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/22/0251

Re: Property at 7/6 23 Oswald street, Glasgow, G1 4PE ("the Property")

Parties:

Ms Jennifer Booth, 7/6 23 Oswald street, Glasgow, G1 4PE ("the Applicant")

Mr Kieran Gallagher, 11 Flynn Gardens, Stepps, Glasgow, G33 6NZ ("the Respondent")

Tribunal Member:

Melanie Barbour (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and it would make an order for payment of £500.00 in favour of the Applicant.

Background and Discussion

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 103 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 ("the 2017 Rules") seeking an order against the landlord failure to lodge a tenancy deposit.

2. The application contained:-

    a. Tenancy agreement;

b. advice that the tenancy had not ended;
c. Evidence from approved deposit schemes that they held no deposit for the property; and
d. Evidence of payment of the deposit.

3. The matter proceeded to a case management hearing on 3 May 2022, where the applicant and the respondent's representative both appeared. Reference is made to the terms of the case management note, the main terms of which are set out as follows:-

    a. The Respondent lodged written representations prior to the case management discussion. The Applicant had had sight of the written representations.

    b. The applicant advised that she noted that the respondent was not disputing that the deposit had not been paid into a scheme. She agreed the deposit was now in an approved scheme. She had read the respondent's written submission and she did not agree with parts of it, in particular she did not agree that the case was analogous with the tribunal decision of *Watt v Morrell*. In present case, she did not consider that Mr Gallagher was naïve about a landlord's duties.

    c. She advised that Mr Gallagher had been in business for 30 years and she thought his line of work was relevant to property management. She advised that he has several properties that he rents out (and she did not believe that he only had two). She advised that she has written proof that he has more than two as he mentioned "*all his properties*" in correspondence to her. She advised that the respondent had told her verbally that he had more properties; and he had initially sent a lease over to her with the name of a different individual on it, so it appeared that he had rented out properties before she became a tenant.

    d. She confirmed that the deposit had now been paid into an approved scheme, this was around the beginning of February 2022. The landlord had contacted her on 25 January 2022 to advise that he was going to instruct letting agents to deal with his properties and therefore he would return her deposit to her and then she should pay it to the letting agents. This had all been done.

    e. She confirmed that she had not contacted the landlord to request her deposit back, he had approached her in January 2022 to advise that he was moving matters to a letting agent; and he had raised the issue of the deposit being repaid to her, in order that she could then pay it to the letting agent.

    f. She advised that her relationship with the landlord had broken down over the heating system. She advised that it was her position that the heating system was not working property and taking too much money for heating, she has instructed a report which supported her position; the landlord had had prepared a report which stated the hearting system

was working properly. The parties were not in agreement over this matter.

g. She advised that she had calculated how much she thought she was being overcharged for her energy bills, and she had deducted money from her rent over a three month period to cover this. She advised that she is currently paying all of her rent. It was not clear why she decided to deduct some rent for three months in relation to the alleged faulty heating system but was now paying full rent, when the issue over the heating system did not appear to have been resolved.

h. She advised that the landlord had been reasonable with her over some unpaid rent over lockdown; she had paid that back.

i. She advised that the respondent was a businessman and worked for 30 years in a company dealing with insurance and assessment.

j. The respondent's representative advised that his client's position was as set out in the written submissions lodged. He advised that the respondent's position was that he had been unaware that there was a requirement to lodge a deposit with an approved deposit scheme. He only became aware of this when he had appointed letting agents. The deposit was then paid back to the applicant; and he noted that this had been done prior to these proceedings being raised by the applicant.

k. He noted that regulation 10 of the tenancy deposit regulations imposed strict liability, and an order would have to be made given that there had been a breach by the respondent. Matters relating to mitigation were set out in the written submission.

l. He advised that the respondent disputed that the applicant was entitled to withhold the rent due to an alleged faulty electrical system; that the respondent advised that he only has one other property which he rented out; that the respondent is a loss adjuster and therefore has no particular experience in dealing with landlord and tenant matters. The landlord had resided in the property until 2019, when he then let it out to the applicant. He has one other property, which the representative believed had been purchased in around 2020. The deposit for that second property had also been lodged with an approved scheme at the same time as the one lodged for this property.

m. I noted that the respondent had asked for the rent arrears to be off-set against any order. I advised that this was not competent in these proceedings, however the respondent could make an application to the approved deposit scheme to seek recovery of the rent arrears; or make a civil application to the tribunal and ask to have the application conjoined with this one. I also suggested that consideration could be given to mediation through the tribunal, between the parties, if the question of the heating system had not been resolved. The respondent's

representative advised that he would require to take his client's instructions on further procedure to be sought.

n. Given that certain matters relating to mitigation are in dispute, I will require to send this case to a hearing. I will issue direction to regulate the procedure at the forthcoming hearing.

o. Further, as the respondent's agents requires to take instructions on any further procedure to be adopted in relation to the rent arrears, I will also fix a further case management hearing in order, for him to confirm if a civil application is to be brought to the tribunal and if they wish to have it conjoined with this application. I suggested that the case management discussion may not have to call. I would ask that the representative confirm by email what further procedure his client seeks to adopt; and it may be possible to deal with the matters procedurally and if need be issue a direction to confirm any other procedure issues.

4. On 10 May 2022 the respondent's representative emailed the tribunal office to advise that:-

   a. the Respondent did not wish to raise proceedings for the recovery of the rent arrears at this time. The Respondent therefore asked for the submission regarding offsetting of arrears to be disregarded in the Tribunal's decision.

   b. other than 7/6, 23 Oswald Street, he only owned one other rental property; which had been purchased in 2012.

   c. the Respondent was content for the matter to be decided upon the information provided to the tribunal.

   d. That he confirmed that he accepted that an order must be made against him and he has no further information to submit in mitigation other than that already before the tribunal.

5. On 13 May 2022 the applicant emailed the tribunal office to advise:-

   a. That she was happy to go ahead to a Tribunal decision without a hearing.

   b. She felt strongly that the possible motivation of the landlord, in retracting his attempt at mitigation through naivety, was recognised.

   c. The landlord's potential realisation that actually the so-called arears are justified payments, taken as part of the costs incurred due to the proven dysfunctional water heating system in his property.

   d. She asked that her correspondence be taken into account by the Tribunal in their decision.

e. She asked that consideration be given to the intense stress I have faced for two years, enduring his written insults and threats to evict us.

FINDINGS IN FACT

6. The Tribunal made the following findings in fact:-

   a. The Respondent was the landlord, and the Applicant was the tenant.

   b. The Applicant had paid the Respondent a tenancy deposit on around 10 January 2020 totalling £1000.

   c. That the tenancy commenced on 10 January 2020.

   d. On around January 2022 the respondent had advised that applicant that he was going to use a letting agent.

   e. On around 28 January 2022 the respondent repaid the applicant her deposit.

   f. On around 28 January 2022 the applicant paid the deposit to the respondent's letting agent.

   g. That on 3 February 2022 the applicant's deposit was secured with a tenancy deposit scheme.

   h. The tenancy deposit had not been lodged with an approved tenancy deposit scheme within 30 working days of the tenancy commencing.

   i. The tenancy was ongoing.

Decision

7. The Tenancy Deposit Schemes (Scotland) Regulations 2011 set out a number of legal requirements in relation to the holding of deposits, and relevant to this case are the following regulations:-

   Duties in relation to tenancy deposits
   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.

   Sanctions
   9.— (1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal] 1 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 […]2 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] 1 — (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] 1 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.

8. The Respondent accepted that the deposit had not been paid into an approved scheme in accordance with the terms of the regulations. Therefore, the terms of regulation 10 are engaged, and the tribunal must order that the Respondent pay the Applicant an amount not exceeding three times the amount of their tenancy deposit. The amount to be paid requires to be determined according to the circumstances of the case, the more serious the breach of the regulations the greater the penalty.

9. In this case, I consider that a sum of £500.00 would be appropriate. While there has been a breach of the regulations, I consider that it is at the lower end of the scale in terms of seriousness albeit it is not trivial.

10. In considering what penalty to impose, I have had regard to the verbal and written submissions of both parties.

11. The details of the matter was discussed at the case management discussion. There was some dispute over the number of properties that the respondent rents out, but the applicant now appears to accept the respondent's position that he rents out one further property.

12. I note that the respondent has been renting a property for around 10 years. Given this he should have been aware of the tenancy deposit regulations for a number of years. Further, the applicant's deposit was not protected until the beginning of February 2022. The regulations impose a legal requirement to ensure that a deposit is secured in a scheme within 30 working days of the tenancy commencing and in this case the deposit had not been secured for two years which is not a short period of time.

13. It did not appear however that the respondent had any intention of retaining the deposit improperly and it had been the respondent who had contacted the applicant to address the issue of putting the deposit into an approved scheme. I also note that the respondent indicated that he had paid some of the deposit back when the applicant had been struggling with rent payments. The deposit has been secured in a letting deposit scheme since February 2022.

14. While the applicant asks that I consider the issues over the alleged faulty heating system and the stress that she has endured from the landlord over the last two years. I would note that neither of these two issues are related to the deposit itself and I do not consider them to be wholly relevant to the application before me other than as further information as to the type of landlord that the Respondent is. It appeared to me that although there had been issues with the heating system, the respondent had on other occasions been a reasonable landlord, for example when the applicant had struggled to pay the rent during the covid pandemic.

15. I have to impose a penalty as there has been a breach and given that the deposit was unsecured for two years and the landlord had been a landlord for over 10 years I do not find it to be a trivial breach, but I do also consider that there are mitigating circumstances, particularly that the deposit is now secured and it was secured without any intervention from the applicant. I consider that the penalty should be £500 around one half of one month's rent.

16. As the parties have agreed that the matter could be determined on the papers and submission made, I shall cancel the case management discussion fixed for 24 June 2022.

Decision

17. The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that there had been a breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and it would make an order for payment of £500.00 in favour of the Applicant.

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.

M. B

5 June 2022

Legal Member **Date**