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/18/1069

Re: Property at 0/2 346 Langside Road, Glasgow, G42 8XR ("the Property")

Parties:

Mr Andrew McNeill, 2/3, 6 Alexandra Gate, Glasgow, G31 3AY ("the Applicant")

Mr Paul Heneghan, C/O Edzell Property Management, 1008A Pollokshaws Road, Shawlands, Glasgow, G41 2HG ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that:- (i) the Respondent failed to comply with Regulations 3(1)(a) and (b) of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and (ii) that the sum of £395.00, being a sum equal to the tenancy deposit, was an appropriate sanction; THEREFORE the Tribunal orders that the Respondent make payment to the Applicant in the sum of £395.00.

FINDINGS IN FACT

The Tribunal makes the following findings in fact:-

a. The Respondent is the heritable proprietor of 0/2, 346 Langside Road, Glasgow, G42 8XR ("the Property");
b. The Applicant was the tenant of the Property under and in terms of a tenancy agreement between him and the Respondent dated 8 August 2018;
c. The tenancy commenced on 8 August 2018;
d. Edzell Property Management were the letting agent instructed by the Respondent;

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e. The Applicant paid a tenancy deposit totalling £395.00 to Edzell in two tranches; the first of approximately £200 in or around July 2017 and the balancing payment on 7 August 2018;
f. The tenancy deposit was paid by Edzell to Letting Protection Service Scotland ("LPSS"), an approved tenancy deposit scheme, on 3 October 2017 as part of a larger lump sum of multiple tenancy deposits;
g. The tenancy deposit was not allocated to the correct account at LPSS until 5 April 2018;
h. The Applicant received an email confirmation from LPSS on 6 April 2018 confirming that his tenancy deposit had been received and was protected. This was the first time that the Applicant had received the information prescribed by Regulation 42 of the Tenancy Deposit Schemes (Scotland) Regulations 2011;
i. The Property was damaged to the point of being uninhabitable by an escape of water from the flat above on or around 29 March 2018;
j. The tenancy came to an end on 29 March 2018; and
k. The tenancy deposit was repaid in full to the Applicant in or around June 2018.

FINDINGS IN FACT AND LAW

The Tribunal makes the following findings in fact and law:-

a. The Respondent failed to comply with Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011; and
b. The Respondent failed to comply with Regulation 3(1)(b) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

STATEMENT OF REASONS

1. In this application, the Applicant seeks an order under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"). He contends that the Respondent failed to make payment of a tenancy deposit paid by the Applicant to the Respondent's agents, Edzell Property Management, to the administrator of an approved tenancy deposit scheme within 30 working days of the beginning of the tenancy. He further contends that the Respondent failed to provide him with the information required under Regulation 42 of the Regulations within 30 working days of the beginning of the tenancy.

2. In terms of the Regulations:-

"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.
(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid

to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.
(3) A *"relevant tenancy"* for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—
(a) in respect of which the landlord is a relevant person; and
(b) by virtue of which a house is occupied by an unconnected person,
unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.
(4) In this regulation, the expressions *"relevant person"* and *"unconnected person"* have the meanings conferred by section 83(8) of the 2004 Act.

...

9.—

(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal 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 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 —
(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 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.

...

42.— Landlord's duty to provide information to the tenant

(1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).
(2) The information is—
(a) confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;
(b) the date on which the tenancy deposit was paid to the scheme administrator;
(c) the address of the property to which the tenancy deposit relates;
(d) a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;
(e) the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and
(f) the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.
(3) The information in paragraph (2) must be provided—
(a) where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or

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(b) in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme."

3. The case called before the Tribunal on 10 January 2019 for a Hearing. The Applicant appeared personally and presented his own case, giving evidence on his own behalf. The Respondent was represented at the Hearing by Mr Lovat of Edzell Property Management ("Edzell"). Mr Lovat also gave evidence on behalf of the Respondent. The Tribunal is grateful to both the Applicant and Mr Lovat for their helpful representations.

4. The following matters of fact were not in dispute:-

   a. The Respondent is the heritable proprietor of 0/2, 346 Langside Road, Glasgow, G42 8XR ("the Property");
   b. The Applicant was the tenant of the Property under and in terms of a tenancy agreement between him and the Respondent dated 8 August 2018;
   c. The tenancy commenced on 8 August 2018;
   d. Edzell Property Management were the letting agent instructed by the Respondent;
   e. The Applicant paid a tenancy deposit totalling £395.00 to Edzell in two tranches; the first of approximately £200 in or around July 2017 and the balancing payment on 7 August 2018;
   f. The tenancy deposit was, at some point, paid by Edzell to Letting Protection Service Scotland ("LPSS"), an approved tenancy deposit scheme;
   g. The Applicant received an email confirmation from LPSS on 6 April 2018 confirming that his tenancy deposit had been received and was protected;
   h. The Property was damaged to the point of being uninhabitable by an escape of water from the flat above on or around 29 March 2018;
   i. The tenancy came to an end on 29 March 2018;
   j. The tenancy deposit was repaid in full to the Applicant in or around June 2018.

5. The dispute in this case revolves around two dates: (i) the date that the tenancy deposit was paid by Edzell to LPSS; and (ii) the date that the information required by Regulation 42 of the Regulations was provided by the Respondent to the Applicant.

Evidence: Andrew McNeill

6. Mr McNeill advised the Tribunal that he had been happy in the Property. However, in March 2017, he returned home to discover that the ceiling in various parts of the Property had collapsed. He advised the Tribunal that this was due to an escape of water from the flat above.

7. He referred the Tribunal to an email that he sent to "Claire", an employee of Edzell, on 30 March 2018 in which he said, "*I believe the deposit should be in*

the Deposit Scotland Scheme so if you can send the reference number to me that would be really helpful." Mr McNeill advised that no substantive response to that request was received from Edzell.

8. Mr McNeill referred the Tribunal to an email that he received on 6 April 2018 from LPSS. This appeared to be a standard email from LPSS. It stated, "*Your agent / landlord has successfully submitted a deposit to The LPS Scotland.*" The email went on to provide details of the tenancy deposit, including the value, property it related to, name of the tenant, and name and address of Edzell as the landlord's representative. This was the first time that Mr McNeill had received any information pertaining to the holding and protection of his deposit.

9. Mr McNeill advised the Tribunal that he applied to LPSS for repayment of his deposit. However, he was told by a female employee of LPSS on a telephone call on or around 6 April 2018 that, as the deposit had only recently been paid, it could not be returned during the period of 30 days beginning with the day of payment, which was 5 April 2018.

10. Mr McNeill then referred the Tribunal to an exchange of emails between him and LPSS dated 27, 28 and 29 November 2018. On 27 November 2018, Mr McNeill wrote to LPSS by email and enquired, with reference to the Deposit and Repayment ID numbers for his tenancy deposit, "*Could you tell me when my old deposit was received from the landlord by your organisation?*" The response from LPSS, on 28 November 2018, said, "*Having checked our records, we can confirm that the above details were submitted to us on the 3 October 2017, we can also confirm that the deposit funds were allocated to the deposit on the 5 April 2018. This means your deposit was protected with LPS from the 5 April 2018.*" On 28 November 2018, Mr McNeill responded to LPSS and enquired, "*does this mean that whilst the account for the deposit was created on the 3rd of October, the funds were not added to it until April the 5th?*" The response from LPSS stated, somewhat unhelpfully, "*As per my previous correspondence, we can confirm that the funds were received and allocated to the deposit on the 5 April 2018.*"

11. Mr McNeill advised that this caused a delay in recovering his deposit. He told the Tribunal that the Respondent had initially tried to recover payments from him, and had disputed the release of the tenancy deposit, though the Respondent ultimately conceded that the tenancy deposit should be repaid to Mr McNeill and, indeed, it was in June 2018. This had caused him hardship in that he struggled to raise funds to place a deposit on a new tenancy. He required, he said, to borrow money from his girlfriend in order to do so.

Evidence of Mr Lovat

12. Mr Lovat advised the Tribunal that Edzell managed over 600 properties for its landlord clients. He explained Edzell's process for administrating tenancy deposits. He said that tenancy deposits were paid into Edzell's trust bank account. Edzell then opened accounts with an approved Tenancy Deposit

Scheme in respect of each deposit. The deposits were then transferred to one of the approved Tenancy Deposit Schemes. This would often be done by aggregating the various deposits in its account and making a single lump sum payment to the appropriate approved scheme. The sums paid were then held in a holding account at the Tenancy Deposit Scheme until the appropriate value was allocated to the correct tenant account. That was an internal administrative process at the Tenancy Deposit Scheme which was sometimes automated and sometimes manually carried out. Edzell is not aware of when the allocation exercise is completed, and the non-allocation of funds sometimes only comes to light when the tenant seeks repayment of his deposit. That, Mr Lovat submitted, was the case here.

13. Mr Lovat advised the Tribunal that an account for the Applicant's deposit had been opened at LPSS on 3 October 2017. On that day, Edzell made payment to LPSS in the total sum of £2,000.00, which comprised, amongst other amounts, the Applicant's tenancy deposit of £395.00. Having checked his firm's trust account during a brief adjournment to allow him to do so, Mr Lovat confirmed that no sum had been paid to LPSS on 4, 5 or 6 April 2018.

14. Mr Lovat advised that information pertaining to the tenancy deposit scheme was contained within the tenant information pack that was provided to the Applicant at the commencement of his tenancy. However, Mr Lovat was unsure what precise information had been provided to the Applicant.

15. Mr Lovat told the Tribunal that his understanding was that LPSS sent an email to a tenant confirming when an account for the tenant's deposit had been opened, and a further email when the deposit had been allocated. The email dated 6 April 2018 was an example of the latter email. He believed that the Applicant would have had a first email on or around 3 October 2017 when the account was opened.

Assessment of the Evidence

16. Both witnesses gave their evidence in a helpful, straightforward manner. The Tribunal felt that they were both credible and reliable. The difficulty was that neither had been involved directly in the payment of the tenancy deposit to LPSS, and were reliant to a significant degree on what they had been told by others.

17. That being so, we are satisfied on the balance of probabilities that the tenancy deposit was paid to LPSS by Edzell on 3 October 2017, as part of a larger sum of multiple tenancy deposits. We are also satisfied that the information prescribed by Regulation 42 of the Regulations was not given to the Applicant until 6 April 2018.

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18. The tenancy commenced on 8 August 2017. In terms of Regulation 3 of the Regulations, the deposit must be paid into an approved scheme, and the prescribed information must be provided to the tenant, within 30 working days

of the beginning of the tenancy. In this case, both ought to have been done on or before 12 September 2017.

19. Having found that the deposit was not paid into an approved scheme until 3 October 2017, and that the prescribed information was not provided until 6 April 2018, it follows that the Respondent has failed to comply with Regulations 3(1)(a) and (b) of the Regulations.

20. In terms of Regulation 10 of the Regulations, having determined that there has been a failure to comply with the requirements of Regulation 3, the Tribunal must now order payment by the Respondent of a sum not exceeding three times the tenancy deposit. We therefore now turn to the question of appropriate sanction.

Sanction

21. Appropriate sanction under the Regulations was considered in *Jenson v Fappiano*, [2015] 1 WLUK 625. When considering the approach to sanction, Sheriff Welsh stated as follows:-

> *"11 Non-compliance is admitted in this case, therefore the regulation is engaged. I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is 'unfettered'. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.*
> *1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment.*
> *2. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.*
> *3. A decision based on judicial discretion must be fair and just ('The Discretion of the Judge', Lord Justice Bingham, 5 Denning L.J. 27 1990).*
>
> *12 Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf Tenzin v Russell 2014 Hous. L.R. 17). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case."*

22. That approach was applied in *Kirk v Singh*, 2015 S.L.T. (Sh Ct) 111.

23. In submissions, Mr Lovat reaffirmed to the Tribunal that he was representing the Respondent, who had in good faith let the Property to the Applicant. It was admitted that there was an issue with drainage from the flat above the Property which had caused the Property to be uninhabitable. That, we were told, is still subject to a lengthy insurance claim. The Respondent let the Applicant out of the lease early and, having initially intended to pursue the Applicant for payment of sums that were outstanding, ultimately decided not to pursue those sums following representations from Edzell. The whole tenancy deposit was then returned to the Applicant. Mr Lovat further submitted that this issue regarding the Edzell process for paying deposits had not arisen before, and was not an issue until the Applicant "made it an issue". He submitted that the Applicant never enquired about his deposit prior to the end of the tenancy, and did not take issue with having not received the prescribed information. When asked whether he was submitting that it had been the Applicant's responsibility to raise questions about his deposit during the tenancy, Mr Lovat (wisely, in the Tribunal's view) accepted that it was not the Applicant's responsibility to essentially chase up what had happened to his deposit. However, Mr Lovat concluded that the Applicant's behaviour in raising this application appeared to him to be vexatious.

24. The Applicant submitted that, even if payment had been made to LPSS on 3 October 2017 of a sum including his deposit, that was not enough. The key question was whether the deposit had been properly allocated, because it was not protected by the scheme until that point. By way of comparison, he spoke of the difference between opening a bank account and depositing funds into that account. In his submission, until the funds are actually in the account, the holder of the funds may direct wherever he chooses. He challenged the suggestion that he had been "let out" of the tenancy agreement by the Respondent, which suggested some sort of gratuitous act by the Respondent. The Applicant's position was that, the Property having become uninhabitable, the tenancy came to an end. Further, the Respondent had actively sought to recover the full deposit from LPSS until in or around June 2018.

25. Having considered the parties' submissions, the Tribunal first wishes to make clear that there is nothing vexatious about the Applicant's conduct in this matter. It is astonishing that Mr Lovat considered it appropriate to make such a submission, particularly where (i) the application was made on 3 May 2018, (ii) LPSS would not release the deposit until 30 days after 5 April 2018, (iii) the Respondent sought to recover the deposit from LPSS on 30 May 2018, and (iv) the full deposit was only authorised to be returned to the Applicant on or around 14 June 2018. There has admittedly been a breach of Regulation 3. In terms of Regulation 9, where such a breach exists, it is a tenant's right to raise this sort of application if he so wishes. He cannot be properly criticised for doing so.

26. It is also worth stating, at this juncture, that it is never wise for a landlord or his agent to criticise a tenant's behaviour in proceedings of this nature. The focus of actions under Regulation 9 is the failure of landlords to comply with the

Regulations. Put simply, the wrongful conduct of a tenant is never an adequate excuse for the unlawful conduct of a landlord. Attempts to deflect attention away from the landlord's unlawful conduct in an effort to mitigate sanction ought to be poorly received by the Tribunal, as it has been in this case.

27. That being said, we are satisfied that the failure to pay the deposit into an approved scheme on time was an administrative error that was swiftly remedied. Whilst the process employed by Edzell whereby they lump numerous deposits together, pay them to a scheme, and then wash their hands of any further check unless required to do so by an inquisitive tenant, is unsatisfactory to put it mildly, the obligation in Regulation 3(1)(a) is in simple terms; that is, to pay the deposit into an approved scheme. The Applicant's submission that the obligation Regulation 3(1)(a) requires the appropriate allocation be made has a superficial attraction. It is beyond doubt that the purpose of the Regulations was to protect tenancy deposits, and that until a block of deposits are properly allocated it is entirely at Edzell's discretion where they are attributed. However, if the words used in Regulation 3(1)(a) are given their ordinary meaning, then properly constructed, Regulation 3(1)(a) only requires that the landlord pay the deposit to the scheme.

28. With regards to the failure to supply the prescribed information, the purpose of Regulation 3(1)(b) is to ensure that a tenant is given all necessary information to allow the tenancy deposit to be recovered at the end of the tenancy without delay. Had Edzel's process been robust, the payment on 3 October 2017 would have resulted in immediate allocation of the deposit funds and intimation to the Applicant of the prescribed information. Instead, there was a further inexcusable delay of six months before the information was provided, and a further month thereafter before LPSS would entertain a claim. It is the Tribunal's strongly held view that what happened in this case should not have happened.

29. The purpose of sanction, in addition to punishment, is to act as a deterrent. A landlord (and his agents) should know that the Regulations impose strict liability for failures to comply with Regulation 3. Policies created by professional agents in particular to ensure compliance with the Regulations should be robust to ensure both that the deposit is paid timeously into an approved scheme, and that the prescribed information is provided within the same timescale. In this case, Edzell's policy has failed.

30. The Respondent had the benefit of assistance from a professional agent when seeking to comply with the Regulations. The Applicant ultimately recovered his whole tenancy deposit, but that process was unnecessarily delayed to his detriment. Having considered all of the relevant factors, the Tribunal is satisfied that the non-compliance with Regulation 3 was unintentional, albeit avoidable had proper diligence been exercised.

31. For all of those reasons, the Tribunal determines that an appropriate sanction is £395.00, which is a sum equal to the tenancy deposit. We will grant an order requiring payment of that sum by the Respondent to the Applicant.

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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.

Andrew Upton

Legal Member/Chair	14 JANUARY 2019 **Date**