Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014 and Regulations 3 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/1708

Re: Property at The Flat, High Plewlands, Strathaven, ML10 6RF ("the Property")

Parties:

Miss Amy Wylie, Mrs Valerie Wylie, 31 Neilsland Road, Hamilton, ML3 8NA; 31 Neilsland Road, Hamilton, ML3 8NA ("the Applicants")

Mrs Sally Crozer, High Plewlands, Strathaven, ML10 6RF ("the Respondent")

Tribunal Members:

George Clark (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted and made an Order for Payment by the Respondent to the Applicants of the sum of £1,200.

Background

By application, received by the Tribunal on 4 June 2019, the Applicants sought an Order for Payment against the Respondent in respect of the failure of the Respondent to lodge a tenancy deposit in an approved tenancy deposit scheme, as required by Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

The application was accompanied by a tenancy agreement, entitled "Equestrian Property Tenancy Agreement" between the Parties, commencing on 15 January 2018 at a monthly rent of £1,200. There was a deposit payable of £5,000. The Applicants also provided evidence of the payment of the deposit by bank transfer on 15 January 2018. In the application, the Applicants stated that the tenancy had ended on 30 April 2019 and that the Respondent had only returned the deposit after receiving a letter from the Applicants' solicitors stating that she must do so. The amount returned, by cheque dated 15 May 2019, had been £4,795.

On 6 September 2019, the Respondent's solicitors, Wright, Johnston & Mackenzie LLP lodged written representations on her behalf. They stated that the let consisted of a flat, indoor and outdoor arenas, three stables and grazing land and that the let terminated on or around 1 May 2019. The deposit had been repaid on or around 15 May 2019 after deduction of certain expenses for clearing and cleaning, which were agreed by the Applicants. The rental was £1,200 per month for a flat, an indoor and outdoor arena, three stables and six acres of grazing land. The Applicants stabled two horses at the Property and the Respondent's horse was also stabled there. The Respondent had used her best endeavours to return the deposit to the Applicants as soon as possible after vacation of the Property but had required to liaise with various contractors to obtain quotes for clearing and cleaning. She also required to travel and stay in Yorkshire on a regular basis as she was the part-time carer for elderly parents. She considered that she had returned the deposit within a reasonable period.

The Respondent contended that the deposit related to agricultural land being stables, indoor and outdoor arenas and grazing land and agricultural tenancies were exempted from the Tenancy Deposit Scheme.

On 2 October 2019, in response to the letter of 6 September, the Applicants stated that the let consisted of a flat, 3 stables and six acres of field. The arenas referred to in the letter from the Respondent's solicitors were not included in the lease, although by informal arrangement, the Applicants were allowed to use them, as were other people. The Respondent had explained the high level of deposit by saying that she had had a bad experience with a previous tenant. The Respondent knew the let Property was never going to be used as a commercial or business venture by the Applicants.

The Respondent had prepared the lease and, whilst the heading referred to "Equestrian Property Tenancy Agreement", the heading did not determine the nature of the contract. For that, it was necessary to look at the wording of the lease and it referred to "a dwellinghouse", payment of Council Tax (not property rates) and it was stated to be a Short Assured Tenancy, which could only be residential, not commercial. The Respondent was arguing that the house was on agricultural land comprised in a lease which was a 1991 tenancy or a short limited duration tenancy under the Agricultural Holdings legislation. There were three types of agricultural tenancies in Scotland. Agricultural land was land used for commercial farming which included the growing of crops, raising livestock, dairy farming or market gardening. None of the three types of agricultural tenancies applied in this case as the land was not used for agricultural purposes. Leases of land for grazing of horses had never been agricultural tenancies but, in any event, this was a residential tenancy and the 2011 Regulations applied. The deposit should have been lodged in an approved scheme.

At a Case Management Discussion held on 13 September 2019, the Tribunal decided that legal arguments with legal authorities would have to be made in order to determine the issue and that a Hearing should be fixed, with both Parties being invited to lodge in advance skeleton arguments with reference to any legislation and legal authorities on which they intended to rely.

On 4 November 2019, the Respondent's solicitor lodged adjusted skeleton arguments. They stated that the Agreement had been prepared by the Respondent without any legal advice or input and it was not clear in its terms. It stated that it was a Short Assured Tenancy, which was not the case and it did not refer to all of the property made available for the Applicants' use. The Applicants had been given

adequate time to consider the terms of the Agreement and to express any unhappiness with any of its terms.

In terms of the Agreement, the Property let consisted of the flat, three stables and two fields extending to approximately six acres, but in actual fact the Applicants were also given the use of another three acre field, the use (albeit non-exclusive) of indoor and outdoor arenas in close proximity and the use of a hay barn. Following signing of the Agreement, further conditions were agreed whereby the rent was reduced to £1,050 per month in exchange for the Applicants looking after the Respondent's horse.

The Respondent contended that the residential use of the flat was ancillary to the main purpose of the Agreement which was the accommodation of the Applicants' horses and the use of the stables, grazing, hay barn and arenas. The location of the flat being in close proximity to the stables made it unmarketable for a residential lease on its own. The rent charged was consistent with a lease of the stables, grazing, hay barn and use of ancillary residential use. Residential use was not the main purpose of the Agreement.

The deposit was to cover any damage caused by the Applicants' horses and, in terms of the Agreement, was to be lodged in an interest-bearing account in name of the Respondent in trust for the Applicants. On termination of the Agreement, interest of £20 had accrued on the deposited funds.

It was denied that any part of the deposit was attributable to the residential element, but even if it was, the amount of such deposit reflected the ancillary nature of the residential flat. The use of grazing land and stables and the level of deposit were consistent with this having been a lease which was for equestrian purposes, albeit with a residential element. The 2011 Regulations did not apply to the deposit in this case but, if they did, they did not apply to the whole of the deposit, standing the equestrian and residential elements.

The Hearing

A Hearing took place at Glasgow Tribunals Centre on the morning of 12 November 2019. The Applicants and the Respondent were present. The Respondent was represented by Mr Keith Mackenzie of Wright, Johnston and Mackenzie, solicitors, Glasgow, who lodged with the Tribunal an Inventory of 8 pages of photographs signed by the Parties on 15 January 2018, and a copy of an advertisement for the letting which had appeared on the horsemart website, containing a response from the Applicant, enquiring about the size of the "stables and indoor".

The Applicants told the Tribunal that the flat was incorporated in the barn where the stables were. The main reason for taking the let was that Miss Wylie could stay there. She could have stabled the horses for very much less than £1,200 per month, especially where she was looking after the horses herself. The real benefit was that she had somewhere to stay, with the additional benefit of being able to stable her horses. The Applicant, Miss Wylie, had not been aware of the tenancy deposit scheme, but had regarded the lease arrangement as being exactly the same as renting a flat, which she had done before. The Applicants accepted that the deposit was high, to cover also damage by horses, but the horses were already insured for public liability. The Applicants were content with the deductions taken from the deposit but had consulted a solicitor as the Respondent had indicated she was looking to retain more than the amount required to cover the items already agreed. It was the Applicants' solicitor who had told them about the tenancy deposit scheme.

He had written to the Respondent on 10 May 2019 and on 15 May, the Respondent had returned the deposit minus the sums already agreed.
Mr Mackenzie, for the Respondent, told the Tribunal that this was in effect an equestrian lease. He was not suggesting it was an agricultural tenancy. The lease referred to a flat, three stables and two fields at a rent of £1,200 per month, which was reduced to £1,050, on account of the Applicants agreeing to look after the Respondent's horse from 10 January 2019. He repeated that the Respondent had had no legal input into the lease and, in addition to the property as mentioned in the lease, the Applicants had been given the use of one further field, indoor and outdoor areas and a hay barn. The Respondent's position was that the primary purpose of the letting had been for the Applicants to have somewhere to keep their horses. The flat was not the sort of residence anyone would have rented on its own. The residential use was very much ancillary to the main purpose, namely stabling and grazing.
Mr Mackenzie stated that he understood there had been an indication at the start of the tenancy that the Applicants did not want the deposit lodged in a tenancy deposit scheme, the matter having been raised by the Respondent at the prompting of her husband. The Applicants denied that this matter was discussed.
The Parties were agreed that the sums deducted from the deposit before it was refunded were not an issue between them.
The Parties then left the Hearing and the Tribunal members considered the application and the evidence before them.

Findings in Fact

- The parties entered into a lease commencing on 15 January 2018.
- The rent was £1,200 per month.
- A deposit of £5,000 was paid, as provided for in the lease.
- The lease defined the subjects of let as a flat, three stables and two fields.
- The lease ended on or about 1 May 2019.
- The deposit was repaid, under agreed deductions, on 15 May 2019.
- The deposit was not at any time lodged in a tenancy deposit scheme.

Reasons for Decision

The primary question for consideration by the Tribunal was whether the arrangement fell within the definition of "private residential tenancy" given in Section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). It contained the heading "Equestrian Property Tenancy Agreement" and the advertisement on the horsemart website used the description "Equestrian flat, stables and indoor school all under one roof". The lease, however, bore to be a Short Assured Tenancy (which it could not be, as it was entered into after 1 December 2017) and the terms of the lease were essentially those that might be expected in a residential tenancy, with references to liability for Council Tax, liability for insurance of the building and contents remaining with the landlord and to Grounds for Recovery of Possession under the Housing (Scotland) Act 1988.
The Tribunal accepted that the Respondent had not sought legal advice in framing the lease and that, had she done so, the position might have been considerably clearer, but the Tribunal had to consider the lease as it stood, as it formed the entire contract between the Parties.
Section 1 of the 2016 Act provides (paraphrasing) that a tenancy is a private residential tenancy where it is one under which a property is let to an individual as a

separate dwelling and the tenant occupies it as his or her only or principal home and the tenancy is not one which Schedule 1 to the 2016 Act states cannot be a private residential tenancy.

Schedule 1, paragraph 4(1) of the 2016 Act states that a tenancy cannot be a private residential tenancy if sub-paragraph (2) or (3) applies to it. Sub-paragraph (3) refers to agricultural tenancies, governed by the Agricultural Holdings (Scotland) Act 2003. The Respondent had not argued that the arrangement in the present case was an agricultural tenancy.

Sub-paragraph (2) applies to a tenancy if the let property includes two acres or more of agricultural land, and "agricultural land" is defined as having the meaning given in Section 115(1) of the Rent (Scotland) act 1984. That Section states that "agricultural land" means "land used only for agricultural or pastoral purposes". The Act does not further define "agricultural" or "pastoral".

The Tribunal was satisfied that the let property in the present case included two acres or more of land, but the Tribunal determined that this was not "agricultural land". In the absence of a definition in the 1984 Act, the words "agricultural or pastoral purposes must be given their ordinary meaning. The view of the Tribunal was that "agricultural" means used for farming or related to farming and "pastoral" means used for the keeping or grazing of sheep or cattle or other herd animals. The Tribunal was satisfied that the definition of "agricultural land" in Schedule 1, paragraph 4(2) of the 2016 Act did not extend to land used solely for the outdoor accommodation and exercise of horses. Accordingly, the lease between the Parties was a Private Residential Tenancy, as it could not be brought within any of the exceptions set out in Schedule 1 to the 2016 Act. It followed, therefore, that the Respondent was obliged by law to lodge the deposit in a tenancy deposit scheme.

Regulation 3 of the 2011 Regulations requires a landlord who has received a tenancy deposit to pay the deposit to the scheme administrator of an approved tenancy deposit scheme within 30 working days of the beginning of a tenancy. Rule 10 of the 2011 Regulations provides that, if satisfied that the landlord did not comply with any duty in Regulation 3, the Tribunal **must** order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit.

In arriving at its decision on the level of sanction, the Tribunal considered all the facts and circumstances of the case, to ensure its Decision was fair, just and proportionate.

The Tribunal was satisfied that the failure to lodge the deposit in the present case had not been wilful and was content that the period taken to refund it had been reasonable, given that estimates for work agreed between the Parties had to be obtained. The Tribunal also noted that the level of deposit was considerably higher than might have been expected in a residential tenancy and, whilst the Tribunal could not speculate on how much the deposit might have been if the let property had not included land and stabling, it accepted that a significant reason for the level of the deposit was the possibility that damage might be caused by the Applicants' horses.

The Applicants' money was at risk for just over 15 months and there was evidence to suggest the Respondent had sought to retain more than the agreed amount. The Applicants had had to consult a solicitor at that stage, and it was only after a solicitor's letter that the deposit (minus agreed deductions) had been returned to the Applicants. The Respondent had been aware of the existence of the tenancy deposit scheme and she ought to have ensured she was complying with the obligations

placed on her as a landlord, taking such advice as she thought necessary to ensure such compliance.
The Tribunal regarded the Respondent's failure as serious but was not inclined to look at a multiple of the deposit in arriving at its Decision, because the deposit was unusually high. Taking all factors into account, including the risk and inconvenience to the Applicants, the Tribunal determined that a fair, just and proportionate amount to order the Respondent to pay was £1,200.

Decision
The Tribunal determined that the application should be granted and made an Order for Payment by the Respondent to the Applicants of the sum of £1,200.
The view of the Tribunal was unanimous.

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.

[redacted]
Legal Member/Chair

12 November 2019
Date