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 regulations 3 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/18/3433

Re: Schoolcroft, Dorbshill, Ellon, AB41 8HG ("the property")

Parties:

Miss Sarah Pickles, 15 Conglass Court, Inverurie, AB51 4LA ("the applicant")

Mr Phillip Simpson, Hemmingway, Pitfour, Mintlaw, Aberdeenshire ("the respondent")

Tribunal Member:

Adrian Stalker (Legal Member)

Decision

The Tribunal determined the respondent did not comply with regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and under regulation 10, orders that the respondent pays the applicant the sum of £300 in respect of that failure.

Background

1. This is an application under rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Procedure Regulations"), in which the applicant, being a former joint tenant of the property, seeks an order against the respondent, under regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

2. A case management discussion ("CMD") took place on 28 March 2019 at the Credo Centre, 14-20 John Street, Aberdeen. The applicant, Miss Pickles, was in attendance. The respondent's solicitor, Aaron Doran, of Messrs Raeburn, Christie, Clark & Wallace, attended on behalf of the respondent.

3. At the same hearing, the Tribunal also heard a CMD in relation to application FTS/HPC/CV/18/3281, being claim for damages and rent arrears made by the respondent against the applicant and Mr Leigh Inglis. A separate note has been issued in relation to the CMD in that case.

4. Both claims arise from a tenancy of the property between the respondent (as landlord) and the applicant and Mr Leigh Inglis, as the joint tenants.

5. The Tribunal received a letter dated 19 March from Mr Doran's firm, attaching written "Representations in Response to Application" on behalf of the respondent, and copies of authorities. This material was also intimated to the applicant. The letter of 19 March expressly accepts that the respondent is in breach of regulation 3 of the 2011 Regulations, and that it is therefore necessary for the Tribunal make an order for the respondent to pay to the applicant an amount not exceeding three times the amount of the tenancy deposit.

6. The letter of 19 March also suggested that there was no significant factual dispute between the parties in relation to application FTS/HPC/PR/18/3433, and that the Tribunal could determine the case at the CMD without the necessity of fixing any further hearing.

7. By email dated 21 March, the applicant responded with a letter which identified those parts of the "Representations in Response to Application" with which she disagreed.

The CMD

8. The Tribunal explained to the parties the purpose of a CMD under regulation 17 of the Procedure Regulations. In particular, it explained that under rule 17(4), "The

First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision." Both parties were content for the Tribunal to make a decision on this application following the CMD, without the necessity for a further hearing.

9. The Tribunal also confirmed that, although the applicant and Mr Inglis (both of whom were present) had been joint tenants of the property, the application ran in the name of the applicant alone. The applicant and Mr Inglis are still cohabitees. The Tribunal explained that, in the event that an award was made in the applicant's favour under the regulations, it would be for her to settle up with Mr Inglis for his share of the award. All present accepted and understood this.

10. Mr Doran had a written submission, copies of which were provided to the Tribunal and the applicant. This expanded upon the "Representations in Response to Application" and specified the relevant points in the four authorities which had been attached to his letter of 19 March: *Jenson v Fappiano 2015 G.W.D. 4-89*, *Kirk v Singh* 2015 SLT (Sh Ct) 111, *Cooper v Marriott* 2016 SLT (Sh Ct) 99; and *Russell-Smith v Uchegbu* 2016 GWD 31-553.

Facts

11. In this case, the circumstances giving rise to non-payment of the deposit into an approved scheme were somewhat unusual.

12. On or about 12 May 2017, the applicant and Mr Inglis paid the respondent's letting agents, Aberdeenshire Leasing, £200 to secure the property. This was to be a part payment toward the full deposit of £1,100.

13. On 9 June, the parties entered into a Short Assured Tenancy Agreement, with entry on that date. In terms of Clause 7 of the Lease Agreement, the tenants were obliged "on or before the date of entry…[to] pay a deposit of £1,100 in cleared funds to the Landlord."

14. However, at that time the applicant and Mr Inglis did not have sufficient funds to

pay the remaining £900 due in respect of the deposit. In recognition of their difficulty in doing so, the respondent agreed to allow the applicant and Mr Inglis to take entry on 9 June, but to defer payment of the remaining £900 until 9 July.

15. The applicant and Mr Inglis did not make payment of the £900 on 9 July. On 14 July, being mindful of the time limit for payment of a deposit into an approved scheme, and being concerned that he would be in breach of the 2011 regulations, the respondent paid the outstanding £900 to Aberdeenshire Leasing himself. He instructed Aberdeenshire Leasing to pay the deposit to Safe Deposits Scotland. On 19 July, the outstanding £900 was then paid by the applicant and Mr Inglis, with the result that the deposit had then been entirely paid by them.

16. Unfortunately, due to an error on the part of Aberdeenshire Leasing, they only paid the sum of £900 to Safe Deposits Scotland on 14 July, rather than the full £1,100. This meant that £200 of the deposit was not protected. The error was not discovered until October 2018. On 17 October 2018, the balance of the deposit was lodged with Safe Deposits Scotland, about 15 months after the deposit was fully paid by the applicant and Mr Inglis.

17. Mr Doran advised the Tribunal that Aberdeenshire Leasing accepted full responsibility for the error, which was not due to any fault on the part of the respondent.

18. These circumstances were not disputed by the applicant and Mr Inglis. However, the applicant indicated that they had initially been advised, wrongly, by Aberdeenshire Leasing, that the problem was due to an error made by Safe Deposits Scotland when they were updating their system. The applicant described this as an attempt at a “cover-up”.

Sanction

19. Mr Doran sought to emphasise the following mitigating factors.

- The respondent's failure was not one of wilful default. There is no suggestion that

there has been repeated and flagrant non-participation in, or non-compliance with the regulations.

- The respondent allowed the applicant to gain entry to the property before receipt of the full deposit. In an effort to assist the tenants and ensure compliance with the regulations, the respondent made payment of £900 himself. It was this unusual action that has caused the confusion within Aberdeenshire Leasing's procedures.
- Over 80% of the deposit was lodged with an approved scheme within the appropriate timescale. The balance of the deposit, being £200, was paid into an approved scheme at the earliest opportunity, following the respondent becoming aware of Aberdeenshire Leasing's failure. The respondent himself did not ignore or procrastinate in implementing his obligations.
- The outstanding £200 was, between July 2017 and October 2018, with the respondent's letting agents, and was never in any danger of being lost, or misused.
- Currently, the full deposit remains with Safe Deposits Scotland, pending resolution of the parties' other outstanding disputes. The applicant has not been deprived of the right to invoke the dispute resolution service provided.

20. For her part, the applicant emphasised: the failures of the respondent's agents Aberdeenshire Leasing, to comply with the regulations; their initial misinformation on the failure being discovered; and the necessity of the regulations being followed, lest the statutory protection of deposits is undermined.

Decision

21. The purpose of an application under regulation 9 of the 2011 regulation is for a monetary order which operates as a sanction on the landlord for non-compliance with the statutory scheme. That scheme is intended to provide enforceable protections to tenants against landlords failing to comply with the scheme.

22. In *Russell-Smith v Uchegbu* Sheriff Welsh said (at paragraphs 7 and 8):

> In my opinion in assessing the level of sanction the function of the court is to impose 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…
> Every case will depend on its own specific facts and at the end of the day the exercise of a judicial discretion is a balancing exercise.

23. In the view of the Tribunal, the mitigating factors relied upon by the respondent are, in this case, unusually strong.

24. The respondent's conduct in the matter (which is not disputed) indicates that he took every reasonable step to ensure that he complied with the 2011 Regulations. He went to the lengths of paying £900 of his own money, so that the total deposit of £1,100 was paid Safe Deposits Scotland within the time limit imposed by the regulations. The fault lay with his agents, to whom he entrusted the steps which required to be taken, to comply with his obligations.

25. The applicant expressed concern as to the information provided by Aberdeenshire Leasing, when the underpayment was discovered. However, the Tribunal was satisfied, on a balance of probabilities, that the underpayment was due to an administrative error, rather than any attempt to avoid the 2011 Regulations. That error was promptly remedied, when it came to light. In the circumstances, the applicant and Mr Inglis were not prejudiced by the delay in payment.

26. Furthermore, only a fraction (less than 20%) of the deposit was unprotected.

27. In these circumstances, the Tribunal considers that a fair, proportionate and just sanction should be very much at the low end of the range. It has decided on a figure of £300, which is 1.5 times the amount which was unprotected.

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.

Mr Adrian Stalker

Signed

Date 30 April 2019