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 Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/21/3091

Re: Property at 9 Millstream Court, Paisley, PA1 1RG ("the Property")

Parties:

Mr Obiora Umerah, Oluoma Michael, 40 Aberfeldy Avenue, Blantyre, Glasgow, G72 0TB ("the Applicant")

Robert Edgar, 21 Brownside Drive, Barrhead, G78 1HN ("the Respondent")

Tribunal Members:

Jim Bauld (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should be ordered to make payment to the Applicant of the sum of ONE THOUSAND TWO HUNDRED POUNDS (£1,200)

Background

1. By application dated 9 December 2021, the applicant sought an order in terms of Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations") in respect of an alleged failure by the respondent to comply with those regulations..

2. On 6 January 2022, the application was accepted by the Tribunal and referred for determination by the tribunal.

3. A Case Management Discussion (CMD) was set to take place on 1 April 2022 and appropriate intimation of that hearing was given to all parties

The Case Management Discussion

4. The Case Management Discussion (CMD) took place on 11 March 2022 .The first named applicant, Mr Obiora Umerah, attended personally. The respondent also attended personally

5. The tribunal explained the purpose of the CMD and the powers available to the tribunal to determine matters. The tribunal asked various questions with regard to the application.

6. The tribunal explained to the parties the maximum award which could be made in terms of the 2011 Regulations

7. The tribunal indicated that it would be entitled to utilise the power within regulation 17 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 ("the tribunal rules") and that the tribunal could make a final decision at the case management discussion without remitting the matter to a further full hearing.

8. The tribunal noted that the respondent had lodged a written submission. In the submission he conceded that as a landlord he had failed to comply with his obligations in terms of the 2011 Regulations. He stated that he was until recently unaware of the mandatory nature of the requirements. He believed that the existence of the tenancy deposit scheme was an option for landlords and tenants to use. He claimed that the deposit had been retained in a separate bank account but no evidence of that was produced to the tribunal.

9. The deposit has not been returned to the tenant and that this is subject to a separate application under tribunal reference number FTS/HPC/PR/21/3090. The landlord has retained the entire deposit claiming it was needed to cover damage caused by the tenant.

10. The applicant indicated to the tribunal that when the deposit was paid to the landlord, the landlord stated that he would place it into a tenancy deposit scheme. The landlord did not accept that he had said this to the applicant

11. During the course of the CMD the tribunal enquired whether parties had attempted to resolve this application by negotiation and discussions leading to an agreed settlement.

12. The parties indicated they had not done so.

13. The landlord accordingly made an offer during the course of the CMD of the sum of £600 to settle both this case and the linked case in which the applicant sought return of the deposit itself. This offer was rejected by the applicant who indicated that to resolve both cases on a mutually agreed basis he would be looking for the sum of £2000.

14. There was further discussion between the tribunal member and the parties with regard to further procedure. It was initially suggested to the parties that the tribunal could fix a hearing at which further evidence could be led both in respect of this matter and the linked matter relating to the return of the deposit.

15. The parties seemed reluctant to have a further hearing fixed and indicated they would prefer the tribunal to proceed to make a decision at the case management discussion.

16. The tribunal member thereafter attempted again to see whether there was any scope for resolution between the parties. At that point the applicant indicated he would accept £1800 in settlement of both cases. The respondent indicated he was not willing to pay that sum.

17. The tribunal then drew attention to the parties of the various decisions which have been made by the tribunal in similar cases. The tribunal indicated to the parties that the likely sum to be awarded in respect of this matter alone would probably not be at the maximum possible award. The tribunal however also indicated that the likely award would be in excess of the amount offered by the respondent. Again parties were asked whether they wish to have some time to discuss matters privately but they declined to do so. They indicated they were content for the tribunal to determine matters

Findings in fact

18. A tenancy agreement was entered into between the parties which commenced on 27 October 2017

19. A deposit of £600 was taken by the respondent

20. The deposit was never paid into an approved tenancy deposit scheme

21. The tenancy ended on 27 October 2021

22. The deposit has never been was repaid by the respondent to the applicant

Decision

23. This application related to the failure of the Respondent to place a tenancy deposit within an approved tenancy deposit scheme. Landlords have been required since the introduction of the 2011 Regulations to pay tenancy deposits into an approved scheme within 30 working days of the commencement of the tenancy. In this case it was accepted by the Landlord that he had failed to do so. Accordingly he was in breach of the duties contained in Regulation 3 of the 2011 Regulations. Those duties are twofold. There is a requirement to pay the deposit to a scheme administrator and the requirement to provide a Tenant with specified information regarding the tenancy deposit. The Respondent failed in both duties.

24. Regulation 9 of the 2011 Regulations indicates that if a Landlord does not comply with any duty in regulation 3 then the Tribunal must order that a Landlord makes payment to the Tenant of an amount "not exceeding three times the amount of the tenancy deposit".

25. Accordingly in this case the Tribunal is required to make an order for payment. The only matter to be determined by the Tribunal is the amount of the payment.

26. In this case the Tribunal carefully considered the evidence which had been produced by the applicant. There was clear evidence that the respondent had failed to pay the tenancy deposit into the appropriate scheme for the whole period of the tenancy (a period of four years). The deposit has never been lodged in accordance with the requirements of the 2011 Regulations.

27. The Tribunal noted that in an Upper Tribunal decision (reference 2019 UK 39 UTS/AP/19/0023) that Sheriff David Bickett sitting on the Upper Tribunal had indicated that it was appropriate for the Tribunal to differentiate between Landlords who have numerous properties and run a business of letting properties as such, and a Landlord who has one property which they own and let out. The Sheriff indicated in the decision that it would be "inappropriate" to impose similar penalties on two such Landlords. In this case the respondent advised the tribunal that he was a landlord who had more than one property available for rent. He had been a landlord for more than six years.

28. Prior to the jurisdiction to determine these applications becoming part of the jurisdiction of the First-tier Tribunal, the applications were determined in the Sheriff Court. There were numerous Sheriff Court decisions which have been reported.

29. In many of these cases, the Sheriff Courts have indicated that the Regulations were introduced to address what was a perceived mischief and that they will be meaningless if not enforced.

30. In a decision by Sheriff Principal Stephen at Edinburgh Sheriff Court in December 2013, the Sheriff Principal indicated that the court was "entitled to

impose any penalty including the maximum to promote compliance with Regulations". (Stuart Russell and Laura Clark v. Samdup Tenzin 2014 Hous.L.R. 17)

31. The Regulations were introduced to safeguard deposits paid by Tenants. They were introduced against a background of Landlords abusing their position as the holder of deposit moneys. The parliament decided that it should be compulsory to put the deposit outwith the reach of both the Landlord and the Tenant to ensure that there was a dispute resolution process accessible to both Landlord and Tenant at the end of a tenancy and which placed them on an equal footing. The Regulations make it clear that the orders to be made by Tribunals for failure to comply with the Regulations are a sanction or a penalty.

32. In this case, the Respondent was in clear and blatant breach of the 2011 Regulations. The tribunal considered whether it should make an award at the maximum range. The respondent had attended the CMD but had failed to provide any proper mitigation of his failure to lodge the deposit in accordance with the Regulations. His position was that he was "somewhat aware" of the 2011 Regulations but was not aware that they were compulsory in requiring deposits to be lodged with an approved scheme. he provided no reason or explanation for his lack of further enquiry into the provisions of the 2011 Regulations. The tribunal also noted the suggestion made by the applicant that the respondent indicated when taking the deposit that he would place it into an appropriate scheme. This was denied by the respondent. The tribunal notes that parties do not agree on this issue. No matter which version is correct, the landlord's failure to lodge the deposit is seriously culpable.

33. The tribunal accordingly considered that this was a significant breach of the regulations which required to attract a penalty towards the higher end of the available range. No proper explanation or mitigation had been offered to the tribunal by the landlord. It appeared he had simply ignored the provisions of the Regulations.

34. The tribunal was not persuaded that the award should be made at the maximum level available to the tribunal which based on the deposit being £600 would have been £1,800. The tribunal took the view that the appropriate award should be £1,200 being twice the deposit.

35. The tribunal also exercised the power within rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 and determined that a final order should be made at the CMD.

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.

J Bauld

_____ _____1 April 2022_____

Legal Member/Chair **Date**