Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules)'in relation to an application for payment where a landlord has not paid the deposit into an approved scheme in terms of Rule 103 of the Procedure Rules.

Chamber Ref: FTS/HPC/PR/24/0380

Re: 8 Dunellan Gardens, Moodiesburn, Glasgow, G69 0GE ("the Property")

Parties:

Dominic Quilty and Ms Laura Reid, 32 Woodhead Place, Westfield, Cumbernauld, Glasgow, G68 9DA ("the Applicants")

Andrew Sharpe and Mrs Danielle Sharpe, 2 Dunellan Gardens, Moodiesburn, Glasgow, G69 0GE ("the Respondents")

Tribunal Member: Jacqui Taylor (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should pay the Applicants the sum of £625 by way of sanction under Regulation 10 1(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011, as amended by the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017.

1. Background

The Applicants submitted an application to the Tribunal for payment where a landlord has not paid the deposit into an approved scheme in terms of Rule 103 of the Procedure Rules, which application was dated 19th and 25th January 2024 and was in the following terms:
'We rented the Property 8 Dunellan Gardens, Moodiesburn, Glasgow, G69 0GE from 11th January 2011 to 4th November 2023. Our deposit of £625 was not protected by the landlords until we challenged them after we received notice to quit in July 2022. We are asking the Tribunal for an order for a financial payment of up to 3 times the deposit to reflect the Landlords egregious failure to protect the deposit for 11 years and 8 months.'

2. Documents lodged with the Tribunal with the Application

Documents lodged with the Tribunal by the Applicants were:
2.1 A copy of the undated Tenancy Agreement (the heading of which states Assured Shorthold Tenancy Agreement) between the parties which states that the term of the tenancy was 1st July 2021 to 1st July 2022.
2.2 A copy of the Deposit Protection Certificate by MyDeposits Scotland which stated that the start date of the tenancy was 11th January 2011, the deposit was collected from the tenant on 11th January 2011 and the deposit had been received by MyDeposits Scotland on 11th August 2022.
2.3 A tenant reference letter from Danielle Sharpe dated 27th July 2022 confirming that Dominic Quilty and Laura Reid had been tenants of the Property since January 2011.
2.4 A text message from MyDeposits Scotland confirming that the deposit of £625 in connection with the tenancy of the property 8 Dunellan Gardens, Moodiesburn was lodged with the scheme on 11th August 2022.

3. Notice of Acceptance.

By Notice of Acceptance by Josephine Bonnar, Convener of the Tribunal, dated 31st January 2024, she intimated that she had decided to refer the application (which application paperwork comprised documents received between 21st January 2024 to 25th January 2024) to a Tribunal.

4. The Case Management Discussion.

This case called for a conference call Case Management Discussion (CMD) Conference call at 14.00 on 8th May 2024.
Dominic Quilty, one of the Applicants attended. The Respondents also attended.

4.1 Preliminary Matters

The parties agreed the following facts, which were accepted by the Tribunal:

4.1.1The Applicants had been Tenants of the Property. The tenancy had started on 11th January 2011.

4.1.2 The Respondents had been the Landlords of the Property. They sold the Property in 2024.

4.1.3 Throughout the tenancy the parties had signed renewed leases each year.

4.1.4 The tenancy ended on 4th November 2023.

4.1.5 The rent had been £625 per month until 2021 when the rent had increased to £650 per month.

4.1.6The parties had used a Shorthold Tenancy template agreement to frame the lease.

4.1.7The Applicants paid the sum of £625 for the deposit to the Respondents on 11th January 2011, which date was before the 2011 Regulations came into force on 6th March 2011.

4.1.8 The Respondents had lodged the deposit with MyDeposits Scotland on 11th August 2022.

4.1.9 MyDeposits Scotland had adjudicated on the deposit at the end of the tenancy and had deducted £125 from the deposit which had been paid to the Respondents and £500 had been paid to the Applicants.

4.1.10 The Respondents did not lease any other properties.

4.2 Oral Representations by Mr Quilty:
Mr Quilty explained that he had started to lease the Property from Mr and Mrs Sharpe in January 2011. The fact that the deposit was unprotected only came to light when they received Notice to Quit in July 2022. The deposit should have been lodged with the tenancy deposit scheme at the start of the lease. It should have either been lodged with a tenancy deposit scheme or returned to him. In all of the circumstances he considers three times the deposit to be an excessive penalty. A reasonable penalty would be a payment of one and a half times the deposit (£937.50).

4.3 Oral Representations by Mrs Danielle Sharpe:
At the start of the tenancy she did not know the deposit should have been protected. She only found out about the tenancy deposit scheme when she took advice about selling the Property in 2022.
The Property is the only property they lease. They originally agreed to lease the Property to the Applicants as she worked with Laura Reid's mother. They did not use a Letting Agency. She did not know about the Association of Landlords when they started to lease out the Property.
As soon as she became aware that the deposit should have been protected she lodged the deposit with MyDeposits Scotland.
Throughout the lease the deposit had remained lodged in the Respondents Rental Royal Bank of Scotland account.
The tenants signed a lease agreement at the beginning of the tenancy in 2011 and thereafter the tenants signed a new lease agreement every year.
At the end of the tenancy in 2023 MyDeposits Scotland adjudicated on the deposit and determined that £125 of the deposit was due to the Respondents.
She wasn't sure of the date My Deposits Scotland became operational but as the lease was renewed annually throughout the tenancy she accepted that the deposit had been lodged with MyDeposits Scotland late.
She apologised and explained that she accepts responsibility for not lodging the deposit in a tenancy deposit scheme on time. She would agree to refunding the tenants the sum deducted from the deposit of £125 and considers that it would be reasonable to also pay them £325 for the inconvenience they have may have experienced in bringing the application to the Tribunal.

5. Decision.

5.1 The tenancy was a relevant tenancy for the purposes of the 2011 Regulations.
5.2 The tenancy ended on 3rd November 2023 and the Applicants sent their application to the Tribunal on 25th January 2024. The application had been made timeously.

5.3 The relevant sections of the Tenancy Deposit (Scotland) Regulations 2011 ('2011 Regulations'), as amended, provide:

Regulation 3.

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.

Regulation 10

10(1)If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal—

(a)must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit;

Regulation 47. Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force, regulation 3 applies with the modification that the tenancy deposit must be paid, and the information provided, within 30 working days of the date determined under paragraph (a) or (b)—

(a)where the tenancy is renewed, by express agreement or by the operation of tacit relocation, on a day that falls three months or more, but less than nine months, after the first day on which an approved scheme becomes operational, the date of that renewal;

(b)in any other case, the date which falls nine months after the first day on which an approved scheme becomes operational.

5.4 The 2011 Regulations came into force on 6th March 2011. The Applicants had paid the tenancy deposit to the Respondents on 11th January 2011, which date was before the 2011 Regulations came into force. MyDeposits Scotland was founded in 2012. Regulation 47(b) of the 2011 Regulations required the Respondents to pay the tenancy deposit into an approved tenancy deposit scheme within nine months and thirty working days of the date the approved tenancy deposit scheme became operational. The exact date that MyDeposits Scotland became operational is not

known. The Tribunal was mindful of the over riding objective to avoid delay and determined that it was not necessary to continue the Case Management Discussion to allow the parties to ascertain the exact date MyDeposits Scotland became operational. The Tribunal find that if MyDeposits Scotland had become operational on 31st December 2012 the latest date the deposit should have been lodged with the tenancy deposit scheme was 11th November 2013. However, it was reasonable to assume that MyDeposits Scotland became operational earlier during 2012. The deposit was lodged with MyDeposits Scotland on 11th August 2022. The Tribunal determined that the Respondents had not paid the deposit of £625 to the scheme administrator of an approved tenancy deposit scheme within thirty working days and nine months of the date MyDeposits Scotland became operational.

5.5 In assessing the level of sanction the Tribunal considered the parties representations and the following cases:-

5.5.1 Jenson v Fappiano 2015 G.W.D. 04-89
In this case a deposit of £1000 had not been lodged in an approved scheme for the period of more than a year. When a dispute arose the full deposit was paid into an approved scheme and became subject to an independent adjudication which found in favour of the tenant who received the deposit in full. The breach of the 2011 Regulations was admitted. Sheriff Welsh concluded that Regulation 10(a) set an upper limit but did not lead to the automatic triplication of the deposit as a sanction. Such an approach would negate meaningful judicial assessment. Judicial discretion had to be applied as constrained by settled equitable principles. In exercising his discretion by taking account of the relevant factors within the particular circumstances of the case a sanction equivalent to one third of the deposit was imposed.

5.5.2 Kirk v Singh 2015 SLT Sh Ct 111
In this case the Sheriff considered the whole circumstances and decided that whilst the defender's default could be characterised as serious it was not at the most serious end of the scale and it was also necessary to have regard to the mitigating circumstances advanced by the defender. Accordingly, in his opinion, the fair, proportionate and just sanction in that case, having regard to the maximum sanction available, was £500. The deposit in that case was £380.

5.5.3 Cooper v Marriot 2016 SLT (Sh Ct) 99
In this case the deposit had been held unprotected for two years and resulted in depriving the tenant of his right to invoke the dispute resolution service which would have been provided by an approved scheme. Sheriff Welsh found no mitigation. He considered the breach to show flagrant and wilful disregard of the terms and purposes of the Regulations and ordered payment equivalent to twice the deposit.

5.5.4 Rollett v Mackie UTS/AP/19.0020.
In this case Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a 'serious' breach will vary from case to case – it is the factual matrix, not the description, which is relevant." In analysing the "factual matrix" in that case, Sheriff

Ross noted that in assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability.

5.5.5 Ahmed v Russell 2023 S.L.T. (Tr) 33 FTS
In this case Sheriff Cruickshank found that the Tribunal should seek to assess a sanction that is "fair and proportionate" in all the circumstances, taking into account both aggravating and mitigating circumstances. The level of sanction should mark the gravity of the breach which has occurred. The purpose is not to compensate the tenant.

5.5.6 Bavaird v Simpson UTS/AP/23/0006
In this case Sheriff Jamieson found that ignorance of the Regulations is no excuse and cannot be a mitigating factor. The Tribunal are bound to take into account as an aggravating factor any deliberate intention on the part of a landlord to ignore the tenancy deposit scheme when the landlord had knowledge of the scheme but had deliberately chosen to flout the Regulations. The deposit had been unprotected throughout the tenancy but had been returned to the tenant at the end of the tenancy. Whilst the actual risk was relatively insignificant, as one of the purposes of the Regulations is to guard against any level of risk, moderate weight ought to be attached to this factor. Significant weight ought to be attached to the appellant's ignorance of the scheme over a prolonged period of five years as a landlord but significant weight also falls to be attached to the mitigating factors that the deposit was repaid in full immediately after the termination of the tenancy and the respondents suffered no loss or inconvenience as a consequence of the appellant's failure to comply with the Regulations. The maximum sanction he could have awarded was £6000 and he awarded £2500.

5.6 The Tribunal in assessing the sanction level has to impose a fair, proportionate and just sanction in the circumstances, always having regard to the purpose of the 2011 Regulations and the gravity of the breach.

5.7 The Tribunal found the following factors to be aggravating factors:

A moderate risk aggravating factor is that the deposit had been unprotected for a lengthy period of time, amounting to approximately ten years.

The Tribunal accepts that the actual risk was small given that the deposit was held by the Landlords in a separate bank account they used for the lease of the Property but as stated by Sheriff Jamieson in the Upper Tribunal decision Bavaird v Simpson referred to at paragraph 5.5.6 above one of the purposes of the Regulations is to guard against any level of risk and therefore determining this to be a moderate risk is appropriate for this factor.

5.8 The Tribunal found the following factors to be mitigating factors:

A small weight mitigating factor is that the tenancy deposit scheme had not been in existence at the start of the tenancy.

Medium weight mitigating factors are (i) that the Respondents had lodged the deposit in a separate rental account in their name throughout the tenancy. This is not a strong mitigating fact as the deposit was in an account registered in the name of the Landlords and it was not available to the Tenants. (ii) The fact that the Landlords accepted that they had made an error by not lodging the deposit with a tenancy deposit scheme timeously.

Strong weight mitigating facts are (i) that the Respondents had lodged the deposit with My Deposits Scotland when they became aware of the requirement to do so and that the Applicants had not been deprived of utilising the tenancy deposit dispute resolution service and (ii) the Tenants have not advised that they suffered any loss or inconvenience as a result of the deposit not being lodged in the tenancy deposit scheme timeously.

5.9 In the circumstances the Tribunal considers it to be fair, proportionate and just to sanction the Respondents for non compliance by awarding the Applicants a sum of £625 being the equivalent of one times the deposit.

5.10 The Tribunal orders the Respondent to pay the Applicant the sum of £625 by way of sanction under Regulation 10 1(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

6. 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.

Legal Member **8th May 2024**