



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”)

Chamber Ref: FTS/HPC/PR/20/1257

Re: Property at 12 Bellfield View, Kingswells, Aberdeen, AB15 8PG (“the Property”)

Parties:

Miss Ashleigh Lancaster, Mr Jonathan Wiggins, 19 Deer Park Grove, Countesswells, Aberdeen, AB15 8FT; 53 Westhill Grange, Westhill, Aberdeenshire, AB32 6QJ (“the Applicants”)

Ms Rachel Santos, 24 Falcon Wood Close, Manchester, M28 1FG (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order in the sum of Three hundred and thirty seven pounds and fifty pence (£337.50) Sterling in favour of the Applicants against the Respondent.

Background

- 1** By application to the Tribunal the Applicants sought an order for payment as a result of the Respondent's failure to lodge their deposit in an approved tenancy deposit scheme within the statutory timescales.
- 2** By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 7 October 2020.

- 3 A copy of the application paperwork together with notification of the date, time and location of the Case Management Discussion was served on the Respondent. She subsequently submitted written representations on 14th August 2020, 20 August 2020 and 2 September 2020. In summary she stated that the failure to lodge the deposit with the scheme had been a result of a banking error and she would endeavour to obtain documentary evidence to prove this. The Applicants submitted further written representations in response by email on 29 August 2020.

The Case Management Discussion

- 4 The Case Management Discussion took place on 7 October 2020. The Applicants and the Respondent were all in attendance. The Respondent reiterated her position that the failure to lodge the deposit in an approved scheme had been a result of a banking error. The Legal Member confirmed that the Respondent accepted there had been a breach of the Regulations in that the deposit had not been lodged timeously. The Legal Member therefore assigned a Hearing in the matter on the basis that the issue to be resolved by the Tribunal was what level of sanction should be awarded having regard to the nature of the breach of Regulation 3 of the 2011 Regulations. The Hearing was set for 28th October 2020 alongside two other applications involving the same parties.
- 5 Due to there being insufficient time on 28th October 2020, the Hearing was adjourned to 4 December 2020 and proceeded on that date by teleconference due to the restrictions imposed by the Covid-19 pandemic.

The Hearing

- 6 The Hearing took place on 4 December 2020. The Applicants and the Respondent were all in attendance. The Tribunal heard submissions from all three parties. A summary of the relevant and material points are as follows:-

Ms Rachel Santos

- 7 Ms Santos referred to the written representations she had submitted, in particular the letter from her bank dated 30 August 2020. She explained that the tenancy had commenced on 15 October 2018, at which point she had sent the tenant an email outlining the arrangements for the deposit and confirming it would be lodged with a tenancy deposit scheme within thirty working days. Ms Santos had set up an account with the Letting Protection Service Scotland ("LPSS") and arranged the transfer of the deposit to the account on 2 November 2018. It wasn't until the end of the tenancy that she discovered the funds hadn't been received. This was brought to her attention by Mr Wiggins on 29th May 2020. She then made enquiries with her bank and realised the payment to LPSS had not been successful. She made reference to the letter

from her bank which confirmed the account had been set up and payment arranged. She had received no notification about a failure or error in the payment so assumed all was fine. There had been an error with the online transaction. She did however recognise that she had failed in not double checking with LPSS that the payment had reached them.

- 8 Ms Santos rectified the issue by making a new payment transfer to LPSS on 1st June 2020. LPSS confirmed receipt of payment of 4th June 2020. The breach was not intentional by any means. She had been entirely transparent with the Applicants about the deposit scheme. It had been an administrative error. Ms Santos explained that when she made the payment to LPSS she already knew she would be seeking deductions from the deposit but wanted to follow the correct process. The relationship with the tenants had broken down and they had involved a solicitor. Ms Santos had advised that LPSS about the ongoing dispute and they had advised that the deposit could be frozen until such time as the outcome of the legal proceedings was known. Ms Santos had asked LPSS to suspend the deposit on that basis. The Applicants had not been prejudiced by the initial payment failure. Their deposit was protected and the dispute process was still ongoing. The Applicants would not have received their deposit any earlier as a result. Ms Santos explained that there were other external factors which should be taken into account, in that the tenants didn't want to speak to each other and she was juggling an increased workload and dealing with both tenants separately. She had always been transparent, clear and flexible with the tenants.

Mr Jonathan Wiggins

- 9 Mr Wiggins explained that he considered the maximum level of sanction was justified in this case. Had Ms Santos placed the deposit in an approved tenancy deposit scheme at an earlier stage the matter would have been resolved soon and would have been fairly disputed. She had breached the law but not putting the deposit in the scheme until June 2020. On that date he had contacted the LPSS to see if they could claim the deposit only to find that the process had been suspended by Ms Santos. Mr Wiggins couldn't understand how Ms Santos didn't notice that the £675 hadn't left her account. The bank error had arisen after he and Ms Lancaster had mentioned a legal process which he felt was convenient. The situation had caused him immense distress and could have been resolved much sooner. The deposit could not be fairly disputed as it hadn't been put in the deposit scheme in the first place.

Ms Ashleigh Lancaster

- 10 Ms Lancaster reiterated that Ms Santos had broken the law and she and Mr Wiggins had been unable to dispute damages through LPSS. She had initially replied to an email from Ms Santos about damages but couldn't comprehend

the response from Ms Santos, hence the reason why she advised that she wished to dispute the damages through the deposit scheme. Ms Lancaster also found it difficult to believe that Ms Santos would not have noticed a payment of £675 remaining in her account. Ms Lancaster explained the financial difficulty she had suffered. The situation had caused a great deal of stress.

Relevant Law

- 11 The relevant law is contained with the Tenancy Deposit Scheme (Scotland) Regulations 2011 which provide as follows:-

“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.

(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.

(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 by summary application and 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 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.”

Reasons for Decision

- 12 The Tribunal determined the application having regard to the application paperwork, further written representations and the verbal submissions from the parties at the Hearing. The Tribunal was satisfied that it had sufficient information upon which to make a determination of the application. The substantive facts were agreed and the issue was simply one of judicial discretion in terms of assessing what level of sanction was appropriate in the circumstances of the case.
- 13 The Tenancy Deposit Scheme (Scotland) Regulations 2011 specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy. This gives both parties the benefit of the scheme's independent scheme dispute resolution process in order to resolve any dispute that may arise regarding repayment of the deposit.
- 14 The Applicant submits that the Respondent did not pay the deposit into an approved tenancy deposit scheme in accordance with her duties under Regulation 3. This was accepted by the Respondent. Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. Further, under Regulation 10 in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case.
- 15 The Tribunal noted the purpose of Regulation 10, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The provisions of Regulation 10 leave no discretion where a landlord is found to have failed to comply and permit an award of up to three times the deposit where a finding of breach is made.
- 16 The Tribunal considered the requirement to proceed in a manner which was fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained unprotected for the entire term of the tenancy, having been lodged after the tenancy had ended. However the Tribunal accepted the Respondent's account of events in that she had every intention of placing the deposit in a

scheme, had been open and transparent with the Applicants in this regard, had created the account with the LPSS but ultimately the failure was the result of an online banking error. The Tribunal noted that the deposit had been lodged as soon as the Respondent had realised this error.

- 17 Whilst the Tribunal can understand the Applicants' frustration in the suspension of the deposit process, ultimately the Tribunal did not agree that the Applicants have been denied access to a fair dispute resolution process in respect of the deductions sought by the Respondent. The Tribunal is an independent and impartial forum in which the Applicants have had the opportunity to have their case considered by an independent panel of Members under separate applications involving the same parties. The Tribunal would struggle to see on what basis the Applicants have been prejudiced in this regard, particularly as the LPSS have clearly stated that they will suspend their process until such time as the proceedings before the Tribunal have been resolved. This option would have been available to the Respondent regardless of whether the deposit was placed in a scheme at the start of the tenancy or in June when the Respondent realised her error.
- 18 However the Tribunal was conscious of the purpose of the sanctions available to it under Regulation 10, namely to prevent landlords from exhibiting the same or similar behaviour in future. Accordingly balancing the competing factors in the particular facts and circumstances of the application, the Tribunal considered that this was a case where a sanction in the sum of £337.50 would be appropriate, being half the deposit. The Tribunal considered the seriousness of the breach to be at the lower end of the scale having regard to the Respondent's genuine error, and took into account the mitigating factors put forward by her which satisfied the Tribunal that a lesser amount should be awarded.
- 19 The Tribunal therefore made an order against the Respondent in the sum of £337.50.

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 O'Hare

31 December 2020

Legal Member/Chair

Date