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 2011/176 ("the 2011 Regulations") and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules")

Chamber Ref: FTS/HPC/PR/18/2277

Re: Property at Flat TF, 6 Bellfield Avenue, Dundee, DD1 4NQ ("the Property")

Parties:

Mr James Bell, 41 Lindsay Circus, Edinburgh, EH24 9EN and Mr Scott Robinson, 37 Thorndene, Elderslie, Johnstone, PA5 9DB ("the Applicants")

Mr Robert Robinson, 37 Thorndene, Elderslie, PA5 9DB ("the Applicants' Representative")

Mr Andrew McCulloch and Ms Cara McCulloch, 5 Cammo Parkway, Edinburgh, EH4 8EP ("the Respondents")

Mr Brian Grieve, Grant Property Management, 14 Coates Crescent, Edinburgh, EH3 7AF ("the Respondents' Representative")

Tribunal Members:

Susanne L M Tanner Q.C. (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") was satisfied that the Respondents did not comply with the duties in regulation 3 of the 2011 Regulations and ordered the Respondents to pay to the Applicants the amount of SEVEN HUNDRED AND FIFTY POUNDS (£750) STERLING.

1. Findings-in-fact

1.1. The Applicants entered into a joint short assured tenancy with the Respondents in respect of the Property on 15 May 2017, in respect of the Property, for the period 11 July 2017 to 11 July 2018.

1.2. The Respondents engaged the services of the Respondents' Representative as letting agents in respect of the management of the tenancy, including protection of the deposit payable in terms of the tenancy agreement.

1.3. The deposit payable by the Applicants in terms of Clause 4 of the tenancy agreement was £920.

1.4. The deposit payable by the Applicants after an agreed "cash back" offer of £200 was taken into account was £720.

1.5. The lease specified that the deposit would be paid to SafeDeposits Scotland in terms of the 2011 Regulations.

1.6. A payment of £920 was paid by the Applicants to the Respondents' Representative on or about 15 May 2017 and the Applicants received £200 "cash back" from the Respondents' Representative after the tenancy agreement was signed.

1.7. The Respondents' Representative paid the deposit of £720 into SafeDeposits Scotland approved scheme on 30 November 2017 and a Deposit Protection Certificate was issued by the scheme to the Applicants.

1.8. The Respondents' Representative did not issue the prescribed information to the Applicants in respect of the lodging of the deposit.

1.9. The reason for the late lodging of the deposit was a combination of human error and system failures on the part of the Respondents' Representative. In particular, an error in the tenancy agreement in relation to the amount of the deposit which resulted in the cashroom staff incorrectly forming the view that the deposit monies paid by the Applicants were short; and further, system failures which meant that the discrepancy was not identified until an internal audit of the business was carried out in or about November 2017.

1.10. There is no personal fault on the part of the Respondents in relation to the late lodging of the deposit.

1.11. The Respondents were unaware of the failure until at least 30 November 2017, after they were advised by the Respondents' Representative that the deposit had been lodged late.

1.12. In the period from receipt of the deposit by the Respondents' Representative to the date upon which it was paid to the approved scheme, the deposit was held in a secure non-interest bearing client current account of the Respondents' Representative.

1.13. After the end of the tenancy in July 2018, the full deposit monies of £720 were repaid to the Applicants via SafeDeposits Scotland.

1.14. The Respondents' Representative has apologised to the Applicants for its failures in relation to deposit protection.

1.15. The Respondents' Representative made a goodwill offer to the Applicants in the sum of £500 in respect of its failures in relation to deposit protection. The offer was rejected by the Applicants.

1.16. In or about 2016, the Respondents' Representative failed to lodge a deposit paid by one of the Applicants and his joint tenants in respect of a different tenancy with a different landlord, said by the Respondents' Representative to have occurred as a result of accounting failures, for which the Applicant and his joint tenants accepted an apology from the Respondents' Representative and a goodwill payment of £300.

2. Findings in fact and law

2.1. The Respondents did not pay the Applicants' deposit of £720 into an approved scheme within 30 working days of the beginning of the tenancy on 11 July 2017, namely by 22 August 2017.

2.2. The Respondents did not provide the Applicants with the information required under regulation 42 of the 2011 Regulations within 30 working days of the beginning of the tenancy on 11 July 2017, namely by 22 August 2017.

2.3. The Respondents did not comply with the duties in Regulation 3 of the 2011 Regulations.

3. Procedural background

3.1. The Applicant made an application to the tribunal on 28 August 2018 seeking an order for payment where the landlord has not paid the deposit into an approved scheme, in terms of Rule 9 of the Tenancy Deposit Schemes

(Scotland) Regulations 2011/176 ("the 2011 Regulations") and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules").

3.2. The Applicant sought an order for three times the deposit amount. No deposit amount was specified in the Application itself but the supporting documents lodged with the Application showed the deposit to be £720 after taking into account a £200 "cash back" agreement between the parties.

3.3. The Applicant lodged with the Application:
- 3.3.1. Email from Scott Neilson at the Respondents' Representative to one of the Applicants dated 29 August 2017;
- 3.3.2. Short Assured tenancy agreement between the parties dated 15 May 2017;
- 3.3.3. Email from Deanna Garden at the Respondents' Representative to the Applicants dated 4 July 2018;
- 3.3.4. Email from Andrew Hutton at the respondents' Representative to the Applicants' Representative dated 10 July 2018; and
- 3.3.5. Deposit Protection Certificate from SafeDeposits Scotland dated 30 November 2017.

3.4. The Application was referred to the tribunal on 26 September 2018.

3.5. A Case Management Discussion ("CMD") was fixed and adjourned to 16 November 2018. The Application paperwork was served on the Respondents on 23 October 2018. The Respondents were invited to make written representations by 9 November 2018.

3.6. The Respondents submitted written representations on 25 October 2018 in which it was stated that they had been served by Sheriff Officers with the Application paperwork and that they had had no prior notification from the Applicants or their intention to make an application to the tribunal. However, the Respondents indicated that they had made enquiries with the Respondents' Representative and had been advised that the failure had occurred as a result of an "admin error" resulting in a delay in submission of the deposit. The Respondents advised that the Respondents' Representative would represent them at the tribunal and that they would be responsible for meeting any payment order. The Respondents stated that they acted as responsible landlords and submitted that no liability should attach to them.

3.7. On 12 November 2018 the Respondents' Representative lodged written representations which were accepted because the CMD had been postponed to 16 November.

4. Summary of Case Management Discussion

4.1. A case management discussion (CMD) took place 16 November 2018 at 10am at Glasgow Tribunals Centre.

4.2. The Applicants' Representative attended the CMD.

4.3. Mr Grieve, HMO Operations Manager and Miss Garden, Branch Manager of the Respondents' Representatives attended the CMD on behalf of the Respondents.

5. Applicable legislation

5.1. Tenancy Deposit Schemes (Scotland) Regulations 2011/176 (Scottish SI), Regulation 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.

5.2. Regulation 9

(1) A tenant who has paid a tenancy deposit may apply to the [First-tier Tribunal] 1 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 [...] 2 no later than 3 months after the tenancy has ended.

5.3. Regulation 10

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

(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] 1 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.

6. Opening remarks in relation to the nature of the duties imposed by Regulation 3

6.1. After the tribunal chair and the parties had introduced themselves, the tribunal chair advised the parties that in spite of the Respondents' email suggesting that no finding of liability should be made in relation them, as landlords, Regulation 3 of the 2011 Regulations imposed duties on Landlords and not on their agents, and that any decision about failure to comply with the duties and any payment order made would be made against the landlords as the Respondents. The tribunal chair further indicated that any arrangements inter se the Landlords and their agents in respect of complying with any payment orders was a matter for them between themselves and not for the tribunal.

6.2. Both parties indicated that they were proceeding on that basis.

7. Applicants' Representative's submissions

7.1. Mr Robinson stated that:

7.1.1. His son, Scott, and Scott's friend James Bell ("the Applicants") took out a tenancy in May 2017 with Grant properties for the academic year in Dundee, from 11 July 2017 to 11 July 2018. The Applicants discovered towards the end of the tenancy that the deposit had not been paid into an approved scheme.

7.1.2. The deposit was paid when the lease agreement was signed on 15 May 2017. It was signed at the agent's offices. Mr Robinson paid all of the deposit and the rental payments came out of his bank account. The tenancy agreement said that the tenant shall pay a deposit of £920. It was paid by bank transfer. Safe Deposits Scotland was identified in Clause 4 of the lease as the scheme into which it was to be paid.

7.1.3. The Applicants and Mr Robinson had no dealings at all with the Respondents. Everything was conducted through Grant Property, the Respondents' Representatives.

7.1.4. When asked by the tribunal chair about the cash back situation which was referred to in the Application documentation, Mr Robinson indicated that Scott had been in a property the year before which was administered by the Respondents' Representatives. The original plan was that Scott would stay in the old flat and they would get two other people to share but there were problems finding additional tenants, so it eventually

became apparent that he could not keep flat. Scott moved into the Property with James Bell. Scott advised Mr Robinson that there was a £200 cash back deal for the Property. Mr Robinson had a conversation with someone in the Respondents' Representative's office. They advised him that there was £200 coming back. He just wanted the deposit paid. He believed he would pay £920 and would receive £200 back. He raised this with Dundee City Council and they seemed concerned about the £200 "cash back". The Council suggested taking legal advice. There was also a condition that in lieu of being credit checked he could pay 3 months' rent up front. He believes James's father is self-employed. James's father said he would pay 3 months' rent up front. Mr Robinson agreed to do that as well. He was told that it would be used for the last 3 months' rent. In fact this resulted in an overpayment of rent at the end of the tenancy but he got the money back.

7.1.5. The Applicant's Representative usually dealt with the Agents on behalf of his son and James, but the agents also corresponded directly with the Applicants. Mr Robinson expected the deposit information to be sent to Scott and to be forwarded to him, because Scott and James was the people named on the lease.

7.1.6. No deposit information was provided at any point by the Respondents or the Respondents' Representative.

7.1.7. As the tenancy reached its end, Scott and James realised between them that the deposit had not been lodged until 30 November 2017. Mr Robinson understood that they had looked it up online and that was how they found out.

7.1.8. The Application was made to the tribunal on 28 August 2018. Mr Robinson was not aware at the time that the deposit had not been lodged timeously. It was as the tenancy agreement came to an end that Scott brought it to Mr Robinson's attention.

7.1.9. The tenancy agreement came to an end on 11 July 2018 although Scott and James moved out a bit earlier.

7.1.10. Mr Robinson contacted Grant Property. He actually tried to contact Scott Neilson as he had dealt with him the previous year regarding non lodging of a deposit in relation to another tenancy in which Scott was a joint tenant. Grant Property had offered a goodwill payment of £300 at that time. Mr Robinson and his son were assured that it was a one off and that it would not happen again. It then became apparent that it had happened again. Mr Robinson called to try and speak to Mr Neilson and ended up speaking to Andrew Hutton. He said he would look into it. Mr Hutton checked and agreed that the deposit had not been properly registered. Mr Robinson said that he/the Applicants would be seeking compensation for it.

7.1.11. The Respondents came back saying that there had been no monetary loss or inconvenience experienced. They said this never happened. They stated that £720 was lodged with SafeDeposits Scotland on 30 November 2017.

7.1.12. The deposit money was returned in full through the Safe Deposits Scotland scheme at the end of the tenancy.

7.1.13. Mr Robinson submitted that it is relevant that the failure to lodge has happened before. When they had the issue with the previous tenancy, Scott Neilson said that it was a complete oversight on their part, thanked them for their understanding and apologised for the error. Mr Robinson had no reason to think that it would be repeated. He/Scott and the joint tenants accepted a goodwill payment so there was no claim to the First Tier tribunal or any other forum.

7.1.14. In relation to this Application, no offer was made until last week when Mr Robinson was in America. Mr Hutton sent an email asking if Mr Robinson was available for phone call. The Respondents' Representative made an offer of £250 each to Scott and James. Mr Robinson said that he did not think that Scott and James would accept that. Mr Robinson consulted with the Applicants and they both said that given the fact that Grant Property were intransigent at the outset of the complaint that they were not prepared to accept it.

7.1.15. The tribunal chair asked Mr Robinson to explain what was meant my "intransigence". He referred to Document 4 in the Application paperwork which is an email from 11 July 2018. He stated that his son thought that that the reply was intransigent. Mr Robinson stated that the offer was not made until shortly before the CMD and that the Respondents were not prepared to negotiate. He stated that no counter offer made. Mr Robinson replied to Mr Hutton's email after the phone calls saying that they did not believe that the offer was good enough and that if there was going to be another offer it would have to be closer to the amount sought which was three times the deposit, namely £2160.

7.1.16. The tribunal chair asked Mr Robinson for his submissions on the basis upon which he is seeking a payment order at the full amount. He stated that this is not the first time that this has happened. With both deposits administered by Grant Properties, only one has been registered with Safe Deposits Scotland, and that was done months late.

7.1.17. Mr Robinson confirmed that the amount he is asking for 3 times £720, because we did receive the £200 cash back.

7.1.18. He further stated that he believes that the delay from July to 30 November 2017 justifies the payment order he is seeking.

7.1.19. In relation to the written representations lodged for the Respondents' Representative, specifically bullet point 6, he stated that it was disputed. He said that there was a failure to lodge the deposit in the previous tenancy and that additionally they were not particularly happy towards the end of that previous tenancy because they thought excessive claims for deductions were being made at the end of that tenancy.

7.1.20. In relation to the Bullet point 7 in their written representations, he observed their assertion that the money was not at risk and submitted that "no harm no foul" does not relieve Grant Property of their responsibilities. He stated, however, that he accepts that the money was held in a property client account until lodged and was "safe".in that respect

7.1.21. In relation to the paragraph on page 2 of the representations which begins "The claimant makes reference..." he said that Scott and Evie had moved into the previous tenancy, a deposit was taken and the tenancy agreement was signed. He does not understand why they were saying that there were problems with the outgoing tenants getting their deposits back. Scott was as unaware as he was that there was changes to an existing short term assured lease. Scott and the new tenant were moving in in place of two others. They paid a deposit and signed a lease for that property. He submitted that if Grant Properties' procedures are unable to cope with that it casts doubt on their systems being as robust as they say that they are.

8. Respondents' representative's submissions

8.1. Mr Grieve, assisted by Miss Garden, stated the following:

8.1.1. He did not wish to prolong the CMD or the matter in general. He accepted that the Application and CMD could have been avoided and he apologised for failures on the part of the Respondents' Representatives.

8.1.2. He said that from their side in many respects he could be quite brief as there was no dispute on the facts as outlined by the Applicants' Representative.

8.1.3. He stated that the error is not in dispute. Due to human error the Respondents' Representative got this wrong. The deposit should have been paid to SDS within 30 working days of the start of the tenancy.

8.1.4. He explained that the company deals with about 1250 tenancies in the UK. They have a fair amount of experience with SDS. He believes they are knowledgeable about how this process works.

8.1.5. In relation to a question about the £200 "cash back", Mr Grieve explained that the amount lodged by the Applicant (£920) is not the amount lodged in the scheme (£720). Miss Garden explained for some tenancies they do offer cash incentives. There was one for this Property and at the time the Applicants paid £920. £200 awarded back once the deposit had been paid in full and the lease agreement had been signed. Therefore, the deposit should only have been £720 in the lease. The lease should have been amended to reflect the true deposit. She explained that the fact that the tenancy agreement was not corrected was a major contributory factor in the delay, between receipt of the deposit and 30 November when it was submitted to SDS. After the deposit funds are received into the cashroom, the cashroom staff upload the funds to SDS, as long as it is the amount stated in the lease. Because the lease was wrong, there was a delay, the cashroom were looking for the extra £200. The branches receives weekly reports from the finance team which advise any deposits that have been uploaded for the prescribed information to be sent. The reports also advise discrepancies. However, Miss Garden did not think that there was a notification about a discrepancy in this case. It is not an automated system. It involves human interaction. Incorrect information was uploaded at the outset. If that had been done correctly, they would have avoided the saga.

8.1.6. Mr Grieve explained that there was a checks and balances done later in the year on all deposits. This is the only problem of which he is aware during the audit which was carried out. The audit was just looking for discrepancies before an external auditor came in.

8.1.7. The deposit money was sitting in a non-interest bearing client account until it was lodged. At no time was there any risk to these monies. They were just sitting there but he accepted that there were not enough checks and balances undertaken.

8.1.8. When they discovered that money was waiting to be lodged he did not think that any contact was made with the tenants.

8.1.9. When asked whether the prescribed information had been sent to the Applicants at that time, or any correspondence advising them about the delay, MS Garden stated she did not know for certain if the normal processes had been followed. The tribunal chair allowed a short adjournment for those matters to be checked.

8.1.10. After the adjournment Mr Grieve stated that the Respondents' Representative cannot prove that any information was indeed sent to the Applicants regarding the late submission nor can they prove that the prescribed information was sent.

8.1.11. The Applicants' Representative stated at this point that Scott had told him that he got an email on 1 December 2017 directly from the

Deposit Protection Company to say that the deposit had been lodged, but had receive nothing from the Respondents' Representative.

8.1.12. Mr Grieve stated that the company has taken measures to seek to make sure that it does not happen again, namely there is more staff training, they have taken on more members of staff and they have assessed the IT system.

8.1.13. In relation to the Respondents, Ms Garden emailed them in around June or July this year to notify them that the deposit was lodged late, so they were aware prior to the Application being made to the tribunal.

8.2. The Respondents' Representative also confirmed that the Respondents have not raised any proceedings against the company.

8.3. Mr Grieve reiterated that an offer has been made by the Director of £500, so £250 to each tenant. Mr Grieve said that the offer was still on the table. He submitted that if one were to pro rata the delay it would be roughly speaking one quarter of the maximum fine, namely £500 versus £2160. He pointed to the length of the delay being from the middle of August 2017 to 30 November 2017. He accepted that there was no proof of the prescribed information being sent out even after the deposit was lodged. He said that the failure to send the prescribed information was not taken into account when the offer of £500 was made to the tenants.

8.4. He further submitted that the failure is not at the top end of the scale. It has happened twice to Mr Robinson's son. The last time it was £100 goodwill payment per tenant.

8.5. He stated that the company considers itself to be at the top end of the market professionally. The company genuinely is remorseful. Mr Grieve further stated that he certainly does not blame Mr Robinson for seeking the maximum penalty but stated that they did seek to offer something which they thought was appropriate. He accepted that the offer was made late in the day and that this followed on from the earlier letter.

8.6. He stated that they do not appear to have identified any similar issues in the internal audit. There are now systems in place and staff training. The error was human error but there were some internal improvements that were made.

8.7. Mr Grieve accepted that Mr Robinson and his son had been through a similar situation with Grant Property only shortly before this issue arose.

9. Applicants' Representative's submissions in response

9.1. Mr Robinson repeated submissions already made.

10. Reasons

10.1. There was no real dispute on the facts as between the parties and the tribunal was able to determine the matter without a full hearing.

10.2. On the basis of the findings in fact outlined above, the tribunal and made findings in fact and law in which it determined that the Respondents did not comply with the duties in Regulation 3 of the 2011 Regulations, namely a failure to pay the deposit into an approved scheme within 30 working days of the start of the tenancy.

10.3. In the circumstances the tribunal must order the Respondents to pay the Applicants an amount not exceeding three times the amount of the tenancy deposit.

10.4. In assessing the appropriate amount for a payment order, the tribunal had to balance competing considerations. The tribunal recognised that the Respondents had delegated their duties in terms of the 2011 Regulations to the Respondents' Representatives but the duties imposed by the Regulations are imposed on the Respondents as landlords. The Respondents' Representatives also confirmed during the proceedings that they took responsibility for the failures and would be making the payment directly to the Applicants. During the period that the Respondents' Representative was holding the money it was in a designated client account and subject to legislation governing client accounts so it was, in that sense, safe. The money was paid into an approved scheme around three months late. No prescribed information was provided to the Applicants at any time. There was no correspondence with the Applicants about the delay in lodging their deposit or any apology tendered until the Applicants discovered and raised the matter towards the end of the tenancy in July 2018. Since that time, the Respondents' Representative has accepted responsibility for the failures and have apologised to the Applicants and the Applicants' Representative. The Respondents' Representative made an offer of £500 compensation which was rejected by the Applicants. However, that was made after the Applicant had the necessity of making this Application to the tribunal. The Applicant's Representative has also had the inconvenience occasioned by attending a CMD. The failures are clear and admitted, in so far as the Respondents' Representative, if not the Respondent personally.

10.5. The previous failures on the part of the Respondents' Representative, in relation to failure to lodge a deposit in relation to a previous tenancy, although relevant to one of the Applicants, were not directly relevant to this Application because it related to a different property and landlord. The tribunal did not take this matter into account in assessing the appropriate amount for the payment order.

10.6. Taking all relevant matters into account, the tribunal made an order for payment in the sum of £750.

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.

S Tanner _____ **16 November 2018**

Susanne L M Tanner Q.C.
Legal Member/Chair