Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 9 of the Tenancy Deposit Schemes (Scotland) (Regulations) 2011 (the Regulations)

Chamber Ref: FTS/HPC/EV/21/2421

Re: Property at 12 Dundonald Crescent, Auchengate, Irvine, KA11 5AX ("the Property")

Parties:

Miss Lynne Devlin, 36 Sandra Place, Ayr, KA7 4FN ("the Applicant")

Carnegie Properties (Scotland) Ltd., 24-28 Broad Street, Glasgow, G40 2QL ("the Respondent")

Tribunal Member:

Jan Todd (Legal Member) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of Eight Hundred and Twenty five pounds be made in favour of the Applicant.

Summary of Discussion

1. This was a hearing to consider the application by the Applicant dated 7th October 2021 for a penalty for failure to lodge the deposit she paid in a tenancy she entered into in 2009 with the Respondent who is the Landlord.
2. A CMD was arranged and held on 20th January 2022 and prior to that the Respondent submitted written representations confirming that the applicant rented the Property on a short assured tenancy, that by 15th May 2013 when they believe all tenancy deposits should have been lodged in a tenancy deposit scheme they did not hold any deposit on behalf of the applicant, and advised they were seeking further bank statements to prove this.

3. At the CMD it was clarified that neither party had a copy of the tenancy agreement as it was entered into some time ago and neither has a copy. Both agreed the tenancy commenced around September 2009 and the tenant lived there initially with her partner and children. The tenant averred she paid the sum of £525 as a deposit at the start of the tenancy along with one month's rent in advance. She had contacted the tenancy deposit schemes and they have all confirmed they do not hold a tenancy deposit in her name or the landlords for this Property. She is therefore claiming that there has been a breach of the Regulations and wishes a penalty for this.
4. The Applicant also mentioned that she gave notice last year and although she had left the property in July she handed back the keys on 9th August and also confirmed that when she left Mr Johnstone had advised her, the Landlord owed her money.
5. Mr Johnstone for the Respondent confirmed that there was a tenancy with the Applicant and that it commenced on 10th September 2009 when the Applicant moved in with her partner and children. He advised that the rent started at £575 and was increased to £600 a month in line with property rental prices at that time after around 6 months and remained at £600 for the rest of the tenancy. He pointed out this meant no further increase for 12 years.
6. He confirmed that the Applicant did pay a deposit and one month's rent in advance at the start of the tenancy but denied it was £525 advising that he believed the deposit paid was £575 the same as one month's rent.
7. Mr Johnstone explained that the Landlord's position is that the Applicant was always erratic in her payment of rent and he advised he has spreadsheets ready to send to the tribunal showing the rental payments made and those missed. This led, he advised, to rent arrears of around £900 being due by 2013 and he advised that in light of this the landlord kept the deposit to pay for those rent arrears so that when the tenancy deposit regulations came into force there was no deposit available to lodge. He advised the Respondent had a loan to pay and needed all the rent due so the deposit was used early on to pay off the arrears. He advised that records from more than 6 years ago are archived and would take time to retrieve them from this time.
8. The Applicant denies being asked or told that the deposit could be used to offset arrears and denies being in arrears significantly, advising that she often paid her rent later than the 10th of each month as she was paid her salary around the 28th of each month and would pay consistently then.
9. The Tribunal issued a direction to both parties seeking information and paperwork to support their positions. Both lodged various productions between 4th March and 31st March. Some of the e-mails and productions including photographs and statements related to the general conduct of the tenancy and the state of the property when the Applicant left which are not relevant to this dispute. The Respondent lodged an inventory of productions with an index of 13 different submissions included in that was a specimen lease of a type the Respondent advised they used in 2009, bank statements from 2009 to 2011 and copy letters to the Applicant regarding arrears and the use of the deposit dated between June 2011 and December 2012. The Applicant did not lodge an inventory but submitted various e-mails.

The Hearing

10. The Hearing was held over two days on 12th April and 25th July 2022. Both proceeded by way of teleconference and Ms Devlin the Applicant was present in person along with Mr William Johnstone who was representing the Respondent. Mr Johnstone had a colleague with him namely Mr McPhail one of the Directors of the Respondent on the first hearing day who was there as a supporter only.
11. At the first hearing evidence was taken from Ms Devlin and Mr Johnstone but it was continued as both members of the Tribunal agreed they needed a full rent statement showing the sums due, sums paid and the running balance to consider fully the evidence and statements made by both parties.
12. At the Second hearing the ordinary Member had changed and so evidence was taken again on all pertinent points.
13. Prior to the Second day of the hearing both parties lodged copy bank statements covering the majority of the period of the lease and the Respondent lodged a rent schedule summarising the rent due, rent paid and balance.

Evidence from Ms Devlin

14. Ms Devlin was not represented and when asked to advise what her position was she confirmed the following:-
15. Ms Devlin confirmed that she heard from a neighbour at no 11 Donaldson Crescent that the landlord had not put her deposit into a scheme and so she investigated where her deposit was and contacted the tenancy deposit companies who confirmed that it was not lodged. She felt this was unfair and illegal and so raised this action. She advised she had taken the tenancy of the Property from September 2009 and initially lived there with her children and partner before they split up. She could not remember the precise date it started but agreed that the deposit was £575 (having previously stated it was £525 she now agrees with the sum Mr Johnstone confirmed was paid). She advised that she left last year in July but only handed over the keys in August on 11th August as Mr Johnstone had said her rent was paid up and he owed her money and not to pay the last month's rent. Ms Devlin confirmed that she last paid rent in June 2021 but not in July as it was covered. She confirmed that as her deposit that had been paid at the start of the tenancy and had not been lodged in a tenancy deposit scheme her position was that the Respondents have broken the law and she was seeking a penalty for this. She confirmed that she was not seeking any repayment of the deposit and mentioned it being very stressful as the reason why.
16. The Tribunal then asked Ms Devlin various questions and in response to questions about the lease she advised that the tenancy started in September 2009 and that she thought it would have been for an initial period of 3 years as she was looking for security as her family was very young and she had a bad experience with a previous tenancy. She was not sure the exact date it started and as previously advised at the CMD she confirmed she no longer had a copy of the tenancy agreement. When asked if it was likely to have

been in the format set out in the style lodged by Mr Johnstone in Index 13 of his first productions she stated it wasn't as she was adamant it was for more than 6 months, that this had been negotiated at the start and she thought it was no more than 1 to 11/2 pages long. The style lease lodged was 4 pages long.

17. The Tribunal then asked Ms Devlin if she had received or remembered the various letters lodged by the Respondent dated 16th June 2011 and subsequent letters dated 15th July, 12th August, 12th and 24th September and 17th December 2011 all referring to rent arrears or non-payment of rent. She denied receiving any of those letters or indeed any letters from the Respondent advising that Mr Johnstone was the person she dealt with from the company and that he would phone her often in the morning if there were issues with rent. She categorically denied receiving those letters and in particular the first one stated that they were invoking a clause regarding the rent."
18. When asked by the ordinary member when her rent increased from £575 to £600 she thought it was after the first period of the lease which she averred was 3 years. Later in the hearing it was noted that bank statements showed that rent paid was increased to £600 in March 2012 to which she advised that if it was on her bank account then that would be correct.
19. Ms Devlin advised she never received any rent statements from the landlord during the lease but just checked her rent from her bank accounts.
20. The Tribunal then went through each of the credits from the Applicants bank statements from 2009 to May 2013 and checked if she agreed that this matched the sums shown on the Respondents rent summary sheet that had been produced along with copies of the Respondent's bank accounts for the duration of most of the lease. The Applicant's bank accounts and the Respondents rental sheet showed that from October 2009 to 12th September 2010 that the Applicant paid her rent in full for each month. On 12th October and 10th November 2010 she only paid £500 and not the rent due which was then £600. Ms Devlin advised that she thought she might have no heating for 3 days around then. It was then noted there was an overpayment of £50 on 10th February and 10th March 2011. The rent of £600 a month was then paid from April 2011 to June 2011 but another underpayment of £100 was made for each of the months of July, August and September 2011. This was confirmed by the bank statements lodged by the Applicant which showed those payments being made and also showed that on a few, but not many occasions the standing order payment had been rejected by her bank as having insufficient funds and then was repaid later in the month. Ms Devlin when asked why there was an underpayment said she was not sure why this was underpaid, but advised that she did ask for rent reductions for repairs in particular in regard to the washing machine which she said was inadequate from the beginning of the tenancy and with regard to a window in the property which she claimed was defective for a long time. She advised that these were ongoing issues and sometimes she would agree with Mr Johnstone a reduction in the rent but then he would say that unless she paid the rent in full the landlord could not afford to fix issues and so she made up payments. She also mentioned that she had been off long term sick on October/November 2010. The Tribunal noted that her submissions regarding repairs appear to

show a list of text messages regarding repairs which start in 2016 and do not cover the period between 2009 and 2013. Ms Devlin had previously advised that she changed phone around then and does not have previous messages. She advised that most requests for repairs or maintenance would have been done verbally or over text message with Mr Johnstone.

21. Ms Devlin did not have access to her copy bank statements at the hearing as she believed she had left them at her work, but agreed after each credit was read out and compared with the Respondents rental statement that the sums shown on the rental statement as paid by her were accurate and this left a sum of rent not paid by 10th May 2013 of £300. (Mr Johnstone also confirmed that is was correct at that date.)
22. Ms Devlin further explained that sometimes she would withhold rent in order to try and get repairs done but Mr Johnstone would then say to her that he couldn't do the work until she made up the money. She suggested that the shortfall in July to September 2011 could be a rent deduction for the window or washing machine.

Evidence from Mr Johnstone

1. Mr Johnstone advised that he manages the properties for the Applicant and confirmed that he dealt with Ms Devlin when she moved in. He advised she was the first tenant.
2. He referred to the written evidence he had lodged and advised that he felt the evidence he had presented in writing was overwhelming. He confirmed the Applicant had moved in on 10th September 2009 and immediately before then the flat had been fully renovated. He advised the first month's rent and deposit of £575 each was paid in cash and that is why the first bank statements he has lodged start from October 2009.
3. Mr Johnstone advised that although his company did not have a copy of the actual lease entered into with the Respondent it would have been in the style and conform to the one he has lodged at number 13 of his inventory of productions. It would have been therefore a Short assured tenancy and they would have offered 6 months initially which would roll on every 6 months. He advised that the rent started at £575 but Consultants came in to advise and told them it was too cheap and so he confirmed they increased it to £600 6 months later. He denied he would have agreed to a 3 year term.
4. He agreed that Ms Devlin left and tenancy ended in August 2021.
5. He confirmed that the Applicant does not and did not issue rent statements because he advised there was no need. All his tenants with the exception of Ms Devlin paid on time and it was only Ms Devlin that paid late. He confirmed that he remembered writing the letters regarding Ms Devlin being in rent arrears which he has lodged as productions numbers 5-11 of Index 3 to Ms Devlin and said it would be likely they were posted or at least posted through her door.
6. Mr Johnstone submitted that the rent was due on 10th of each month and that it can be seen from the statements that for the first few months/year Ms Devlin did pay the rent around that time or a few days late it was only later that she

started paying at the end of the month. He advised he had drawn up the rent schedule for this Tribunal hearing and apologised for a couple of minor and insignificant errors in it. He confirmed that on 15th June when he wrote the letter invoking the clause about the deposit the Applicant was only in one month's arrears of rent and by 10th May 2013 she owed £300 however he submitted by then they had applied the deposit towards her arrears and this left a credit in her favour of £275 which is shown on the balance column in the rent schedule.

7. He advised it was crucial for the company's finances and to prevent them going into unauthorised overdraft that they received all the rents on time. He advised that it was only the Applicant who would be late or not pay rent on occasion. He advised that in accordance with Clause 5 of the pro forma lease the Applicant was entitled to retain the full deposit until the arrears were paid. He confirmed that because the Applicant was constantly late in paying her rent they were entitled to use the deposit to cover the rent and that they wrote to the tenant and set this out in their letter of 16th June and given that they had told her they were doing that the Respondent was allowed to keep the rent and not lodge it in a deposit scheme even when that came into force. On being asked if the payments made by Ms Devlin ever made up the full amount he advised that no they did not. He referred to the sum shown at the end of the rent schedule which shows she owed more than £1090 even allowing for the deposit being taken off.
8. The Tribunal noted that the Regulations for lodging tenancy deposits came into force for deposits paid prior to 2011 at the latest by 2nd May 2013. The Tribunal asked Mr Johnstone why if the Applicant was at the most in £300 of arrears as at the beginning of May 2013, he felt the Respondent did not have to lodge even the balance of the deposit in a tenancy deposit scheme? He responded that he and the company felt that as they had invoked the clause in the lease that allowed them to apply the deposit to any defaults that meant the deposit was used up and wasn't available to lodge. The Clause in the style lease and repeated in the letter of 16th June says *"The Tenant's deposit is held by the landlord or his/her agent to secure compliance with the tenant's obligations under this agreement, without prejudice to the landlord's other rights or remedies and if at any time during the Term the landlord or his agent is obliged to draw upon it to satisfy any outstanding breaches of such obligations then the Tenant will forthwith make such additional payments as is necessary to restore the full amount of the deposit held by the Landlord or his agent. As soon as reasonably practicable following the termination of this Agreement the landlord shall return to the Tenant the deposit or the balance thereof after any deductions properly made."* The letter of 16th June then says *"Basically the above means you now have no deposit until your rental payments are made on time along with your rental account being brought up to date, once this happens your deposit will be reinstated."* Mr Johnstone advised that in view of this letter the company thought there was no deposit and that they had the right to withhold it in terms of the lease. Mr Johnstone then questioned what jurisdiction the Housing and Property Tribunal had to consider this matter given it relates to a deposit paid in 2009?
9. With regard to whether the Respondent had ever agreed to reduce the rent payable in respect of repairs outstanding Mr Johnstone firmly denied this

stating that there are often ongoing issues with properties and that it could take time to get parts or repairs but that in relation to the washing machine for instance he submitted any issue was due to how it was used.

Findings in Fact

23. **The Applicant tenanted the Property from the Respondent from 10th September 2009 until 11th August 2021.**
24. **Rent was due initially at £575 per month and then after 6 months until the end of the tenancy at £600 per month.**
25. **A Deposit of £575 was paid at the start of the tenancy.**
26. **The Deposit has not been lodged in a tenancy deposit scheme after they came into force.**
27. **The initial term of the tenancy is not clear.**
28. **The Applicant did fall into arrears of rent in the first two years of the tenancy.**
29. **The Applicant owed £100 on 16th June 2011.**
30. **The Applicant owed £300 at the end of April 2013.**
31. **Rent was paid regularly late and at the end of the tenancy further arrears were due.**
32. **The deposit has been retained by the Respondent to pay for arrears.**
33. **This application was raised within 3 months of the tenancy ending.**

Reasons

34. It is noted that the Regulations were passed in March 2011 but came into effect on 2nd July 2012. There are transitional provisions in the Regulations which state in Regulation 47:-

S47 Where the tenancy deposit was paid to the landlord before the day on which these Regulations come into force regulation 3 applies with the modification that the tenancy deposit must be paid and the information provided within 30 working days of the date determined under paragraph (a) or (b)-

a) where the tenancy is renewed by express agreement or by the operation of tacit relocation on a day that falls three months or more but less than nine months after the first day on which an approved scheme becomes operational the date of that renewal:

b) in any other case the date which falls nine months after the first day on which an approved scheme becomes operational.

35. The deposit was paid before the Regulations were passed and operational so the date on which the lease renewed by tacit relocation or otherwise is therefore important to establish when the duty to lodge the deposit arose. Neither party could produce a copy of the written lease although they both agree one was entered into. There are no copy letters or other documents available to show when and how that lease may have started or how long it was initially agreed for. The Respondent has lodged a style lease which

suggests they would have asked for 6 months but the Applicant was adamant that she came to a verbal agreement that it would be for an initial period of 3 years, she gave details as to why she would have asked for that and appeared credible in her submissions regarding this. If the lease was for 1 year or more then the date the regulations become operational in terms of clause S47 (b) above is 9 months after 2nd July 2012 namely 2nd May 2013. If the lease was for 6 months then the lease would renew by tacit relocation on 10th March and 10th September and so the date by which any deposit should be lodged is 10th March 2013 either way, whether the lease was for 6 months or 3 years the tenant was not in arrears of over the amount of the deposit at those dates.

36. The Respondent has raised the question of whether the Tribunal has jurisdiction to decide whether or not a breach of the Regulations have taken place in respect of a lease which commenced in 2009. The Regulations impose a duty to lodge a deposit in a scheme after the commencement date of the Regulations. In Regulation 3 it says "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"
37. Regulation 9 goes on to state that " Tenant who has paid a tenancy deposit may apply to Sheriff 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.
38. Regulation 10 says "If satisfied that the landlord did not comply with any duty in regulation 3 the Sheriff must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit…"
39. Since 1st December 2017 the function and jurisdiction of the Sheriff has transferred to the First Tier Tribunal for Scotland Housing and Property Tribunal. As noted above Regulation 47 applies transitional arrangements to the deposits paid before 2012 when the Regulations came into force. Given the deposit was paid, that the applicant is alleging the deposit was never paid into a scheme this tribunal therefore does have jurisdiction to consider this dispute.
40. The matter in dispute is whether when the regulations came into force or at any time thereafter there was a deposit held by the landlord which has not been placed in a tenancy deposit scheme. The Respondent agrees the deposit was paid, this is not in dispute however Mr Johnstone on behalf of the Respondent submits that the clause in their lease agreement allowed them to retain the deposit and apply it to any defaults. The Applicant strongly denied that this would be a clause in any agreement she entered into and given there is no written lease this is a matter remains one of dispute between the parties. The Tribunal however notes that the Respondent does refer to this clause in their letter to the Applicant of 16th June 2011 and although the Tribunal is not satisfied that a short assured tenancy was entered into for 6 months only given the lack of paperwork to support this, the Tribunal does on balance find it is more likely than not that the letters dated between June 2011 and

December 2011 were written by the Respondent and sent to the Applicant. It is noted that the Applicant was then living with a partner and she may not have seen these letters or may not remember them. Either way the Tribunal accepts that the Respondent believed it had a clause it could rely on with regard to the deposit however the Tribunal does not agree that the clause itself entitles the Respondent to completely withhold the deposit for the duration of the lease and in particular to completely disregard legislation in the form of these Regulations which were introduced after this lease commenced to regulate the retention and use of such tenancy deposits and to provide the tenants with protection and independent adjudication.

41. The Clause itself states "*The Tenant's deposit is held by the landlord or his/her agent to secure compliance with the tenant's obligations under this agreement, without prejudice to the landlord's other rights or remedies and if at any time during the Term the landlord or his agent is obliged to draw upon it to satisfy any outstanding breaches of such obligations then the Tenant will forthwith make such additional payments as is necessary to restore the full amount of the deposit held by the Landlord or his agent. As soon as reasonably practicable following the termination of this Agreement the landlord shall return to the Tenant the deposit or the balance thereof after any deductions properly made". The Clause itself does not* ***explicitly*** *say that the landlord can use it to pay for arrears during the course of the lease, it does however* ***imply*** that a landlord could draw upon it to satisfy any outstanding obligations, and then imposes an obligation on the tenant to make up the difference**.** It refers as well to a balancing exercise to be done **on termination of the tenancy** when the landlord is bound to repay it subject to any deductions properly made**.** It was agreed between the parties that at the date the letter of 16th June 2011 was sent the arrears were only £100. Therefore the only outstanding breach was at the most £100 of rent the balance of the deposit still being available as a deposit as it was not required for rent. On 15th July 2011 the Respondent writes the Applicant to say that "we have secured your deposit against your arrears and constant late payments. It does not mean you can pay less rent you have paid £500 on 13th July and that is another £100 towards your arrears which takes your arrears to £200." On 12th August the Respondent writes again to the Applicant saying "Hi Lynne, Can I bring your attention to your rental payment on 12th August once again for the second month running you have paid £500 where your rent is £600 this now takes your rental arrears to £300." These letters indicate that far from applying the deposit to the arrears and leaving the tenant with a surplus going forward which meant the deposit had been used up as Mr Johnstone tried to argue, the deposit is instead being used as a back up to fill the lack of payment due at that time (and possibly stop the unauthorised overdraft) but at the very most the only right the Respondent has to use those funds are in the words in the clause which state "if the landlord is obliged to draw upon it to satisfy any outstanding breaches…". In other words the only right they could possibly have is to use part of the deposit to pay current arrears which at August 2012 was £300.

42. The Respondent has lodged a rent schedule for this hearing where he shows the deposit applied in June 2011 and then a running balance that is in credit for the Applicant but this is not what seems to have happened according to

the letters sent. The Respondent did not in fact credit the Applicant with the full amount of the deposit quite the opposite. They were still demanding and expecting full rent for each month and had not given her the benefit of the deposit towards her rent past and future. This means that when the new Regulations came into force for this tenancy and that would be either on 2nd March or 2nd May 2013 (and the Tribunal favours 2nd May 2013 in the absence of any clear evidence that the tenancy was for only 6 months), then there was at least part of the original deposit that was being held by the Respondents and not applied to any rent arrears, and which has not been placed in a scheme as they mistakenly believed that telling a tenant they were withholding it was sufficient to allow them to withhold it.

43. The sum of arrears at 2nd May 2013 is £300. The Applicant has submitted that there may have been reasons why she withheld rent or that she came to an agreement as to a rent reduction for repairs but the Respondent denies this, Mr Johnstone has explained that matters were attended to although there can be delays with repairs and getting parts. There is evidence that the Applicant did receive 3 washing machines by 12th November 2013 when she signed a letter confirming this was her third machine in four years and she would not receive any more until after November 2015. There was not sufficient evidence available to allow the Tribunal to conclude that there should be any abatement of rent and so the Tribunal does accept the Applicant was in arrears to the extent of £300 by 2nd May 2013. Given that the Applicant does not appear to have reduced those arrears from then until the end of the lease according to the letters sent and bank accounts produced the Tribunal is satisfied that at least £275 of the original deposit was available and should have been protected from 2nd May 2013. The regulations were brought in to protect all tenants and to ensure deposits were not used until the end of the tenancy. The Respondent was still seeking full payment of rent and arrears from the Applicant after saying there was no deposit. The Respondent is not entitled after Regulations come into force to continue to act as the adjudicator of this deposit or to ignore the impact of the Regulations. The Tribunal is satisfied that a fair and appropriate amount in respect of a penalty is 3 times the balance of deposit after the arrears of £300 are taken into account (namely 3 x £275) which reflects the length of time the deposit was not protected but also takes account of the implied contractual provision that they might be entitled to apply the deposit towards outstanding obligations. Although the clause referred to in the style lease and letter is not as clear as it could be, the Tribunal finds the Respondent thought they had the right to take this amount but does not find it credible they thought they should retain the rest of the deposit just in case of further arrears. In that respect the Respondents have circumvented the intention of Parliament and this penalty is therefore appropriate.

Decision

The Tribunal determines that an order for payment of the sum of £825 should be made in favour of the Applicant.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

J. Todd

Legal Member **Date** 25th July 2022