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/20/0610

Re: Property at 12 Airlie Court, Gleneagles Village, Auchterarder, Perthshire, PH3 1SA ("the Property")

Parties:

Mrs Victoria Bassett-Smith, Eubha, Main Road, Aberuthven, Auchterarder, Perthshire, PH3 1HE ("the Applicant")

Mr Jordan Holgate, Mr Andrew Nicholson, Mrs Lesley Nicholson, Flat 6, 32A Mill Road, Cambridge, CB1 2AD; c/o 137 Moss Carr Road, Long Lee, Keighley, BD21 4SD; c/o 137 Moss Carr Road, Long Lee, Keighley, BD21 4SD ("the Respondents")

Tribunal Members:

Valerie Bremner (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Application as it relates to Jordan Holgate should be dismissed and makes an order for payment of the sum of £400 by the Respondents Mr Andrew and Mrs Lesley Nicholson to the Applicant in terms of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations").

Background

This is an application under Regulation 9 of the 2011 Regulations and Rule 103 of the Tribunal procedure rules seeking payment for the failure to protect a tenancy deposit within an approved deposit scheme.

The Tribunal had regard to the following documents at the Case Management Discussion on 16th July 2020 :

1. Application received on 20 February 2020.
2. Copy of a tenancy agreement dated 2 December 2016
3. Copy of a tenancy agreement dated 1 January 2017
4. Emails between the Respondents and Belvoir Lettings.
5.Emails between the Applicant and Respondent.
6.Emails between the Applicant and the Tenancy Deposit Schemes
7. Photographs of documents lodged by the Applicant.
8.Written representations made by the Respondents.

Case Management Discussion

The Applicant appeared in person and represented herself. She was accompanied by a supporter Mrs Louise Bassett-Smith. The Respondents Jordan Holgate and Andrew Nicholson were not present but were represented by Mrs Lesley Nicholson who attended the case management discussion.

The parties agreed that a deposit of £1650 in respect of a tenancy at the property was paid by the Applicant in November 2016 to Belvoir Lettings in Perth. This firm had been engaged by the Respondents Mr and Mrs Nicholson to assist them with the letting and management of the tenancy at the property, as this was the first time they had rented out a property in Scotland. The Property Management Agreement between Mr and Mrs Nicholson and this firm, which the Tribunal did not see, authorised Belvoir Lettings amongst other matters, to draw up a tenancy agreement and sign it as agent for the landlords and also to pay the deposit into an approved tenancy deposit scheme. This first tenancy agreement signed by the Applicant on 2nd December 2016,was produced with the Application and was for a short assured tenancy and referred to a deposit of £1500, but both parties confirmed that the actual deposit taken was higher, some £1650, as Mrs Bassett-Smith had advised she was bringing a cat to the property and an enhanced deposit was charged as a result.

Both parties agreed that although there were two tenancy agreements produced, the second being one drawn up by Mr Nicholson after he and Mrs Nicholson had terminated the Property Management Agreement with Belvoir Lettings in December 2016, there had been one continuous tenancy and the Applicant had been in occupation from early December 2016 continuously until she gave notice of her intention to leave the property with effect from the end of November 2019.Parties were agreed that the tenancy start date was 1st December 2016, although it was signed the day after that (2nd December 2016) and the end date of the tenancy was 30 November 2019.

The Tribunal was advised that Jordan Holgate is the son of the Respondent Mrs Nicholson and a registered landlord at the property but it was agreed by parties that

he had had no dealings with the Applicant's tenancy and was not named on either of the tenancy agreements although had signed one as a witness. The Applicant confirmed that as far as she was aware her landlords at the property were the Respondents Mr Andrew and Mrs Lesley Nicholson.

Shortly after the first agreement was signed, around 16th December 2016 there was a parting of the ways between the Respondents Mr and Mrs Nicholson and Belvoir Lettings of Perth (for reasons set out in an email exchange of that date lodged by the Respondents) and this resulted in the termination of the agreement between the two Respondents Mr and Mrs Nicholson and Belvoir Lettings in respect of the property. As a result of this the Respondent Mr Andrew Nicholson had contacted the Applicant by email and requested that she sign a new tenancy agreement which was in similar terms to the first and simply removed clauses covering interest on late payment of rent, charges for late payment reminders and inserted a clause confirming that the rent would not increase for the duration of her occupancy of the property.

In subsequent email correspondence between the Applicant and the Respondent Mr Andrew Nicholson on 23rd December 2016, the Applicant queried what would happen to the deposit she had paid to Belvoir Lettings and asked if it would be transferred to the Respondents Mr and Mrs Nicholson as landlords, or stay within a deposit scheme. The Respondent Mr Andrew Nicholson responded on the same date advising that the deposit " is tied up in the scheme right now , so will leave it there for the time being…".

The second tenancy agreement which was produced was signed in January 2017 and Mr and Mrs Andrew Nicholson were named as landlords as they had been in the first agreement signed on their behalf by Belvoir Lettings.

The Applicant produced photographs of a receipt dated 11th November 2016 from Belvoir Lettings in Perth acknowledging receipt of the deposit she had paid for the property.The second photograph produced by the Applicant was a typed document she had also received from Belvoir Lettings which was dated 2nd December 2016 and was headed " Key Information about your Deposit" and referred to Regulation 42 of the Regulations and stated in typescript beside the typed words " date paid by the landlord (or their representative) to the Letting Protection Scotland Service", was a date of 1st December 2016. The clear inference which might be drawn from this document which the Applicant had signed, was that her Deposit had been put into a named and approved tenancy deposit scheme on 1st December 2016.There was no reference number for a Deposit Scheme on the document but the Applicant had noted a reference on the Belvoir Lettings deposit receipt which she had received and assumed this was the Deposit Scheme reference. In the face of these documents and the information she received from the Respondent Mr Andrew Nicholson by email on 23rd December 2016 that the deposit was "tied up in a scheme", the Applicant was of the view that her deposit was protected in an approved tenancy deposit scheme from December 2016.

Mrs Nicholson on behalf of the Respondents pointed to an e mail exchange of 16th December 2019 in which Mr Andrew Nicholson had requested that Belvoir Lettings return the Applicant's deposit after the termination of the Property Management

agreement,but this request had been refused by Audrey Coates of Belvoir Lettings, she stating by e mail that this could not be done,but asking for details of the government scheme the Respondents wished to use, with their account number, and indicating that the deposit would be transferred accordingly. Mrs Nicholson appeared to regard the email as proof that the deposit had been placed in a scheme by Belvoir Lettings before the email exchange, but accepted that the email did not actually say that. In the Respondents' written submissions and at the case management discussion Mrs Nicholson confirmed that in a later phone call with Audrey Coates at Belvoir Lettings regarding the deposit, the Respondent Mr Andrew Nicholson had been told by Audrey Coates that the deposit could not be returned to him as it had already been placed within a scheme as this was a legal requirement. Mrs Nicholson indicated that this was what led the Respondents to believe the Deposit was already in a scheme and why the Applicant had been advised of this by email on 23rd December 2016.Mrs Nicholson advised that she and Mr Nicholson had trusted that Belvoir Lettings had secured the deposit within a tenancy deposit scheme and did not think it worthwhile to move the deposit from one scheme to another since it was, they believed, already protected.

It became clear during the case management discussion that the Respondents had not seen the deposit receipt and " Key Information About your Deposit" documents which the Applicant had obtained from Belvoir Perth on 2nd December 2016, until a few days before the case management discussion. Similarly the Applicant had not seen the e mail exchanges in December 2016 between the Respondent and Belvoir Perth regarding the deposit until she lodged her application with the Tribunal and received written representations from the Respondents.

The Applicant advised the Tribunal that she had not questioned the whereabouts of her deposit until she gave notice that she was leaving the property and started to make enquiries about how to retrieve her deposit. At that time she advised the Respondents Mr Andrew and Mrs Lesley Nicholson that she had found some paperwork with the original tenancy deposit scheme reference numbers on it and would make enquiries about this. The Applicant explained to the Tribunal that the reference number on the Belvoir receipt for her deposit payment was what she was referring to here, mistakenly thinking that this number came from a deposit scheme. In October 2019 the Applicant made enquiries with the three approved schemes, explaining the situation in emails regarding her deposit and said " Belvoir said to me at the time that they wouldn't return the money to the landlords as the money had to stay in a scheme". All three of the Scottish approved tenancy deposit schemes indicated that the deposit was not held by them. The Applicant also made enquiries with Belvoir Lettings and indicated that she had been advised by them that the Respondents Mr and Mrs Nicholson had her deposit. When she had queried this with the Respondents they were clear that they did not have the deposit. Ultimately the Applicant advised that she required to raise civil proceedings with the First Tier Tribunal to have her deposit returned to her and she advised that during that process she discovered that her deposit had remained with Belvoir Lettings throughout her entire tenancy and had never been paid into a deposit scheme. The Applicant accepted that the Respondents had been helpful to her in recovering the deposit from Belvoir Lettings. She had recovered the deposit in full.

The Tribunal did not have sight of any material from a previous application to the First Tier Tribunal before or during the case management discussion.

The Respondent Mrs Nicholson was adamant at the case management discussion that the Respondents were not responsible for the failure to pay the deposit into an approved Scheme and queried how landlords could be in breach of the regulations when the deposit had been taken by an agent and not properly dealt with by them. The Regulations were explained to the Respondent Mrs Lesley Nicholson and the fact that these imposed a duty which was one of strict liability on a landlord. Mrs Nicholson confirmed that Belvoir Lettings were acting as agent for Mr and Mrs Nicholson as landlords when the first tenancy agreement was signed and the deposit was taken. This was clearly stated within the first tenancy agreement.
The Tribunal raised the possibility that Mrs Nicholson might wish to take legal advice on the matter but she felt that this would not be of any assistance and agreed that she would abide by the decision of the Tribunal.

The Tribunal considered the terms of the Regulations and was satisfied that it had sufficient information to determine the matter at this stage and that the procedure was fair.

The Tribunal indicated that it was of the view that the Regulations had been breached in that the Landlords Mrs and Mrs Nicholson had failed to ensure that the deposit had been paid into an approved deposit scheme, a matter of strict liability which did not require actual negligence or intention on their part. Whilst they had not received the deposit their agent had and was authorised to receive it by them.

The Tribunal was also of the view that the application should be dismissed as it related to Jordan Holgate given that it was agreed he was not a landlord for this tenancy.

In considering the amount of any sanction on the two remaining Respondents the Applicant accepted that she had been under the impression that the deposit had been secured in an approved scheme for almost the entire tenancy, a period of almost three years. This she said had been due to the actings of Belvoir Lettings and the Respondents Mr and Mrs Nicholson who could have acted to " nip things in the bud" early on when they had the chance to move the deposit in December 2019 when this was offered by Belvoir Lettings by e mail. She felt the Respondents could have done more at the start and it was fortunate that she had been able to secure the return of her deposit at all. She pointed to the time, energy and stress the whole process had involved and felt this should be considered in the amount of any sanction.

For the remaining Respondents Mr and Mrs Nicholson, Mrs Nicholson asked that the Tribunal consider how the failure had happened and pointed to the fact that although they have rental property in England where deposits are protected, this was their first rental in Scotland and they had chosen a " well known name on the High Street" to manage the tenancy and had trusted them when they said that the deposit had been paid into an approved scheme. She indicated that she and Mr Nicholson had not thought it necessary to move the deposit around the time this was offered by Belvoir Lettings as they believed it was already protected in a scheme, having been told this

by phone by the member of staff they dealt with at Belvoir Lettings. They too had been under that impression that the deposit was safely in a scheme until they learned towards the end of the tenancy from the Applicant that it was being suggested that they (Mr and Mrs Nicholson) had the deposit. Mrs Nicholson also indicated that the property has been re let and the deposit taken was within an approved scheme.

The Tribunal found the following facts to be agreed or established:

1.The parties Andrew and Lesley Nicholson and the Applicant Victoria Bassett-Smith entered into a tenancy agreement commencing 1st December 2016.
2.This agreement was drawn up and signed by Belvoir Lettings of Perth as agents on behalf of the Landlords.
3.The Applicant paid a deposit of £1650 and received a receipt for this deposit from Belvoir Lettings which indicated the deposit was held by them from 11th November 2016.
4.The Applicant also received a typed document from Belvoir Lettings which she signed on 2nd December 2016 which appeared to suggest that the deposit had been protected by payment into an approved tenancy deposit scheme with effect from 1st December 2016.
5.The Respondents Andrew and Lesley Nicholson ended their management agreement with Belvoir Lettings in December 2016 and asked for the deposit paid by the Applicant to be returned to them.
6.By email of 16th December 2016 a member of staff at Belvoir Lettings indicated that the deposit could not be returned to them and asked the Nicholsons to give their deposit scheme details and the deposit would be moved accordingly.
7.In a phone call after this email exchange on 16th December 2016, the Respondent Andrew Nicholson was advised by a staff member at Belvoir Lettings that the deposit was already in a tenancy deposit scheme.
8.Mr and Mrs Nicholson accepted this information and on 23rd December 2016 advised the Applicant that the deposit was already in a tenancy deposit scheme and would be left there.
9.The Landlords Mr and Mrs Nicholson drew up a new tenancy agreement which was signed in January 2017.
10.There was one continuing tenancy between the Applicant and Mr Andrew and Mrs Lesley Nicholson between 1st December 2016 and 30 November 2019.

11.The Respondent Jordan Holbrook had no dealings with this tenancy and is not a named landlord on either tenancy agreement.

12. The deposit was not protected for the duration of the tenancy.

13.Both the Applicant and the Respondents Mr and Mrs Nicholson believed the deposit had been protected by payment into a scheme until around October 2019 when the Applicant made enquiries as to its whereabouts.

14.The Applicant received her deposit back in full but only after she raised civil proceedings at the First Tier Tribunal.

15.The Respondents have other rented properties where deposits are protected but these are in England.This tenancy was the first time they had leased property in Scotland and this was the reason they engaged a firm to manage the tenancy for them.

Reasons for Decision

The Tribunal was satisfied that the Respondents Mr and Mrs Nicholson had failed to comply with their duty under Regulation 3 of the Regulations to ensure that the deposit, paid to them by means of their agent was paid into an approved deposit scheme within 30 working days of the start of the tenancy.

The Tribunal required to consider what award should be made in respect of the failure to protect the deposit. The Tribunal had regard to the case of ***Russell-Smith and Others v Uchegbu [2016] SC EDIN 64.***In particular the Tribunal considered what was a fair, proportionate and just sanction in the circumstances of the case, always having regard to the purpose of the Regulations and the gravity of the breach. Each case will depend upon its own facts and at the end of the day the exercise by the Tribunal of its judicial discretion is a balancing exercise.

The Tribunal weighed all of the factors and found it to be of significance that the deposit was unprotected for the entire length of the tenancy and also the circumstances under which this had occurred. Both parties at the case management discussion gave their accounts in an open and transparent fashion and the facts around the issue were not in dispute. It is not uncommon for the Tribunal to encounter an application under the Regulations where an agent perhaps in error, fails to protect a deposit by paying it into a deposit scheme, but it is not so common to encounter a case where both parties are under the impression that the deposit is protected and that impression appears to be gained at least in part through the actions of the landlord's agent. I accepted without hesitation that the Nicholsons had genuinely believed that their former agents had paid the deposit into a scheme and this had influenced them when they were offered the chance to move the money and did not take this, believing that it was pointless to move it from one scheme to another when it was already protected. The Applicant argued that they could have done more and " nipped the matter in the bud " at the start. It is fair to say that perhaps it was unwise of the Nicholsons not to ask for proof of payment of the deposit into a scheme as this should have been readily available had this been done, in the form of a certificate from the approved scheme. This is particularly the case when the Management Agreement between the Nicholsons and Belvoir Lettings had been terminated, parties appearing to be on bad terms (from the e mails seen by the Tribunal) and there was no legal relationship still existing between them at that time. The issue of the deposit was always going to arise at the end of the tenancy and landlords should always know where a deposit is being kept.

Other factors to be weighed in the balance here are that the Nicholsons have other rental properties where deposits are protected but never having previously rented out a property in Scotland they sought assistance to deal with this tenancy.In addition the property has been re let and the deposit now taken is within an approved scheme. It

was also accepted by the Applicant that she had received assistance from Mrs Nicholson in retrieving the deposit.
The Tribunal accepted that the Applicant had acted correctly throughout and had been put to considerable time, trouble and stress by the whole process she had required to undertake to trace her deposit and recover it, albeit she was assisted in its recovery by the Respondent Mrs Nicholson who attended at the Tribunal proceedings in respect of the deposit. Nevertheless the Regulations do not allow for compensation to an Applicant and that is not their purpose. The purpose of the Regulations is to sanction landlords who breach their duties under the Regulations.

In all of the circumstances the Tribunal found the breach to be at the lower end of the scale in what are unusual circumstances and accordingly determined that the sanction should be £400 in the particular facts and circumstances of this case.

Decision

The Tribunal determined that the Application as it relates to Jordan Holgate should be dismissed and makes an order for payment of the sum of £400 by the Respondents Mr Andrew and Mrs Lesley Nicholson to the Applicant in terms of Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations").

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.

Valerie Bremner
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Legal Member/Chair

16 July 2020
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Date