taking occupation. He now knows of his obligations, and he has protected the deposit paid by his current tenants. He indicated that he done what he could during the tenancy to ensure that the Property was kept in repair and any issues identified by the Applicant were attended to timeously. He also indicated that, although he and his wife had been living together at the time this tenancy was entered into, they were having difficulties and had now formally separated. He has 3 young children and had been suffering a very stressful time. He also indicated that he returned the deposit in full to the Applicant shortly after the tenancy ended despite not inspecting the Property and made no attempt to hold onto the deposit for the purpose of making deductions. He criticised the Applicant for the way she dealt with the handing back of the Property, but despite this had returned the deposit in full as a "goodwill gesture". He also indicated that he had not expected to "go through the hassle" of the Application as a result.

In response the Applicant pointed out that, in her view, the Respondent was an experienced landlord in that there had been at least one set of tenants at the Property before her. She took issue with the way her handling of the return of the Property had been characterised by the Respondent but did accept she posted the keys through the letterbox of the Property as she did "not want to face" the Respondent again following an earlier discussion regarding notice and rent. She indicated that one of her children has autism and any conflict can upset them, so she felt that what she had done regarding the keys was "the correct choice". She confirmed the deposit had been returned in full but indicated this happened after she had pointed out to the Respondent that, as it had not been protected, the Respondent had "no right to deduct" from it. She indicated that, prior to the deposit's return, she had been worried that the Respondent may seek to retain the deposit and had thought this may have been the reason why it had not been paid into an approved scheme.

- Findings in Fact and Law

1) The Respondent is the landlord for the purpose of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
2) The Applicant was a tenant of the Respondent in terms of a tenancy agreement for the property at 30 Holm Gardens, Bellshill, North Lanarkshire, ML4 2PB that commenced on 1 February 2020.
3) That under the terms of the tenancy agreement, the Applicant paid to the Respondent the sum of £700 by way of security deposit.
4) That the security deposit of £700 was not paid into an approved tenancy deposit scheme.
5) That the Respondent has failed to comply with regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

6) That the Respodent did not issue the information to the Applicant as required by regulation 3(1)(b) and as prescribed by regulation 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.
7) That the tenancy between the parties is at an end and the deposit of £700 was returned to the Applicant by the Respondent with no deductions.
8) That an appropriate penalty is a sum equivalent to the level of the original deposit being £700.

- Reasons for Decision

The Respondent admitted that he had not complied with his obligations under regulation 3(1)(a) and (b) of the 2011 Regulations. His position being that he was unaware of those obligations. As has been stated before in similar such cases, ignorance of the law is no defence to such an application. The only real issue therefore for the Tribunal in the face of such an admission of breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 is to consider the level of the appropriate sanction. The level of such a penalty is a matter of discretion for the Tribunal taking into account the particular circumstances of the case when considering the approach to the level of the appropriate sanction (Jensen v Fappiano [2015] 1WLUK 625). Whilst the Respondent may not be the most experienced of landlords, he had been, by his own admission, a landlord for a period of roughly 2 years with one set of tenants prior to the Applicant. It was noted that, whilst the Respondent did return the deposit in full after discussions with the Applicant, the deposit had remained unprotected for the whole term of the tenancy (from 1 February 2020) and the Applicant therefore lost the potential protection the regulations were designed to provide. It is for landlords such as the Respondent to familiarise themselves with their obligations as landlords or, if they do not wish to do so, engage professional agents to assist them. The fact that his wife may have taken more to do with setting up the tenancy does not excuse the Respondent or mean that it is not the Respondent that is responsible for the protecting of the deposit. It perhaps does operate to reduce the level of the Respondent's culpability a little, but it would not reduce the level of culpability that, say, the engagement of professional letting agents might if they neglected to protect a deposit. There was also an underlying attempt by the Respondent in his written response seeking to blame, at least in part, the Applicant for not pointing out his failure to lodge the deposit at an earlier stage. The protecting of a deposit is a matter for a landlord and no blame can be attributed to a tenant who does not advise a landlord of this requirement. Indeed, the responsibilities of landlords with regards to a deposit are set out in the Scottish Government's Model Tenancy Agreement at clause 11, a copy of which the Respondent signed. The Tribunal accepted that the Respondent was likely going through a difficult time in terms of his personal life at the stage the tenancy with the Applicant was entered into. For all these reasons the Tribunal reached the conclusion that the non-compliance in this case was at neither extreme of the spectrum of triviality. Taking this into account and all the circumstances of the Application, the response and the parties' oral submissions, the Tribunal was of the view that this was an example of a case where the Respondent's culpability was at the middle to lower end. The appropriate sanction therefore would be to make an award at the level of the original deposit.

- Decision

The Tribunal orders that the Respondent pay to the Applicant the sum of £700 being a sum equivalent to the original deposit.

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.

R. C

Legal Member/Chair **20 August 2021**
Date