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/22/2330

Re: Property at 51/27 Caledonian Crescent, Edinburgh, EH11 2AT ("the Property")

Parties:

Mr Luke Wotton, Adnan Avidic-Belltheus, 54A Battersea Park Road, London, SW11 4JP ("the Applicants")

Connor William Morrison, Garett Morrison, Liam Morrison, 24 Aghinlig Road, Dungannon, County Tyrone, BT71 6SR ("the Respondents")

Tribunal Members:

Andrew Upton (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that: (i) the Application, insofar as directed against Garett Morrison and Liam Morrison, should be dismissed; (ii) Connor William Morrison, as landlord of the Property, has acted in breach of his duties in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and (iii) an appropriate sanction is the sum of ONE HUNDRED POUNDS (£100.00) STERLING.

STATEMENT OF REASONS

1. This Application called for its Case Management Discussion by teleconference call on 10 October 2022. The Applicants were personally present. The Second Respondent, Garett Morrison, was present on the call on behalf of all of the Respondents.

2. This is an Application by the Applicants for sanction of their former landlord under the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the

Regulations"). They say that on 3 June 2021 they paid a tenancy deposit of £995 ("the Deposit") to a letting agent instructed by the landlord in advance of their tenancy commencing on 9 June 2021. The Deposit was subsequently lodged with Safe Deposit Scotland, an approved Tenancy Deposit Scheme, on 6 August 2021. That was outwith the 30 business day period permitted by the Regulations.

3. At the outset, the discussion focussed on who the landlord actually was. The tenancy agreement specified Liam Morrison. The Certificate from Safe Deposits Scotland specified "Gareth" Morrison (presumably intended to be "Garett". The Title Deeds show that the Property is owned by Connor William Morrison. The Application was raised against all of them. The Applicants advised that they were not sure who the true landlord was, but that they had only ever dealt with Garett.

4. Mr Morrison sought to explain the situation. The letting was effectively a family business. The Property is owned by his brother, Connor William Morrison, who is the true landlord. The Property is managed on behalf of Connor William Morrison by Garett Morrison. The Property was historically owned by Liam Morrison, who is their father. He is no longer involved in the letting. His name featured on the tenancy agreement as a consequence of what was described as a legacy letting agreement, which I understood to mean that the letting agent had not updated the tenancy agreement to reflect that Mr Morrison Senior was no longer involved. The Applicants accepted Mr Morrison's explanation of the relationships. As such, I dismissed the Application insofar as directed against Garett Morrison and Liam Morrison.

5. In terms of the 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; and

(b) provide the tenant with the information required under regulation 42.

(1A) Paragraph (1) does not apply—

(a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and

(b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

(a) the references to deposit were to each instalment of the deposit, and

(b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.

(3) A *"relevant tenancy"* for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a) in respect of which the landlord is a relevant person; and

(b) by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions *"relevant person"* and *"unconnected person"* have the meanings conferred by section 83(8) of the 2004 Act.

9.—

(1) 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.

(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

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."

6. The duty of a landlord to lodge a tenancy deposit in an approved scheme within the prescribed timescale is an absolute. There is no defence to a failure to do so. Any such failure is a breach of duty in terms of Regulation 3 which carries strict liability. The only question thereafter is what the sanction should be.

7. Mr Morrison did not dispute that the Applicants paid the Deposit as contended. He explained that the Deposit was paid to the landlord's letting agent, Fineholm Letting. The arrangement with Fineholm Letting was that they would then pay tenancy deposits to Garett Morrison, who would arrange for payment to Safe Deposits Scotland. In this case, Fineholm Letting did not forward payment of the Deposit to Mr Morrison until 28 June 2021. He then arranged for payment of the Deposit to Safe Deposits Scotland on 4 August 2021, albeit Safe Deposits Scotland did not acknowledge receipt thereof until 6 August 2021. On that basis, Mr Morrison contended that he had paid the Deposit to an approved scheme within 30 business days of his personal receipt of it. He said that his intention had always been to lodge the Deposit into an approved scheme. The only reason that he had not done so earlier was that he had not been notified of when Fineholm Letting had made the payment to him, and he checked the account it was paid to infrequently.

8. The Applicants did not seek to challenge Mr Morrison's explanation of how parties came to be in this position. They spoke briefly to issues which they said arose at the end of their tenancy, but unrelated to whether the Deposit had been lodged timeously. Those comments explained why they decided to raise this Application, but were irrelevant to the questions of breach and sanction. It is therefore apparent that there were no matters of fact in dispute between the Parties.

9. In terms of Rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, the Tribunal may do anything at a CMD that it may do at a Hearing, including make a decision. In terms of Rule 2, when making a decision the Tribunal must have regard to the overriding objective to deal with proceedings justly; including by avoiding unnecessary delay. Given that there were no matters of fact in dispute between the Parties, the Tribunal was satisfied that it was able, in the interests of avoiding unnecessary delay, to make a decision at the CMD.

10. The Tribunal accepts that Mr Morrison's intention was to lodge the Deposit in an approved scheme within the statutory timescale. However, he has evidently misdirected himself on the legal effect of payment having been made to the agent of a disclosed principal. The effect of such a payment is the same as if the payment had been made directly to the principal. As such, in this case, the Deposit was paid on 3 June 2021 and the Tenancy commenced on 9 June 2021. The period for lodging the Deposit therefore began on 9 June 2021. The Deposit ought to have been lodged with an approved scheme on or before 21 July 2021. It was not lodged until, at least 4, August 2021, which

was two weeks after the final date for lodging. Nothing turns on the fact that Fineholm Letting did not make payment to Mr Morrison until 28 June 2021. The Respondent is in breach of his duty in Regulation 3.

11. That being so, the final matter for the Tribunal to determine is what an appropriate sanction should be. The Regulations prescribe that the maximum sanction is a sum equal to three times the tenancy deposit, but the Tribunal has discretion to determine an appropriate sanction having regard to all of the circumstances. The Tribunal's exercise of discretion in relation to these matters was considered in the case of *Jenson v Fappiano*, unreported (2015 SCEDIN 6), at paragraphs 11 and 12:-

"I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.

1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment.
2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.
3. A decision based on judicial discretion must be fair and just (*'The Discretion of the Judge'* , Lord Justice Bingham, 5 Denning L.J. 27 1990).

12. Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf *Tenzin v Russell 2014 Hous. L.R. 17*). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case."

12. Having regard to all of the circumstances of this case, I am satisfied that the breach of statutory duty in this case falls at the lower end of the spectrum of severity. I accept Mr Morrison's unchallenged position that he had always intended to lodge the Deposit with an approved scheme and that his failure to do so timeously was a consequence of a combination of his own misunderstanding of the law and administrative oversight. Having regard to the very limited period during which the Deposit was unsecured and therefore unprotected, the fact that the Deposit was ultimately lodged in an approved scheme which allowed the Applicants to benefit from the protection that

affords, and Mr Morrison's obvious desire to remain compliant with the legislation moving forward, the Tribunal determined that an appropriate sanction was the total sum of £100. The Tribunal accordingly made an order for payment of that sum.

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.

A Upton

10/10/2022

Legal Member/Chair **Date**