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 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/20/1945

Re: Property at 1/2 1108 Argyle Street, Glasgow, G3 8TD ("the Property")

Parties:

Ms Hannah Foster-Rain, Ms Rhona MacKintosh, Ms Laura Pollock, Flat 3, 537 Sauchiehall Street, Glasgow, G3 7PQ ("the Applicant")

Mr Ajitpal Dhillon, 9 Whittingehame Gardens, Glasgow, G12 0AA ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent acted in breach of his duties under Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and that an appropriate sanction is the sum of TWO THOUSAND SEVEN HUNDRED AND NINETY POUNDS (£2,790.00) STERLING, being a sum equal to two times the tenancy deposit.

FINDINGS IN FACT

1. The Applicants were the tenants, and the Respondent the landlord, of a Private Residential Tenancy which commenced in June 2019.
2. On or around 28 May 2019, in advance of the commencement of the tenancy, the Applicants made payment of a tenancy deposit of £1,395 to the Respondent ("the Deposit").
3. The Respondent did not lodge, and has not lodged, the Deposit at any of the approved tenancy deposit schemes.

4. The Applicants wrote to the Respondent in June 2019 and August 2019 to seek information regarding the payment of the Deposit into an approved scheme.
5. The Respondent is the landlord of a portfolio of properties.
6. The Respondent was aware of his duty in terms of Regulation 3 of the Regulations prior to the commencement of the tenancy.
7. In or around May 2019, Miss Pollock and Miss MacKintosh signed an HMO Exemption form asserting that they were in a relationship with one another.
8. The Respondent is a professional landlord with a current portfolio of 15 properties and over 20 years' experience as a landlord.
9. The Respondent is involved in the management of properties which he does not own.
10. The Respondent knew about his duties under the 2011 Regulations prior to the commencement of the tenancy agreement with the Applicants.
11. The Respondent knew or ought to have known from 13 June 2019 that the Applicants' deposit had not been lodged in an approved scheme.
12. Upon becoming aware that the Applicants' deposit had not been lodged in an approved scheme, the Respondent chose not to lodge the deposit into a scheme.
13. The Applicants' deposit was unprotected for the entirety of the tenancy.
14. The Applicants were deprived of the dispute resolution service of an approved tenancy deposit scheme.
15. The Respondent has previously breached his duties under the 2011 Regulations.
16. The Respondent has taken steps to avoid future breaches of the 2011 Regulations by instructing a professional letting agent.

FINDINGS IN FACT AND LAW

1. By failing to lodge the tenancy deposit with an approved Tenancy Deposit Scheme or supply the prescribed information within 30 business days of 1 June 2019, the Respondent was in breach of Regulations 3(1)(a) and (b).

2. In all of the circumstances, an appropriate sanction under Regulation 10 is the sum of £2,790, being a sum equal to twice the tenancy deposit.

STATEMENT OF REASONS

1. This is an application under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations") for sanction pursuant to a breach by the Respondent of his duties under Regulation 3. The Application previously called for a Case Management Discussion on 5 November 2020 and 1 December 2020. In advance of the CMDs, both parties lodged documents that they wished to be taken into account. At those CMDs, the following matters were agreed by the parties:-

    a. The Applicants were the tenants, and the Respondent the landlord, of a Private Residential Tenancy which commenced in June 2019.

b. On or around 28 May 2019, in advance of the commencement of the tenancy, the Applicants made payment of a tenancy deposit of £1,395 to the Respondent ("the Deposit").
c. The Respondent did not lodge, and has not lodged, the Deposit at any of the approved tenancy deposit schemes.
d. The Applicants wrote to the Respondent in June 2019 and August 2019 to seek information regarding the payment of the Deposit into an approved scheme.
e. The Respondent is the landlord of a portfolio of properties.
f. The Respondent was aware of his duty in terms of Regulation 3 of the Regulations prior to the commencement of the tenancy.
g. In or around May 2019, Miss Pollock and Miss MacKintosh signed an HMO Exemption form asserting that they were in a relationship with one another.

2. At the CMD on 1 December 2020, the Applicants indicated their intention to lead evidence from four witnesses: (i) Rhona MacKintosh; (ii) Laura Pollock; (iii) Beth Cowan; and (iv) Olivia Rae. The Respondent indicated that he intended to give evidence, and that he may also lead evidence from his solicitor. Neither party could confirm that they would not have other witnesses.

3. On 1 December 2020, the Tribunal issued a direction that lists of witnesses should be lodged and intimated by 15 December 2020, any documents to be relied upon by either party should be lodged and intimated by 22 December 2020, and that written witness statements should be lodged and intimated no later than 14 days prior to the Hearing that was to be fixed. A Hearing was fixed for 1 February 2021. Neither party complied with the Direction.

4. On 28 January 2021, the Applicants sought to lodge late documents in support of their application. On 29 January 2021, the Applicants sought to lodge a late list of witnesses. On 29 January 2021, the Respondent sought to lodge late documents in support of his defence.

5. The Application called on 1 February 2021 for its Hearing by teleconference call, together with the related application CV/20/2172, in terms of which the Applicants sought repayment of their tenancy deposit. The Applicants were represented by Mr McLean. The Respondent was initially represented by Mr Fielding, solicitor, but during the course of the Hearing he and Mr Fielding determined that he should continue with the Hearing without Mr Fielding's representation.

Preliminary Matters

6. Prior to carrying on with the business of the Hearing, the Tribunal required to determine what should happen with the late productions and late list of witnesses. The Applicants offered no good explanation for the late lodging of those documents. Mr McLean conceded that he had not read the Direction until it was already too late. The List of Witnesses consisted of four named individuals: Miss MacKintosh and Miss Pollock (as previously indicated), as well as a Mrs Weiss and Mr Castillo who had not previously been referred to. The documents sought to be lodged consisted predominantly of letters from

two of the Applicants (Miss MacKintosh and Miss Pollock) as well as from a number of allegedly former tenants of the Respondent, including the aforementioned Mrs Weiss and Mr Castillo.

7. The Respondent's documents consisted primarily of pro forma questionnaires allegedly completed by his tenants and screenshots of the Facebook pages of Miss MacKintosh and Miss Pollock. He did not propose to lead any evidence from the tenants who had allegedly completed the forms. He explained that he had tested positive for Covid-19, and that his recovery was continuing.

8. When making any decision, the Tribunal requires to have regard to the overriding objection in Rule 2(1) of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure to "deal with proceedings justly". In terms of Rule 2(2):-

> "(2) Dealing with the proceedings justly includes—
> (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;
> (b) seeking informality and flexibility in proceedings;
> (c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;
> (d) using the special expertise of the First-tier Tribunal effectively; and
> (e) avoiding delay, so far as compatible with the proper consideration of the issues."

9. Having regard to the overriding objective, the Tribunal determined that it would be unfairly prejudicial to allow the Applicants to lead evidence from Mrs Weiss and Mr Castillo. The Respondent had no prior notice that it was intended to call either of those individuals as witnesses and could not have been expected to prepare for them. Accordingly, the Tribunal determined that the List of Witnesses be allowed only insofar as naming Miss MacKintosh and Miss Pollock as witnesses.

10. The Tribunal determined that the documents sought to be lodged late by the Applicants should be allowed to be received. They were principally letters allegedly prepared by individuals who were not going to give evidence in the proceedings and were not available for cross-examination. Accordingly, their evidence was of little (if any) evidential value, and could not be said to prejudice the Respondent.

11. The Tribunal also determined that the documents sought to be lodged late by the Respondent should be allowed to be received. The authors of the pro forma questionnaires were not going to be giving evidence, so the forms were of little (if any) evidential value. The screenshots were of the Applicants' own public Facebook pages, and the Tribunal felt that there was no prejudice to them in their production. In any event, Mr McLean very helpfully confirmed

that he was ready to deal with the Respondent's late productions, and there was therefore no prejudice to the Applicants in their being allowed.

12. Having determined the preliminary matters, the Tribunal turned to the substance of the Hearing.

Evidence

Rhona Isabel MacKintosh

13. Miss MacKintosh confirmed that she was the co-author of the two letters from her and Laura Pollock which were contained in the bundle of documents lodged on 28 January 2021. She adopted the contents of those letters as her evidence.

14. Miss MacKintosh advised that she is a student at the University of Glasgow studying medicine. In March 2020, as a consequence of the coronavirus pandemic, she and her co-Applicants had lost their employment. They all moved home for the national "lockdown", which the Tribunal understood to mean the restrictions on movement implemented by the emergency public health legislation and guidance by the Scottish Government.

15. Miss MacKintosh spoke to an exchange of text messages between the Applicants and the Respondent at the end of March 2020. On 26 March 2020, a text message was sent by Hannah Foster-Rain on behalf of all of the Applicants to the Respondent to give notice to leave. In that message, Miss Foster-Rain stated, "This is a difficult situation for us all and we were hoping to keep the flat, but it's just not feasible given the current situation. Thanks for your understanding and let us know if we can come to any other arrangement."

16. On 30 March 2020, the Respondent replied to that message saying "How does half rent sound". Miss Foster-Rain replied asking "For how long?", to which the Respondent replied "Until this stuff is sorted". Miss MacKintosh said that she believed this to mean until the pandemic was over.

17. On 1 April 2020, Miss MacKintosh sent a text message to the Respondent accepting the half rent offer previously made, and asking "Would you take £600/month until August?". The Respondent replied "We would have see how we get on". Miss MacKintosh asked "What do you mean?", but got no response.

18. Miss MacKintosh said that the Applicants thereafter paid £600 to the Respondent in April 2020, and a further £600 in May 2020. Miss MacKintosh said that the Respondent had not objected to receipt of those payments. Miss MacKintosh was asked by the Tribunal why they had paid £600 when half rent would have been £697.50. Miss MacKintosh said that they had sought clarification of the payment due and had not received any.

19. On 29 May 2020, Miss MacKintosh received a text message from the Respondent enquiring why the Applicants had only paid £600 for rent in May, and stating that he would need the full rent for June. The Applicants subsequently paid £700 in June. It was Miss MacKintosh's view that the Respondent was not entitled to demand full rent for June. He had made an agreement to reduce the rent to half, and two days was too short notice. It would, in her view, be unfair to find that the Respondent was entitled to put the rent back up. Whilst the Respondent had referred to the availability of Government funding to assist tenants during the pandemic, the Applicants did not qualify for that funding because they were students.

20. On 12 June 2020 the Applicants gave Notice to Leave the Property on 11 July 2020. Miss MacKintosh then spoke to the Respondent behaving in an aggressive manner towards the Applicants. She spoke to the Respondent having entered the property using his own key on three occasions during the tenancy without knocking or announcing himself. She said that the Respondent had shouted at the Applicants, and had made threatening phone calls to them. She spoke to the Applicants having felt unsafe and having been left in tears. She also said that this was not an isolated incident, and spoke to having witnessed the Respondent behave aggressively to the owner of the laundrette business beneath the property after the washing machine in the property had flooded the laundrette.

21. Miss MacKintosh stated that, as a consequence of the Respondent's behaviour, the Applicants removed from the property on 5 July 2020. She said that the Respondent had threatened to keep the Applicants' deposit. The Applicants were afraid of the Respondent. They could not stay the additional week because of that fear. Accordingly, it was her position that they should not be liable for the rent for the period 5-11 July 2020.

22. Miss MacKintosh spoke to the Respondent's breach of the 2011 Regulations not being an isolated incident. She said that she had spoken to other former tenants of the property, who had advised that the Respondent had not lodged their deposits either. They included Beth Cowan and Olivia Rae. In respect of Beth Cowan, Miss MacKintosh said that she had been contacted by Beth Cowan after the CMD on 1 December 2020 and told that the Respondent had called her and shouted at her to retract her witness statement. Miss MacKintosh stated that Miss Cowan had told her that she would not give evidence because she was afraid of the Respondent.

23. In cross-examination, Miss MacKintosh was asked why the Applicants had changed their minds about staying in the property, and her position was that the relationship had broken down. It was put to her that she was lying and exaggerating issues experienced during her tenancy to gain a windfall from the 2011 Regulations, which she denied. She was asked how she and Miss Pollock were able to afford full rent at another property when they could not afford full rent at the Property. Miss MacKintosh spoke to having found new employment in April 2020, but not receiving her first wage until six weeks thereafter. She and Miss Pollock were now sharing the new property with a

different flatmate. She spoke of needing to move from the Property because she did not feel like she could continue to live in the Respondent's property. The Respondent put it to Miss MacKintosh that she had lied about being in a relationship with Miss Pollock in order to get around the House in Multiple Occupancy legislation and that the Tribunal should not believe her evidence as a consequence. Miss MacKintosh denied that she had lied. She was asked about a Jack Capener, who she described as a friend of Miss Pollock.

Laura Anne Pollock

24. Miss Pollock also adopted the terms of the letters that she co-authored with Miss MacKintosh. She spoke to being a history student at the University of Glasgow, and having recently commenced employment as a barista.

25. Miss Pollock spoke to having spoken with other tenants of the Respondent whose deposits had not been lodged in an approved Tenancy Deposit Scheme. She spoke to having contacted the Respondent on 13 and 14 June 2019 to enquire about which Scheme the Applicants' deposit had been lodged with, and to the Respondent having responded with an aggressive telephone call that had left Miss MacKintosh in tears.

26. Miss Pollock confirmed that she had lost her job in March 2020 and moved to Edinburgh to stay with family during the lockdown. She moved back to Glasgow in June 2020 when the lockdown measures were eased and property moves were allowed again.

27. Miss Pollock spoke to there having been an agreement between the Applicants and the Respondent that the rent would be halved. She spoke to the payments of £600 having not been objected to by the Respondent until after they had both been paid. Her position was that it was not a term of the agreement to reduce the rent that the Applicants would stay in the Property long-term.

28. Miss Pollock also spoke to the Respondent's aggressive behaviour and that being the principal reason for the Applicants leaving the property. She spoke to the Respondent having let himself into the property on three occasions: once between July and September 2019 to get a ladder from the cupboard; once on or around 26 September 2019 whilst the Applicants were baking in the kitchen; and once on or around 3 July 2020. Miss Pollock said that she was afraid of the Respondent. On 5 July 2020 she attended the property early with her father to drop off her keys and give the Property a final clean. She did so to avoid meeting him altogether and to avoid the risk of being alone with him.

29. Miss Pollock was asked about her relationships with Miss MacKintosh and Mr Capener, and she gave further detail about the relationship.

30. Miss Pollock spoke to the financial hardship that she had suffered and continued to suffer as a consequence of the Respondent withholding the

deposit. She spoke to having borrowed significant sums from her family to pay rent and other debts.

31. In cross-examination, the Respondent highlighted contradictions in Miss Pollock's evidence about the condition of the washing machine; specifically that she had said in her written statement that it had not worked for four months and then said during her evidence in chief that it had not worked for six months. He put it to her that she was exaggerating the issues that the Applicants had experienced to try to show the Respondent in a bad light. Miss Pollock denied that. The Respondent put it to Miss Pollock that, if his behaviour had been so aggressive and placed the Applicants in a state of fear, then they would have said so in the "Notice to Leave" text message exchange in March 2020. Miss Pollock answered that, at the time, the principal reason for giving notice was financial, but said that this did not mean that the Applicants were happy with the Respondent's behaviour. Miss Pollock accepted that the Respondent had his own liabilities in respect of the Property, and that the Respondent had no obligation to reduce the rent payable by the Applicants. Mr Dhillon put it to Miss Pollock that the Applicants never intended to return to the Property, and that by June 2020 they had already begun looking for new properties. Miss Pollock stated that the Applicants had intended to return to the Property, but that by June 2020 they no longer wished to live there.

Ross Fielding

32. Mr Fielding is the Respondent's solicitor. During the course of the Hearing, he advised that there had been a misunderstanding between him and his client regarding the purpose of the Hearing and what his involvement would be. Mr Fielding had other commitments and was unable to stay on the teleconference. However, he confirmed that the letting agent arm of his firm's offering had been instructed by the Respondent in respect of his entire portfolio of properties for the academic year 2020/21. Accordingly, Mr Fielding's firm was now handling the payment of tenancy deposits into approved schemes. Mr Fielding then left the Hearing. The Applicants did not have an opportunity to cross-examine him.

Ajitpal Dhillon

33. Mr Dhillon advised that the allegations made against him were taken out of context, being misconstrued, and that the Applicants were displaying disregard for the truth. He described them as opportunistic, and claimed that they were trying to "milk the system". He said that he had been a good landlord for over twenty years. He had lots of happy tenants, and had offered good terms to the Applicants when the pandemic was causing difficulties.

34. Mr Dhillon admitted, with the benefit of hindsight, that he could have improved his tone when speaking with his tenants. He accepted that he had on one occasion lost his temper during a telephone call with the Applicants in late May 2020 after he had discovered the underpayment of rent, for which he apologised.

35. He explained that the original offer of half rent was intended for the period until the end of lockdown, which is what he meant by “Until this stuff is sorted” in his text message of 30 March 2020. Lockdown was lifted in June 2020, and he was therefore entitled to raise the rent back to the full sum. Separately, when making the agreement to half the rent, he understood that his doing so would result in the Applicants remaining in the property long term. He spoke to the Applicants having said at the outset of the tenancy that they were looking for somewhere to stay for two to three years. He thought that reducing the rent would allow that to happen. As it was, that agreement to half the rent was vitiated by the Applicant’s conduct in failing to pay the agreed reduced rent in April and May 2020.

36. The Respondent spoke to having previously instructed a letting agent, Regency Properties, to assist him with his portfolio, but to the papers being messed up. He explained that this was why the Applicants’ deposit had not been lodged in an approved scheme. The Respondent spoke to his concern upon discovering the oversight. When asked why he did not lodge the deposit in a scheme when he discovered it, he replied that he did not see the point; it was already late and the Applicants had already indicated that they would make a claim.

37. Mr Dhillon spoke to what he felt was harassment from the Applicants, including Mr McLean having attended at his property posing as a delivery man. Mr Dhillon did not elaborate on that event.

38. Mr Dhillon spoke to having a portfolio of 15 properties and being involved in the management of other properties. He spoke of letting properties in partnership with his father. The properties were located across Glasgow. He spoke to Mr Fielding being instructed to assist him with the letting of his properties, and the deposits being attended to with the benefit of professional advice. This had been the case since June/July 2020. Mr Dhillon spoke to having learned lessons on the back of his dispute with the Applicants.

39. Mr Dhillon stated that the Applicants had actually been good tenants until this issue arose. The Property was kept in good condition. He apologised again for shouting at them on the telephone, and explained that he had been under considerable stress at the time.

40. Mr Dhillon said that he wanted this situation to be settled fairly, but indicated that sanction of three times the deposit was just not feasible. He also admitted that he had contacted Beth Cowan following the CMD on 1 December 2020, and had been told by her that she had not written the statement produced by the Applicants.

41. Under cross-examination, it was put to Mr Dhillon that the Applicants had made two offers to resolve these applications outwith the Tribunal and that this demonstrated that they had behaved reasonably. Mr Dhillon’s position was that the offers made were not reasonable.

42. Mr Dhillon conceded that there was no express agreement with the Applicants that they would stay long-term if the rent was halved by him.

43. Mr Dhillon was asked why he had contacted Beth Cowan, and he advised that he had called both Beth Cowan and Olivia Rae because he was disappointed that they had given statements in the terms that they had. They had both replied that they had not written the statements.

44. When asked whether he accepted that his behaviour could have been perceived as aggressive, Mr Dhillon accepted that he had behaved poorly on a telephone call, but described the other accusations as an unjustified character assassination. He also denied having ever entered the Property unannounced.

45. Finally, Mr Dhillon insisted that the failure to lodge the tenancy deposit of the Applicants was an isolated incident. Mr McLean then took Mr Dhillon through the letters lodged by the Applicants that purported to be from Mrs Weiss, Mr Castillo, Miss Cowan, Miss Rae and Eilidh McCallum. Thereafter, Mr Dhillon conceded that this was not an isolated incident. His position was that mistakes had been made, but measures had been put in place to stop them happening again.

Submissions

Applicants

46. For the Applicants, Mr McLean submitted that the agreement to reduce rent by half was open ended. It was not limited to any particular period, and had no conditions attached to it. It was binding on the Respondent, who could not unilaterally put the rent back up, or retrospectively claim full rent for April and May 2020. Separately, the evidence suggested that the Respondent had behaved aggressively and that the Applicants were within their rights to remove early from the Property. They should not be found liable in rent for the period 5-11 July 2020 as a consequence.

47. Regarding sanction for breach of the 2011 Regulations, the Applicants had lodged written submissions prior to the CMDs, and Mr McLean elaborated on those. The Respondent is an experienced professional landlord with a portfolio of properties. He has a history of failing to comply with the 2011 Regulations notwithstanding his awareness of his duties under them. The Applicants' deposit was unprotected for the entirety of the tenancy. Whilst it was accepted that the Respondent had now taken steps to ensure future compliance through the instruction of professional agents, that was the only mitigating factor. Against that background, the appropriate sanction was towards the higher end of the spectrum. He invited the Tribunal to award three times the tenancy deposit.

Respondent

48. The Respondent's position was that the Applicants' conduct had vitiated the agreement to reduce the rent. As such, full rent was payable for the months of April, May and June 2020, and pro rata for July 2020. The arrears were therefore in excess of the tenancy deposit, and the application for repayment of the deposit should be refused.

49. Regarding sanction, the Respondent's position was that he had been a good landlord. The Applicants were being opportunistic. They had gotten a good deal out of him and had taken advantage when he still had other liabilities. His view was that the Tribunal ought to take the Applicants' conduct into consideration. Justice should be done, and three times the deposit would be unjust. If that was the decision, he would be unable to pay it.

Decision

50. Firstly, the Tribunal accepts the evidence of Ross Fielding as being credible and reliable. We accept that his firm has been instructed to act as letting agent for the Respondent, including in the management of lodging tenancy deposits.

51. Regarding the evidence of the remaining witnesses, it was the Tribunal's view that none of them gave a wholly truthful account of what happened. The Applicants' evidence came across as rehearsed. There was a lack of specific detail regarding the incidents of aggressive behaviour that they founded upon as the basis to remove from the property early which gave the impression that the incidents referred to were exaggerated, and that the Respondents did not truly feel unsafe with the Respondent. Meanwhile, the Respondent repeatedly made untrue assertions regarding his history of compliance with the 2011 Regulations until he ultimately accepted that he had previously breached Regulation 3 in respect of other tenants.

52. Against that background, the Tribunal had to assess the evidence and determine what had actually happened here, on the balance of probabilities. Accordingly, having heard the evidence and taken the self-interested presentations of the parties into account, we reached the following conclusions:-

    a. The Respondent is a professional landlord with a current portfolio of 15 properties and over 20 years' experience as a landlord.
    b. The Respondent is involved in the management of properties which he does not own.
    c. The Respondent knew about his duties under the 2011 Regulations prior to the commencement of the tenancy agreement with the Applicants.
    d. The Respondent knew or ought to have known from 13 June 2019 that the Applicants' deposit had not been lodged in an approved scheme.

e. Upon becoming aware that the Applicants' deposit had not been lodged in an approved scheme, the Respondent chose not to lodge the deposit into a scheme.
f. The Applicants' deposit was unprotected for the entirety of the tenancy.
g. The Applicants were deprived of the dispute resolution service of an approved tenancy deposit scheme.
h. The Respondent has previously breached his duties under the 2011 Regulations.
i. The Respondent has taken steps to avoid future breaches of the 2011 Regulations by instructing a professional letting agent.

53. Having reached these factual conclusions, the Tribunal now requires to apply them to the 2011 Regulations.

54. In terms of the 2011 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.

(1A) Paragraph (1) does not apply—

(a) where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and

(b) the full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,

within 30 working days of the beginning of the tenancy.

(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.

(2A) Where the landlord and the tenant agree that the tenancy deposit is to be paid in instalments, paragraphs (1) and (2) apply as if—

(a) the references to deposit were to each instalment of the deposit, and

(b) the reference to the beginning of the tenancy were to the date when any instalment of the deposit is received by the landlord.

(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."

55. Regulation 10 imposes strict liability. Where a landlord has breached its duties under Regulation 3, the Tribunal must make an order for payment. The only discretion afforded to the Tribunal relates to the imposition of a sanction. Determining sanction is an exercise of judicial discretion. What is key about that exercise is that the focus is on the landlord's conduct to determine what an appropriate sanction is. It will never be a mitigating statement for the landlord to assert that his failure to comply with a statutory obligation was because his tenant was difficult, or that his failure can somehow be forgiven because of his tenant's unreasonable behaviour following conclusion of the

tenancy. Accordingly, insofar as the Respondent invites the Tribunal to give consideration to the Applicants' conduct, we decline to do so. The Applicants' conduct is not relevant.

56. The correct approach to assessing sanction matters of this nature is that set out by Sheriff Welsh in *Jenson v Fappiano*, 2015 EDIN 6 at paragraphs 11 and 12, where he says:-

"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."

57. In this case, the Respondent has considerable experience as a landlord and, frankly, should have known better. According to Regulation 3, the Respondent's duty was to lodge the deposit with an approved scheme by 12 July 2019, being 30 business days after the commencement of the tenancy. Given that he knew or ought to have known by the middle of June 2019 that it had not been lodged with an approved scheme, he can have no good explanation for not having done so. His apparent disregard for his obligations was best summed up by him during his evidence when he said that he "did not see the point" in lodging the deposit with an approved scheme. That

flagrant disregard for his duties under the 2011 Regulations merits sanction towards the upper end of the scale. It was a flagrant disregard which permeated into these proceedings, where the Tribunal had to repeatedly warn him about his behaviour during the hearings.

58. That notwithstanding, the Tribunal does consider that there are mitigating factors here. The Respondent accepted his breach at the earliest possible opportunity. He has taken steps to ensure future compliance with the 2011 Regulations, which at least demonstrates that he has learned something from this occasion and that there is little need for the sanction to act as a deterrent.

59. Accordingly, having considered all of the circumstances, the Tribunal considers that an appropriate sanction is a sum equal to twice the tenancy deposit. The Tribunal will order that the Respondent makes payment to the Applicants in the sum of £2,790.

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.

1 February 2021

Andrew Upton
Legal Member/Chair

Date