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)

Chamber Ref: FTS/HPC/PR/18/1937

Re: Property at Carhurly Farm House, Carhurly Farm, By Crail, St Andrews, KY16 8QH ("the Property")

Parties:

Dr Stephen Jameison, 50 Silverdale Road, Earley, Reading, Berkshire, RG6 7LS ("the Applicant")

Mrs Joan Dobie, Balhouffie Farm, Anstruther, Fife, KY10 3LB ("the Respondent")

Tribunal Members:

Virgil Crawford (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

BACKGROUND

1. By Lease dated 22nd August 2014, the Respondent let the property to the Applicant;
2. The lease provided for payment of deposit of £1,350.00;
3. The Deposit was paid on 22nd August 2014;
4. The Deposit was not lodged within an approved Tenancy Deposit Scheme, in accordance with Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the TDS regulations") within a period of 30 days;
5. The Deposit was, in part, lodged with an approved Tenancy Deposit Scheme – LPS – on 8th February 2017, £1,250 being lodged with the Scheme on that day with a further £100 being lodged with LPS on 22nd November 2017;
6. The Respondent failed to provide the Respondent with the required notification in terms of regulation 42 of the TDS Regulations advising him of,

amongst other things, the Tenancy Deposit Scheme with which the deposit was lodged;

7. By letter dated 18th July 2018 LPS intimated to the Applicant that they "did hold a £1,350.00 deposit for you at the address in question."
8. The Tenancy ended on 1st May 2018. The Respondent subsequently made an application to LPS seeking return of the deposit to her;
9. LPS intimated this request to the Applicant, that intimation being by email. When lodging the deposit, however, the Respondent provided an incorrect email address for the Applicant. As a result, the Applicant did not receive notification of the request for repayment of the deposit to the Respondent. Accordingly, he did not object to the same and, as a result, LPS returned the deposit funds to the Respondent;
10. Had the Applicant received notification of the request for the deposit to be repaid to the Respondent he would have objected to the same. He would thereafter have been able to use the cost free dispute resolution service provided by LPS to resolve any dispute in relation to whom the deposit was to be paid;
11. As at the time the deposit was repaid to the Respondent, the Applicant did not know that it had been lodged with LPS;
12. The failure of the Respondent to provide information, in accordance with Regulation 42 of the TDS Regulations, to the Applicant meant that the Applicant was unable to present a claim for the deposit to be repaid to him at the termination of the tenancy.

THE CASE MANAGEMENT DISCUSSION ON 9TH OCTOBER 2018

13. A Case Management Discussion was held on 9th October 2018, this taking place by way of conference call between the Tribunal and the Parties. During that Case Management Discussion the Applicant maintained, as he had in his application, that, despite the terms of the lease, he had paid a deposit of £1,730.76. The Respondent disputed that, stating that the deposit paid was £1,350.00, that being the amount provided for in terms of the Lease and the amount lodged with LPS;
14. The Respondent's legal agent claimed that she was an inexperienced Landlord and that the management of the property was dealt with by letting agents on her behalf, while also accepting, however, that it was the responsibility of the Respondent to ensure that the deposit was lodged with an approved Tenancy Deposit Scheme;
15. The Applicant disputed the submissions on behalf of the Respondent. The Applicant asserted that the Respondent was an experienced Landlord and that she did manage this property herself. In addition, he maintained that, despite deposit funds being lodged with LPS, it was not lodged in relation to this Tenancy and, in particular, that the address details held by LPS did not match the correct postal address of the property;
16. Issues were also raised in relation to alleged rent arrears. The Applicant had also, in his application, made reference to allegations that the Respondent's son had behaved in a threatening manner towards him and had been

prosecuted for that. This, however, does not appear to have been included within the note of the Case Management Discussion prepared for this date;

17. The legal member concluded "that it was likely that a Hearing would be required in this application standing the substantial factual disputes between the parties which go to the heart of this matter" and also made reference to the Tribunal "determining the level of ***compensation*** which might be appropriate ...." (emphasis added). The Tribunal, however, felt there would be benefit in a further Case Management Discussion prior to any further Hearing being fixed;

THE CASE MANAGEMENT DISCUSSION ON 23RD NOVEMBER 2018

18. A further Case Management Discussion was held on 23rd November 2018, this taking place by way of conference call. The Applicant participated and represented himself. The Respondent did not participate personally but was represented by Mr Shearer, Solicitor, Messrs Rollos Solicitors, Cupar, Fife;
19. Prior to this Case Management Discussion each party had the opportunity to submit any further representations they felt appropriate to support their submissions or to assist the Tribunal. Each party took the opportunity to do so submitting a variety of documents;
20. The issues between the Parties remained the same as at the previous Case Management Discussion held on 9th October 2018;
21. On behalf of the Respondent, Mr Shearer again maintained that the deposit paid was £1,350.00, that it was not lodged timeously with a scheme, that the Respondent had left the management of the tenancy to her letting agents, that the Respondent, however, accepted that it was her responsibility to ensure compliance with the TDS Regulations, that the Respondent was not an experienced Landlord, that she expected a greater degree of guidance from her letting agents, that she had not complied with the terms of Regulation 42 of the TDS Regulations once the deposit funds had been lodged with LPS, that she accepted that an incorrect email address for the Applicant had been provided to LPS but that that was not done deliberately nor maliciously;
22. The Applicant disputed that the Respondent was an inexperienced Landlord, disputed that this was her first tenancy agreement; disputed that the management of the property was dealt with by letting agents, indicated that he did not receive any notification under Regulation 42 of the TDS Regulations, that he was unaware that any funds had been lodged with a Tenancy Deposit Scheme, that he had received no communication from any Tenancy Deposit Scheme and that, in the circumstances, he was unaware that the funds had been lodged to enable him to make a request for them to be repaid to him;
23. The Applicant maintained that the deposit paid by him was £1,730.76;
24. With respect to the legal member who presided over the previous Case Management Discussion, I was not of the view that there were "substantial factual disputes between the Parties which go to the heart of this matter." It appeared to me that the only points of dispute which were relevant to the issue to be determined by the Tribunal were the exact amount of any deposit

paid (which would determine the maximum sanction the Tribunal could impose) and whether or not the Respondent was an experienced Landlord (which is a factor the Tribunal may take in to account in determining the level of any sanction to be imposed);

25. I asked the parties in what way they felt that these issues would be able to be advanced at a Hearing, as opposed to at this Case Management Discussion. The Applicant was unable to indicate how these matters would be able to be advanced further at a Hearing, while maintaining that the deposit paid was £1,730.76. Mr Shearer, on behalf of the Respondent was of the view that a Hearing would not be able to advance matters at all;
26. I concluded that there would be no benefit in a Hearing being assigned as the issues to be determined could be determined at this Case Management Discussion. I concluded that the amount of the deposit paid was £1,350.00, that being the amount provided for in the lease and the amount subsequently lodged with LPS;
27. In discussing matters with the parties, I, on more than one occasion raised the issue of "compensation" as referred to in the note of the previous Case Management Discussion and the function of the Tribunal in determining the issue before it. I pointed out that Regulation 10 of the TDS Regulations does not, in fact, provide for compensation to be paid to a tenant, rather it makes provision for a sanction to be imposed upon any Landlord who fails to comply with the Regulations. On the basis that the Regulations make provision for payment of any such sanction to the tenant, the tenant will, clearly, benefit from any Order for payment made by the Tribunal. That, however, is a consequence of the sanction imposed upon the Landlord rather than creating an entitlement to compensation on the part of the tenant. Both parties agreed with that on each occasion it was raised;
28. The Applicant thereafter intimated that, in his view, the only "fair, proportionate and just" sanction in this case was to make an Order at the highest end of the scale available to the Tribunal – i.e. an Order that the Landlord make payment of 3 times the amount of the tenancy deposit. He indicated that this was "easily justifiable" as a result of the "subterfuge" and "deceit" of the Respondent. He advised that the Respondent had subsequently "abused" the LPS Scheme resulting in the Tenancy Deposit being returned to her. He thereafter suggested that the Tribunal should take the following factors into account:-
    a. The Tenancy subsisted for 3 years and 7 months;
    b. The Respondent was aware of the relevant regulations as they were referred to within the lease;
    c. The Respondent abused the procedures with LPS;
    d. The Tenancy Deposit was not returned to him;
    e. The Respondent never lived in the property and had let it out continuously since 1995;
    f. The Respondent had let out two other properties and the Applicant believed that she had other properties which she had let out also;
    g. Her representative had been untruthful by suggesting that a letting agency had managed the tenancy as the Respondent had done this herself;
    h. The amount of any sanction should be a deterrent to other landlords;

i. The Applicant was unable to apply the deposit funds to another tenancy subsequently obtained by him;
j. The Respondent, or more particularly her son, had resorted to violence against him and he had previously produced citations he had received as a witness in criminal proceedings;

29. The Applicant subsequently addressed the Tribunal in relation to case law. In particular, he referred to the case of Jensen .v. Fappiano 2015 SCEDIN 6. In that case Sheriff Welsh commented that

> "ignorance of the Regulations is, however, no excuse. Noncompliant Landlords can expect no mercy from the Courts if they conduct their business in flagrant disregard of statutory controls".

He also commented

> "The Respondent's noncompliance deprived the tenant of important information he ought to have had from the Landlord whose responsibility was to deliver it. It deprived him of the assurance that the Landlord was above board and his deposit was safe. The Regulations were introduced precisely to achieve these purposes. The tenant's deposit was unprotected and exposed to potential risk for about one half of the period of Let".

The Sheriff thereafter proceeded to make an Order that the Landlord make payment in the amount of one third of the tenancy deposit in that case. While the Applicant quoted parts of Sheriff Welsh's Judgement, when I pointed out that the order of the Sheriff was for payment of amount equivalent to one third of the deposit the Applicant suggested that the I should ignore that part of the decision;

30. The Applicant also made reference to the case of Tenzin .v. Clark 2014 SCEDIN Case Number: B456/13, being a decision of Sheriff Principal M Stephen in which she upheld an order for payment by the landlords of the maximum sanction available. It should be noted, however, that in her Judgement Sheriff Principal Stephen, at paragraph 30, opined

> "In view of my analysis of the Regulations the Sheriff has complete and unfettered discretion as to the award to make, an Appellant court has little, if any, justification for intervening. Clearly, if a Sheriff exceeded the parameters set down by Parliament in the Regulations that would be an error. Fairness in procedure would suggest that the Sheriff must have regard to any mitigation, however in this case the Sheriff indicates that no evidence was led in mitigation".

It should be noted also that, the case of Tenzin v Clark, the deposit funds had never been lodged with an approved scheme at any point in time;

31. In response, Mr Shearer, on behalf of the Respondent, disputed in any suggestion that there had been any wilful deceit by the Respondent and, in particular, he disputed that he had been in any way untruthful in his dealings with this case or in any submissions he had made to the Tribunal. For the avoidance of any doubt, I indicated to Mr Shearer that, as a Solicitor making representations to a Tribunal, I was proceeding on the basis that he was making representations appropriately on behalf of his client and, despite what

was said by the Applicant, I had no reason to believe that Mr Shearer was being untruthful in any submissions he had made;

32. Mr Shearer thereafter indicated that the deposit funds had, albeit belatedly, been lodged with an approved Tenancy Deposit Scheme, that, even if the Respondent had fully complied with their obligations the deposit would not have been returned to the Applicant as, due to the level of rent arrears, the Tenancy Deposit Scheme would have returned them to the Respondent, that the Respondent was, indeed, an inexperienced Landlord and the Applicant, despite being provided with a period of time and an opportunity to do so, had provided no proof that the Respondent was a Landlord of any other property;
33. The Applicant thereafter stated that he wished the Tribunal also to make an Order, in terms of Regulation 10(b)(i) of the TDS Regulations that the Tenancy Deposit be paid into an approved scheme. Mr Shearer, on behalf of the Respondent indicated there would be no difficulty with such an order as he was confident that, in due course, it would again be returned to the Respondent.
34. I, however, raised an issue of competency of such an Order, given that the deposit had previously been lodged with an approved scheme and had subsequently been uplifted from it. Was it competent for the Tribunal to order that it be lodged again when the tenancy was ended? While this point of competency was raised by the Tribunal, having subsequently considered the terms of the TDS Regulations I concluded that there was nothing contained within them to suggest that such a course of action would be incompetent. Indeed, ordering that the tenancy deposit being lodged with a scheme again would then enable the cost free dispute resolution service provided by each tenancy deposit scheme to be utilised by the parties and that, of course, is part of the purpose of the regulations. In the circumstances, I concluded that it was competent for the Tribunal to make such an Order if it saw fit;

FINDINGS IN FACT

35. The Tribunal made the following findings in fact:-
    a. By Lease dated 22nd August 2014, the Respondent let the property to the Applicant;
    b. The lease provided for payment of deposit of £1,350.00;
    c. The Deposit of £1,350.00 was paid on 22nd August 2014;
    d. The Deposit was not lodged within an approved Tenancy Deposit Scheme within a period of 30 days;
    e. The Deposit was, in part, lodged with an approved Tenancy Deposit Scheme on 8th February 2017, £1,250 being lodged with the Scheme on that day with a further £100 being lodged on 22nd November 2017;
    f. The Respondent failed to provide the Respondent with the required notification in terms of regulation 42 of the TDS Regulations;
    g. The Tenancy ended on 1st May 2018. The Respondent subsequently made an application to LPS seeking return of the deposit to her;
    h. LPS intimated this request to the Applicant, that intimation being by e mail. When lodging the deposit, however, the Respondent provided an incorrect email address for the Applicant. As a result, the Applicant did not receive notification of the request for repayment of the deposit to

the Respondent. Accordingly, he did not object to the same and, as a result, LPS returned the deposit funds to the Respondent;

i. As at the time the deposit was repaid to the Respondent, the Applicant did not know that it had been lodged with LPS;

j. The failure of the Respondent to provide information, in accordance with Regulation 42 of the TDS Regulations, to the Applicant meant that the Applicant was unable to present a claim for the deposit to be repaid to him at the termination of the tenancy.

REASONS FOR DECISION

36. While the Applicant accepted that the Order he was seeking from the Tribunal was one which was designed to impose a sanction upon the Respondent rather than to make an award of compensation to him, his submissions to the Tribunal were clearly designed to attempt to persuade the Tribunal to impose the maximum sanction possible. His submissions were replete with extreme language, with speculation and with irrelevant matters which were clearly designed to paint the Respondent in the worst possible light. He suggested that the Respondent was "wilfully deceitful", that she had "abused" the Tenancy Deposit Scheme; that her agent had been "untruthful", that the Respondent was an experienced Landlord and made reference to allegations that the son of the Respondent had been involved in criminal behaviour towards him. He produced an extract of properties in the North East Fife constituency as listed in 1995 to 2017 electoral registers, this apparently to show that there were various properties at Carhurly, there being Carhurly Farm, Carhurly Farm House, No 1 Cottage, No3 Cottage and The White Cottage. He also produced a transcript of a call he had with LPS in which it was indicated that the tenancy deposit was recorded as being in relation to Carhurly Farm rather than Carhurly Farm House. He was suggesting that this was proof that the tenancy deposit had never, in fact been lodged and registered as relating to the Property, and that despite the fact that he had himself previously lodged a letter from LPS confirming that they had recorded the deposit funds as relating to him. He also confirmed that while there were other dwellings near the Property, there was no suggestion that anyone by the name of Mr Stephen Jameison or Dr Stephen Jamieson resided in any of the other dwellings. He effectively wished that the Tribunal ignore the previous letter from LPS confirming that the deposit was lodged and registered in relation to him. He was at pains to suggest that the actual deposit paid by him was £1,730.76 rather than £1,350.00. He was clearly aware that the greater the level of deposit the greater the sanction available to the Tribunal. He quoted selectively from case law while, at the same time, indicating that the Tribunal ought not to follow other parts of a case he himself had referred to. In particular, in relation to the case of Jensen .v. Fappiano, whilst he quoted specific comments of the Sheriff, he felt that the decision of the Sheriff in that case to impose only one third of the tenancy deposit as a sanction ought to be ignored;

37. I required to be conscious of the role of the Tribunal and the purpose of the Order being sought. It is, as stated, a sanction to be imposed upon landlords who have not complied with the TDS Regulations. It is, effectively, a penalty being imposed upon such Landlords. The TDS Regulations do not provide any formula for calculating the extent of any sanction to be imposed, save placing a maximum amount of 3 times the amount of the tenancy deposit. That, in itself, is clearly a variable amount and the power of the tribunal to impose a Sanction is governed by the amount of deposit in the first place. In this case, for example, taking the deposit as being £1,350.00, the Tribunal was able to impose a Sanction in the sum of £4,050.00. If the deposit was £1,730.76 the Tribunal would have power to impose a sanction in the sum of £5,192.28;
38. Whilst the Applicant quoted from two particular cases which he felt supported his position, there are, of course, a number of cases relating to Tenancy Deposit Scheme applications (Fraser and Pease v Meechan 2013 SCEDIN Case No B641/13; Kirk v Singh 2015 SCDUMF 27; Herskowit v Uchegbu [2016] SC EDIN 64; Cooper v Marriott [2016] SC EDIN 25). Whilst specific comment from each case may be able to be selected, considering the various cases together, it is clear that there is no guidance as to the manner in which the level of any sanction imposed ought to be determined in any particular case. Having considered various cases, I took the view that I required to impose a sanction which was fair, proportionate and just and that the level of sanction imposed was a matter for the exercise of my discretion having regard to all of the facts in the case;
39. In this case, I considered the important factors to be as follows:-
    a. The tenancy deposit was not lodged with an approved scheme within 30 days, contrary to Regulation 3 of the TDS Regulations;
    b. The tenancy deposit was not lodged with an approved scheme until more than 2 and a half years after the commencement of the tenancy, part of it being lodged during February 2017 with the remainder being lodged during November 2017;
    c. The Respondent did not comply with the terms of Regulation 42 of the TDS Regulations and failed to provide the Applicant with details of the tenancy deposit scheme into which the deposit had been paid, together with other required information;
    d. Following the termination of the tenancy, the Respondent applied to the Tenancy Deposit Scheme for the return of the deposit. Due to an incorrect email address for the Applicant being provided to the scheme by the Respondent, the Applicant did not receive notification of the application by the Respondent for the return of the deposit to her, accordingly did not oppose the same and, accordingly, was unable to use the cost free dispute resolution process provided by the Scheme;
    e. Whilst the Respondent provided an incorrect e mail address for the Applicant to the Tenancy Deposit Scheme, the difficulty in the Tenancy Deposit Scheme communicating with the Applicant was not entirely the fault of the Respondent. It became apparent that the particular Tenancy Deposit Scheme communicated with persons only by e mail. They appeared to hold an accurate telephone number for the Applicant but elected not to contact him by telephone. They did not correspond with him by post. It may be that the policies and procedures of the particular

Tenancy Deposit Scheme ought to be reviewed in relation to the manner in which it communicates with parties. That, however, is not a matter for which the Respondent is responsible;

f. While the Deposit was not lodged timeously with an approved Tenancy Deposit Scheme, it was lodged, albeit belatedly, during the currency of the tenancy; the Respondent was willing to lodge the tenancy deposit with an approved scheme again, which would thereafter enable the Applicant to make a claim on it and, if necessary, use the cost free dispute resolution process operated by each Tenancy Deposit Scheme. That, effectively, would place the Applicant in the position he ought to have been at the termination of the tenancy;

g. There was no information before me to enable me to conclude that the Respondent was an experienced Landlord in the sense that she was a landlord of numerous properties and was well acquainted with the TDS Regulations, although ignorance of the Regulations does not excuse her failure;

40. In all the circumstances, I concluded that, in the particular circumstances of this case, a fair, proportionate and just sanction to be imposed upon the Respondent was an amount equivalent to one and a half times the amount of the deposit, that being the sum of £2,025.00. I also consider it appropriate to make an Order that the Tenancy Deposit be lodged with an approved scheme, thereby allowing the Applicant to make a claim upon it and request that it be returned to him.

DECISION

The Tribunal grants an order against the Respondent:-

- For payment by the Respondent to the Applicant in the sum of TWO THOUSAND AND TWENTY FIVE POUNDS (£2,025.00) STERLING;
- For payment of the sum of ONE THOUSANF THREE HUNDRED AND FIFTY POUNDS (£1,350.00) STERLING to an approved tenancy deposit scheme on or before noon on 7 January 2019, to be registered as a tenancy deposit paid by the Applicant in relation to the Property

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.

V Crawford **23 November 2018**

Legal Member/Chair **Date**