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 (Scotland) Regulations 2011 ("The Regulations" with any reference to a "Regulation" being to these Regulations.

Chamber Ref: FTS/HPC/PR/21/2799

Re: Property at 23 Finlay Drive, Flat 6/2, Glasgow, G31 2BD ("the Property")

Parties:

Dr Sandra Alland, Mr Matson Lawrence, Flat 1/2, 19 Ashgrove Road, Glasgow, G40 4AL ("the Applicant")

Mr Douglas Stiven, 1 Glen Street, Edinburgh. EH3 9JD ("the Respondent")

Tribunal Members:

Andrew McLaughlin (Legal Member) and Mary Lyden (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided to grant the Application and awarded the Applicants the sum of £3,750.00.

Background

The Applicants seek an award under Regulation 10 in respect of a failure to register a sum paid to agents acting on behalf of the Respondent which they contend should properly be considered as being a deposit for the purposes of Regulation 3.

The tenancy agreement produced with the Application purports to provide that no deposit will be paid but instead provides that "*The £1,250.00 paid by you already will be held as your last two month's rent*". The Applicants contend that this sum was actually a deposit and this sum having not being registered in an approved scheme as per

Regulation 3, entitles the Applicants to an order that the Respondent should pay the Applicants a sum equal to three times the value of that deposit, being three thousand seven hundred and fifty pounds.

The Case Management Discussion.

The Application called as a Case Management Discussion (CMD) by conference call at 10 am on 26 May 2022. The Applicants were represented by their solicitor, Ms Berry from Govanhill Law Centre. There was no appearance by or on behalf of The Respondent. This CMD had been assigned to allow for the Application and information about how to join the CMD to be served on the Respondent at the address of 1 Glen Street, Edinburgh which had been disclosed during the previous Hearing on 21 March 2022.

Sheriff Officers had successfully effected service on the Respondent at that address on 10 May 2022 after having established that the Respondent resided there. The Tribunal subsequently also amended the Respondent's address in the Application to this address.

This issue having been addressed, the Tribunal considered it appropriate to consider the Application and the evidence that had been heard on 21 March 2022 in the absence of the Respondent.

The Tribunal had heard from Ms Berry regarding the Application and asked questions throughout. The Tribunal had also heard directly from the Applicants in respect of the effect which the alleged failure to register the deposit had had on them. The Tribunal also carefully considered emails exchanged between the Applicants and O'Neill Property, the letting agents engaged by the Respondent to manage the Property.

Having done so, the Tribunal found the following facts to be established.

Findings in Fact

I. *The parties entered into a tenancy which commenced on 8 July 2016 and had an initial period of let until 9 January 2017;*

II. *The Applicants were the tenants and the Respondent was the landlord who owned the Property and who traded under the name of "Real Estate Intelligence" which is how the Respondent was designed in the tenancy ;*

III. *"O'Neill Property" were the letting agents instructed by the Respondent to manage the Property on his behalf. O'Neil Property prepared the tenancy and acted as the Respondent's agents at all relevant times;*

IV. *The Tenancy itself provided specifically that no "deposit" would be payable;*

V. *The tenancy provided that '"The £1,250.00 paid by you already will be held as your last two month's rent';*

VI. *The Applicants paid the sum of £1,250.00 in advance of securing the tenancy and which required to be paid prior to the tenancy being granted;*

VII. *The tenancy continued on with the Applicants paying the monthly rent on the first day of each month in advance for the rest of the month ahead;*

VIII. *The tenancy continued on past its initial expiry period by tacit relocation;*

IX. *On 15 June 2021 the Applicants gave notice that they wished to end the tenancy on 14 August 2022;*

X. *The parties agreed that the tenancy would end on that date;*

XI. *The Applicants paid their rent on 1 June 2022 at the rate of £655.00 which was the contractual monthly rent after the rent had been increased from £625.00 per month in January 2018;*

XII. *The Applicants sought the return of what they considered to be the balance due to them of £359.19. The Applicants believed that they had paid the last two months rent before the tenancy started which meant that they understood that they had already paid for July and the half of August during which they would still be in occupation of the Property. The Applicants considered that they were therefore broadly due one half of one month's rent back from the Respondent;*

XIII. *The Applicant and O'Neill Property subsequently engaged in correspondence regarding the return of the balancing payment due to the Applicants;*

XIV. *In these discussions, O'Neill Property treated the sums held by them, which were paid by the Applicants prior to the commencement of the tenancy, as akin to a deposit within the meaning set down by s120 of the Housing (Scotland) Act 2006 and which is specifically referred to in the Regulations as having the same meaning within the Regulations;*

XV. *O'Neill Property sent email correspondence to the Applicants explicitly referring to the sums held by them as a deposit with these emails being sent within the context of the Applicants looking to secure the return of the sums they considered due;*

XVI. *O'Neill Property attempted to haggle with the Applicants about the return of the money and made reference to it being returned once the condition of the Property had been confirmed as being acceptable;*

XVII. *O'Neill Property attempted to suggest that the sum of £60.00 should be deducted from the final sum to be returned because the rent had subsequently been increased. Their concern appeared to be that as the Applicants had paid for their last two months at the start of the tenancy in 2016, they were then getting their last two months in 2021 at the previous lower rate;*

XVIII. *The Respondent failed to register the sums received by his agents from the Applicants which properly should have been considered as a deposit with an approved scheme as required by Regulation 3;*

XIX. *The Applicants have been caused stress, inconvenience and financial hardship by the Respondent's agents attempts to circumvent the protections afforded by the Regulations and subsequent failure to register the sums received which were clearly treated as a deposit;*

Note:-

In this Application the Tribunal was asked to consider the terms of section 89(1) of the Rent (Scotland) Act 1984 which is in the following terms:

Section 89

Avoidance of requirements for advance payment of rent in certain cases.
(1)Where a protected tenancy which is a regulated tenancy is granted, continued or renewed, any requirement that rent shall be payable—

(a)before the beginning of the rental period in respect of which it is payable, or

(b)earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months),

shall be void, whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof; and any requirement avoided by this section is, in the following provisions of this section, referred to as a "prohibited requirement".

It was contended that although the initial period of let was 8 July 2016 until 9 January 2017, the £1,250.00 remained in the possession of O'Neil Property until the tenancy ended around 5 years later.

Whilst section 89 (1) meant that the payments made earlier than six months before the end of the tenancy "*shall be void*" as a "*renewal or continuance of the tenancy*", the Tribunal

decided that this was not strictly relevant to the tests the Tribunal required to address to determine this Application.

The Tribunal considered that in making its decision the Tribunal had to answer three questions of a relatively simple nature which were more to do with deposits rather than section 89 of the Rent (Scotland) Act 1984. The questions to be resolved appeared to be as follows:

1. *Was the £1,250.00 paid by the Applicants to O'Neill Property prior to the commencement of the tenancy a deposit within the meaning of section 120 of the Housing (Scotland) Act 2006?*

2. *If it was a deposit, was the deposit registered with an approved scheme as per Regulation 3?*

3. *If not, what award, if any, should the Tribunal make under Regulation 10?*

The Tribunal addressed these issues in turn:

Question 1.

Was the £1,250.00 paid by the Applicants to O'Neill Property prior to the commencement of the tenancy a deposit within the meaning of section 120 of the Housing (Scotland) Act 2006?

In Regulation 2 a "*Tenancy Deposit*" is defined as having the same meaning as set out in Section 120 of the Housing (Scotland) Act 2006.

That section reads:

s120 Tenancy deposits: preliminary
(1)A tenancy deposit is a sum of money held as security for—

(a)the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b)the discharge of any of the occupant's liabilities which so arise.

The Tribunal noted that the Applicants paid the sum of £1,250.00 to the Respondent's agents in advance of taking occupation of the Property. At the end of the tenancy,

O'Neill Property very clearly treated this sum as security for the Applicant's obligations under the tenancy.

There were emails produced in the Application in which O'Neill Property specifically referred to this sum as being a deposit on more than one occasion. The exchange of emails also clearly demonstrated that O'Neill Property intended to make a payment to the Applicants once they had satisfied themselves as to whether any repairs would be needed at the Property once the Applicants had vacated it.

The Tribunal were in no doubt that O'Neill Property were treating this sum as a deposit and that, despite the attempt to provide otherwise in the tenancy, the sums paid met the test of being a deposit as per Section 120 of the Housing (Scotland) Act 2006.

Question 2.

If it was a deposit, was the deposit registered with an approved scheme as per Regulation 3?

It was clear that the deposit was not registered with an Approved Scheme. There were ample emails produced between the Applicants and O'Neill Property in which there was no suggestion that it was registered and O'Neill Property were the sole arbiters of what sums might be returned to the Applicants and when.

Question 3.

If there was a breach of Regulation 3, what award, if any, should the Tribunal make under Regulation 10?

Regulation 10 is in the following terms:

Court orders

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.

There is ample case law that suggests that the Tribunal has to exercise its judicial discretion in determining what award to make based on the circumstances of the case. The Tribunal noted that although the sum of £1,250.00 was paid properly as a deposit, the sums did go towards the Applicant's final month and a half of rent costs which meant that after some back and forth with O'Neill Property, the Applicants received a final amount back of £359.19.

Whilst the Tribunal considered that the sum of £1,250.00 was properly a "*deposit*", this did result in an unexpected benefit to the Applicants in that it meant that the rent they had paid for the final month and a half of the tenancy came from a total deposit that might now be subject to an award in their favour.

Nevertheless, the Tribunal considered that this was a mess entirely of the Respondent's agents' making and that they could not avoid the consequences of the Tribunal considering that the whole sum paid in advance (£1,250.00) was the deposit that served as the base level for any award.

The Tribunal heard from the Applicants about the stress, inconvenience and financial consequences of being deprived of their entitlement to deposit protection. The Tribunal was also struck somewhat that the Respondent's agents would brazenly try to defeat the purpose of the Regulations in such a manner. The Respondent did not attend the CMD or have any involvement in the case and there was accordingly no mitigation before the Tribunal.

The Tribunal therefore decided to make an award at the highest level by ordering the Respondent to pay the sum of £3,750.00 to the Applicants, being a sum equal to three times the value of the true deposit received.

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.

Andrew McLaughlin

26 May 2022

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Legal Member/Chair	**Date**