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 ("the Regulations")

Chamber Ref: FTS/HPC/PR/24/1380

Re: Property at 25 Douglas Crescent, Hamilton, ML3 7SQ ("the Property")

Parties:

Miss Ann Brannan, 19 Douglas Crescent, Hamilton, ML3 7SQ ("the Applicant")

Mr Michael Hyrons, Ms Marie Todd, 1 Clydesdale Place, Hamilton, ML3 7TE; 39 Sunnyside Street, Larkhall, ML9 1DG ("the Respondents")

Tribunal Members:

Ms H Forbes (Legal Member) and Ms S Brydon (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment should be made in favour of the Applicant in the sum of £870.

Background

1. This is a Rule 103 application received on 22nd March 2024. The Applicant representative lodged a copy of a tenancy agreement commencing on 1st January 2022, communication from the three approved tenancy deposit schemes, and termination of tenancy notice. The Applicant is seeking a payment order under the Regulations in respect of the Respondents' failure to lodge a tenancy deposit in the sum of £435 paid by the Applicant to the Respondents at the start of the tenancy which commenced on 1st August 2009.

2. By email dated 16th May 2024, the Respondents lodged written representations and productions (hereinafter referred to as R1).

The Case Management Discussion

3. A Case Management Discussion took place by telephone conference on 12th June 2024. The Applicant was in attendance and was represented by Mr Bird,

Hamilton CAB. The Applicant was supported by Ms Lianne Campbell. The Respondents were in attendance. The application was continued to a hearing.

4. By email dated 10th October 2024, the Applicant representative lodged productions (hereinafter referred to as A/page number).

5. A hearing set down for 31st October 2024 was postponed at the request of the Respondents.

6. By emails dated 14th and 30th December 2024, the Respondents lodged written representations and productions (hereinafter referred to respectively as R2/page number and R3/page number).

The Hearing

7. A hearing took place by telephone conference on 8th January 2025. The Applicant was in attendance and was represented by Mr Bird. The Applicant was supported by Ms Lianne Campbell. The Respondents were in attendance.

Preliminary issues

8. There was some discussion about the numbering of the Applicant's documents which did not match the inventory provided. Mr Bird confirmed this was an error in the inventory, and no pages were missing from the productions.

Applicant's evidence

9. The Applicant said she had lived at the Property from 1st August 2009 until the termination of the tenancy on 12th April 2024. The tenancy was renewed regularly. The Applicant was aware that the Respondents were registered landlords. There was no letting agent involved during the tenancy. She lived in the Property with her son and daughter, initially, then with her daughter. The Applicant had been in receipt of Housing Benefit throughout the tenancy. She paid a tenancy deposit of £435 to the Respondents at the commencement of the tenancy. She could not remember if this had been paid by cash or bank transfer, but she had borrowed the money from her mother, who had witnessed the payment of the deposit. The Applicant had got into rent arrears in May 2010.

10. The Applicant said she did not agree with the Respondents that the tenancy deposit could be attributed to the rent arrears when the first tenancy came to an end in August 2010. She said she knew that any such agreement should be recorded in writing, and it was not. Referred to document A/4, which was a rent statement from 1st July 2009 to 9th August 2010, the Applicant said she received it by email from the Respondents. The Applicant said she had not altered or doctored the document, and was not 'tech savvy' enough to do so. She had provided it to her representative in connection with another case.

The first entry on the document was the payment of the tenancy deposit on 16th July 2009. There was no reference to any application of the deposit towards the rent arrears in the statement. The Tribunal queried the fact that there appeared to be an inaccuracy in the addition of the arrears total at 1st September 2010. The Applicant said she had looked at the document at the time, but had other things going on in her life. The Applicant said she had made payment of £250 on 1st November 2010 as reflected in the account. The Applicant said at that time she had accepted the sums stated in the rent account.

11. The Applicant was referred to A/6, which was a Housing Benefit application form dated 21st January 2013, where it was stated that rent arrears amounted to £1989 covering the period from June 2010 to the date of the form. The Applicant said there was no mention of a deduction from that sum in respect of the tenancy deposit. The Applicant said she completed the form, although she later said Mr Hyrons completed it.

12. The Applicant was referred to A/15, which was a tenancy agreement commencing on 1st September 2017. The Applicant confirmed there was no tenancy deposit mentioned in the new tenancy agreement. Following questions from the Tribunal, with reference to the Respondent's productions, and particularly, R1/15, the Applicant confirmed the original tenancy stated that a deposit of £435 was due, and that the following tenancy, commencing on 1st September 2010 (R1/11) had no clause in respect of a tenancy deposit. The Applicant said this was due to the fact that it was a rolling tenancy. She had already paid the deposit, so there was no need to mention it in subsequent tenancy agreements.

13. The Applicant said she had not received the tenancy deposit from the Respondents at the end of the tenancy. She was unaware where the money was. She had checked with the approved tenancy deposit schemes, but the deposit had not been lodged. The Applicant said her rent arrears were cleared in October or November 2015. She had no further arrears. The Applicant said she had to fight numerous times to get an updated rent card from the Respondents. She had asked for this in January 2024 and was still awaiting it. The Applicant said she was unaware how the Respondents maintained their records. She was aware the columns did not always add up. The Applicant said the Respondent, Mr Hyrons, had tried to get her to understand their system. The Applicant had been going through a stressful time, and there were issues as her benefits were paid fortnightly, and she was paying the rent monthly, rather than four-weekly. The Applicant said she thought the Respondents let around 18 properties. She dealt with both Respondents during the tenancy, and would get the rent card from Ms Todd.

14. Conscious that the Respondents had made representations that the document at A/4 was not the type of spreadsheet they would normally use as a rent book, the Tribunal queried how the Applicant came to be in receipt of the document. The Applicant said it was attached to an email from the Respondents. Mr Bird confirmed that the email had not been provided to him

for the purposes of compiling the productions. Given that this appeared to be a crucial matter, the Tribunal discussed with parties the need to access this email, and whether the hearing should be adjourned. Mr Hyrons said he was keen for the hearing to proceed without adjournment, so that the matter could be determined as soon as possible. It was agreed that the Applicant and her representative would attempt to retrieve the email and send it to the Tribunal and the Respondents. The hearing was adjourned for this purpose.

15. It was eventually ascertained that the rent statement in question was attached to an email from Ms Todd sent to the Applicant on 14th April 2013. Ms Todd said Mr Hyrons was in hospital at the time, and she had probably complied the spreadsheet from bank statements as a provisional rent statement, making errors as she did so. She had not remembered this until she saw the email of 14th April 2013 during the hearing.

Cross-examination of the Applicant

16. The Applicant said she had not been evicted due to arrears at the end of the second tenancy agreement because the parties were cousins, and she had been told not to worry about matters. The Applicant denied there was a lengthy discussion regarding using the tenancy deposit to pay the rent arrears. If they had agreed to use the tenancy deposit for the arrears, she would not have made this application.

Re-examination of the Applicant

17. The Applicant said she did not have a good knowledge of Housing Benefit early in the tenancy. She is more aware of tenancy matters now. It was a difficult time for her when the tenancy started, due to divorce and bereavement. She had discussion with the Respondents about other tenancy matters at the time. She was aware of the obligations of tenant and landlord. The Applicant said she had taken advice from Money Matters in January 2024.

The Respondents' position

18. Mr Hyrons referred to R2/3 which was a letter dated 19th July 2010, enclosing a rent statement (R2/4) which showed the deposit paid on 16th July 2009. Mr Hyrons said this was a follow-up to a conversation with the Applicant. At R2/5, there was a letter dated 29th November 2010 with a rent statement (R2/6). The letter states 'Your two payments for October and your deposit payment for September are noteworthy'. The rent statement showed an entry for 23rd September 2010 of £435, stating the sum had been paid on 16th July 2009, the date on which the deposit was paid. This had been discussed at length with the Applicant. Mr Hyrons said he was open and honest and did not realise the Applicant did not understand the rent account. If he had realised this, he would have discussed it with her at greater length.

19. Asked by the Tribunal what 'noteworthy' meant in the context used, Mr Hyrons said it meant the sums had been paid towards the account, i.e. the payments were noticed. Mr Hyrons said the document at R2/7 was a document used to reconcile mortgage payments for the Property and showed the previous tenancy from 15th April 2009, with the Applicant's tenancy showing from 16th July 2009, when the deposit was paid. Mr Hyrons said this was an authentic document which showed the deposit had been paid towards the arrears on 1st September 2010.

20. Mr Hyrons said he would normally discuss arrears with a tenant when the arrears reached £1000. He does not have a written policy in this regard, and, as the parties were cousins, the Respondents were more relaxed about matters. Ms Todd said she was less involved in this side of the business, but she and Mr Hyrons would get together regularly to go over the accounts. She had been aware that the deposit was used to reduce the arrears. She remembered this had been discussed by the Respondents and thought this discussion took place in 2010 or 2011.

21. Mr Hyrons said he could not remember if there was any conversation about why no deposit was taken for the second tenancy, but he knew the Applicant was going through a hard time. She did not have the money for her rent, far less a deposit. As she was a relative, the Respondents did not feel they needed to take a deposit. Asked by the Tribunal why they had taken a deposit in the first place, Mr Hyrons said it was their usual procedure. They had not charged the Applicant for late payments, which they could have done. Mr Hyrons said he only became aware of the fact that the Applicant was seeking the deposit when he received notification of the application. There had been no deterioration in the parties' relationship after the tenancy ended. Mr Hyrons has health issues which mean the parties have not met very often in recent times.

22. Ms Todd said the Respondents have never had 18 properties to let. They currently have five properties. Any delays in providing a rent card had been due to Mr Hyrons being in hospital with long-term conditions.

Cross-examination of Ms Todd

23. Ms Todd said she had provided the Applicant with the rent statement in 2013 because she knew the Applicant was anxious about her arrears. She confirmed the Respondents administered the accounts together, updating spreadsheets every two months before sending them to the accountant with bank statements. The Respondents would not routinely meet to discuss tenants in arrears, but they met every two months, as well as on family occasions. The tenancy deposit was held in the business account prior to being attributed to the rent arrears. Ms Todd said the Respondents no longer take tenancy deposits, but ask for some rent to be paid in advance. They have never used an approved tenancy deposit scheme. The Respondents are not members of a professional landlord association. They have not taken legal advice about any legislative reforms, but would do so if required.

Cross-examination of Mr Hyrons

24. Mr Hyrons has been a landlord since 2004. He has contracted with letting agents, and currently uses the services of a letting agent, but had not done so for the Property. The Respondents have sold one property in the last year. Mr Hyrons said he is aware of his responsibilities as a landlord and of the Regulations. He receives information from the local authority in respect of legislative reforms, which information is usually comprehensive. He did not recall having to seek any further advice on any issues. He has a good relationship with the local authority. He became aware of the Regulations when they were introduced, which he thought was in 2010, and he was aware that tenancy deposits lodged before the Regulations came into force were covered by the Regulations. At that time, the Respondents dropped the requirement for tenants to pay a deposit. They would ask for payments of two months' rent in advance. The Respondents use the services of a lawyer, tradespeople, and an accountant. The lawyer is used for conveyancing. Mr Hyrons has not sought advice from the lawyer on tenancy issues.

25. Mr Hyrons said he and Ms Todd meet every couple of months. They are equally involved in the business. Ms Todd tends to become more involved when Mr Hyrons has been hospitalised.

26. Mr Hyrons said the letter dated 29th November 2010 was not a word-for-word account of the discussion which had taken place between the parties. It was a summary and that was why it did not spell out the discussion regarding agreeing to use the tenancy deposit towards the rent arrears. There had been a previous letter sent between the letters in July and November 2010, to accompany the September 2010 tenancy agreement, but Mr Hyrons was unable to find a copy of that letter. Mr Hyrons said the agreement to use the tenancy deposit to cover the rent arrears was a verbal agreement. Mr Hyrons said each case is treated on its own merits and the Respondents would treat vulnerable tenants with a more humane attitude. They would ask if assistance was required.

27. Mr Hyrons said he kept diaries and paperwork for two or three years. He had not kept notes of discussions with Ms Todd. He referred to R2/9, which showed an email from him to Ms Todd on 9th January 2018, attaching a rent book. This was the type of communication sent between the Respondents. Mr Hyrons thought the letter dated 29th November 2010 would have been put through the Applicant's letterbox. Sometimes, the Respondents would use mail and recorded delivery. Mr Hyrons said he uses a laptop for tenancy issues, but does not keep historical files over ten years old. He had kept some information on floppy discs, but these are no longer available. The Respondents had searched their documents and lodged all that was available. The documents lodged had been found in a folder in hard copy, and had been scanned.

Summing up for the Applicant

28. Mr Bird submitted that the Respondents' position in relation to the payment of the deposit towards arrears had changed on more than one occasion. The Applicant had not received the deposit at the end of the tenancy. There was no documentary evidence to show agreement to using the tenancy deposit to cover arrears. Any such agreement ought to have been in writing, from a reasonable person's perspective. A rent increase had to be in writing and this was a similar issue. Consumer rights legislation provides that, if parties change the terms of a contract, this should be in writing. The wording of the deposit clause in the first tenancy agreement does not allow the Respondents to apply the deposit to rent arrears. This is too serious a matter and ought to be covered by written agreement. The new housing bill currently in progress deals with the issue of pets, and this is as serious a matter as that of pets in a tenancy.

29. It is the Applicant's position that, if the tenancy deposit was not applied to rent arrears, there would be no arrears of rent, as her rent account was cleared. If the Respondents had complied with the Regulations and lodged the deposit, parties could have taken advantage of the dispute resolution procedure. The Applicant could not say if the Respondents had applied the tenancy deposit to the rent arrears, as claimed. This was a significant amount for the Applicant.

30. Mr Bird submitted that the Applicant was straightforward in answering questions, whereas the Respondents changed their answers on occasion. Their record keeping was not straightforward.

31. Mr Bird referred the Tribunal to UT 2019 44, Ahmed v Russel 2023 SLT TR no 3, FTS/HPC/PR/22/2399 and FTS/HPC/PR/24/0088. It was his position that the Tribunal had to weigh up the evidence and consider aggravating and mitigating factors. Ahmed v Russell was authority that the Tribunal had to be fair and proportionate when deciding on a penalty. The two First-tier Tribunal case decisions showed how the Tribunal should consider aggravating factors. Mr Bird submitted that the Tribunal should be considering a penalty between 2.4 and 3 times the deposit.

32. Mr Bird submitted that the aggravating factors in this case were that the Respondents did not take advice on this matter, and that the Respondents are experienced landlords. The mitigating factors were that Mr Hyrons had health conditions and was not legally qualified.

Summing up by the Respondents

33. Mr Hyrons said he accepted all documents should be kept and this would have shown the conversations took place, followed up by letters. There was no deposit in the second tenancy agreement and the rent due date had been changed to four-weekly to accommodate the Applicant's benefit payment

dates. Mr Hyrons would dispute there was no agreement about the deposit being applied to the rent account. It is the case that he cannot find the document to support it, but there is sufficient evidence to show that the Applicant knew about this matter, particularly from reading the second letter and rent statement which shows there were discussions.

34. Ms Todd submitted that the position was quite clear from the rent accounts and tenancy agreement. The Applicant had not asked for clarity on this matter, as Ms Todd would have expected. This is a large sum for the Respondents, too. If the deposit had not been applied to the arrears, there would be arrears of £435.

35. Ms Todd said there had been no blatant disregard of the Regulations. Mr Hyrons said there was no breach of the Regulations.

36. Both Respondents declined to put forward any representations regarding the amount of the penalty if the Tribunal was to find there had been a breach of the Regulations.

Findings in Fact and Law

37.

(i) The Respondents are the heritable proprietors of the Property.

(ii) Parties entered into an assured tenancy agreement in respect of the Property commencing on 1st August 2009.

(iii) The Applicant paid a tenancy deposit of £425 on 16th July 2009.

(iv) The tenancy agreement was renewed annually.

(v) The renewed tenancy agreements from 1st August 2010 onwards did not contain a clause requiring the payment of a deposit by the Applicant

(vi) The Applicant fell into rent arrears in May 2010.

(vii) The parties had some discussion about the rent arrears and terms of the tenancy prior to September 2010.

(viii) The Applicant did not agree to have the tenancy deposit applied to the rent arrears.

(ix) On 14th April 2013, Ms Todd sent the Applicant a rent statement which did not show the tenancy deposit had been applied to the rent arrears.

(x) The Respondents failed to comply with the Regulations by failing to pay the tenancy deposit into an approved tenancy deposit scheme when the Regulations came into force on 7th March 2011.

(xi) The Respondents have breached Regulation 3.

Reasons for Decision

38. The Tribunal was not persuaded, on the balance of probabilities, that the parties had reached agreement to allow the Respondents to apply the tenancy deposit to the Applicant's rent arrears. Mr Hyrons may have applied the deposit to the rent arrears, as suggested by the letter and spreadsheet of November 2010, however, if the parties did not reach such agreement, it was not permissible for him to do so unilaterally. The Tribunal would have expected to see a written agreement by the parties, or some documentation to indicate such agreement, but there was no such documentation. The Tribunal observed that the accounting procedures of the Respondents appeared to be disorganised, with Ms Todd providing the Applicant with a spreadsheet with accounting errors, and no mention of the application of the tenancy deposit to the rent arrears, despite Ms Todd claiming to have been aware of this matter. The Tribunal was not persuaded that the reason there was no deposit required for the subsequent tenancy agreements was due to the familial relationship between the parties, and considered it may have been due to the fact that a deposit had already been paid.

39. In the absence of any such agreement regarding the application of the deposit to the rent arrears, it was incumbent upon the Respondents to lodge the deposit in an approved tenancy deposit scheme when the Regulations came into force. The Respondents failed to do so.

40. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised in the manner set out in the case *Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015* by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. It is stated in *Jenson v Fappiano* that: *'Cases at the most serious end of the scale might involve: repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals.'*

41. The Tribunal considered this to be a serious matter. The Applicant's deposit was not lodged with an approved tenancy deposit scheme as required by Regulation 3, and remained unprotected for the duration of the tenancy, a period of over thirteen years.

42. The Tribunal took into account the mitigating circumstances of Mr Hyrons' ill health, and the fact that the Applicant was in rent arrears.

43. The Tribunal considered that the Respondents should have been aware of their responsibilities as a landlord. They are experienced landlords, although they have not used the tenancy deposit scheme previously. The Tribunal did not consider there was any fraudulent intention or deliberate or reckless failure on the part of the Respondents. The Tribunal also took into account the fact that the Applicant could have raised this issue on receipt of the letter dated 29th November 2010, as she did not dispute receiving the letter in her evidence. If she had questioned the matter at the time, further discussion could have taken place and she could have made the Respondents aware that she was not agreeable to the deposit being applied to the rent account.

44. The Tribunal took into account the representations made in regard to the previous Upper and First-tier Tribunal decisions and Ahmed v Russell. The Tribunal took into account that the sanction which is imposed is to mark the gravity of the breach which has occurred. The purpose of the sanction is not to compensate the tenant. The level of sanction should reflect the level of overall culpability in each case measured against the nature and extent of the 2011 Regulations.

45. Taking all the circumstances into account, including the mitigating and aggravating factors in the case, the Tribunal decided it would be fair and just to award a sum of £870 to the Applicant, which is twice the tenancy deposit.

46. The Tribunal made no findings in respect of whether the tenancy deposit was payable to the Applicant by the Respondents. This is a Rule 103 application, and the Tribunal has no jurisdiction to make any other orders in this type of application. However, it seemed clear that, if the tenancy deposit was to be returned to the Applicant, there would be an outstanding balance of the same sum on the rent account.

Decision

47. The Tribunal grants an order against the Respondent for payment to the Applicant of the sum of £870 in terms of Regulation 10(a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

Helen Forbes

Legal Member/Chair _____ **14th January 2025**
Date