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 Section 120 - 122 of the Housing (Scotland) Act 2006 and Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/18/2705

Re: Property at Mill Hill Farm, New Abbey, Dumfries, DG2 8EQ ("the Property")

Parties:

Mr David Cox, Mr Alan Penn, Glaick, Corry of Ardnagrask, Muir of Ord, IV6 7TW; Glaick, Corry of Ardnagrask, Muir of Ord, IV6 7TW ("the Applicant")

Mr David Taylor, Dryfesdalegate Farm, Lockerbie, DG11 1ST ("the Respondent")

Tribunal Members:

David Preston (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent as landlord for the property Mill Hill Farm, New Abbey, Dumfries, DG2 8EG did not comply with the duty in Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 and makes an order for the Respondent to pay to the Applicant the sum of one thousand two hundred pounds (£1200).

This is a case management discussion ("CMD") regarding an application in terms of Rule 103 of the First-tier Tribunal for Scotland (Procedure) Regulations 2017 ("the rules") for a penalty where a landlord has not paid the deposit into an approved scheme in terms of regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011, ("the regulations"). The application was made by Mr Alan Penn and Mr David Cox on 9 October 2018. The CMD was held in the form of a telephone conference at the request and agreement of the parties. The respondent was represented by Ms Kara Duke, Solicitor, McJerrow & Stevenson, Solicitors, 55 High Street, Lockerbie DG11 2JJ and Mr Penn spoke for the applicants.

The tribunal had before it the following copy documents:

1. Application dated 9 October 2018 and received by the tribunal on the 10 October 2018;
2. Tenancy agreement dated 1 October 2015;
3. Note dated 16 August 2018 from the tenants giving 2 months' notice of termination;
4. Note dated 1 September signed by the landlord and the tenants setting out terms and agreement of early termination as at 17 September 2018;
5. Note dated 16 August 2018 confirming receipt by tenants of return of deposit;
6. Note dated 16 September 2018 signed by the parties headed "Items to be checked and returned at end of tenancy".

Case management discussion

1. Ms Duke acknowledged at the outset that the landlord had not lodged the deposit paid by the tenants with an approved tenancy deposit scheme. She advised that her instructions were to present facts to mitigate any penalty to be imposed under the Regulations. She said that the respondent confirmed that the tenancy had commenced on 1 October 2015 and that the rent had been paid on time throughout. Her client had considered the applicants to be model tenants. The applicants gave two months' notice of termination of the tenancy on 16 August 2018 resulting in a termination date of 16 October 2018. At the request of the tenants, the landlord agreed to terminate the tenancy on 16 September 2018, notwithstanding that the landlord would have been entitled to rent from 30 September to 16 October 2018. The property had been left in good condition and the deposit had been returned in full on 16 September 2018.

2. Ms Duke said that her client would have been entitled to the rent up to the date of termination as specified in the notice of termination but had waived any claim for that. She said that the landlord was inexperienced in the letting of property and although letting agents had been involved at the commencement of the lease, they had not been instructed to deal with the deposit. He had been aware of the requirements but hads not appreciated the consequences of failure to comply.

3. Ms Duke submitted that the regulations had been intended to deal with the issue of rogue landlords, which was not the case here. She acknowledged that her client had been a bit misguided through his lack of experience. He had: not acted in bad faith; allowed early termination of the lease; and, although she accepted that loss was not a relevant test, he had not received £400 of rent for the period from 30 September to 16 October to which he was entitled. Accordingly, in her submission, any penalty under the regulations should be at the lower end of the scale.

4. Mr Penn, on behalf of the applicant took issue with a number of the points presented on behalf of the respondent. He asserted that the landlord was not as inexperienced as made out. He understood that the landlord had been letting out property for about 10 years. Ms Duke said that he had been renting other properties to family members which did not involve the deposit regulations. Mr

Penn said that he understood that this particular property had been rented previously out-with the family and that on the early termination it had been advertised on the open market for rent.

5. Mr Penn said that the early termination of the agreement on 17 September 2018 had benefitted both parties. After they had served the Notice of Termination the landlord visited them on 1 September 2018 and they had all agreed to the earlier termination on 17 September 2018 which was the date on which the tenants were due to move to their new tenancy. They had therefore come to the agreement as set out in the agreement of that date. That agreement also allowed the landlord to commence to advertise the property for let and to show prospective tenants around before 17 September 2018. Mr Penn said that when they left the property, they had met the incoming tenants who were moving in that day. He therefore submitted that the landlord had not lost by agreeing to the early termination and had, in fact received rent for the period from 17 until 30 September 2018.

Findings in fact

1. The tribunal is satisfied that the Applicants paid a deposit of £800 on 1 October 2015.

2. The tribunal is satisfied that the deposit was never lodged in an approved scheme and the notifications laid down in regulation 42 were not carried out.

3. The tribunal is satisfied that the Respondent failed to comply with any of the duties in regulation 3.

Reasons

6. Rule 17(1)(d) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the Tribunal *"may do anything at a case management discussion which it may do at a hearing, including making a decision"*. The Tribunal was satisfied that it had before it all the information it required to make a decision and that it would, therefore do so without a hearing.

7. Regulation 3(1) of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations"), which were in force before the tenancy of the Property commenced, states that a landlord must, within 30 days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme and provide the tenant with certain information required under Regulation 42 of the 2011 Regulations.

8. Regulation 10 of the 2011 Regulations provides that if it finds 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.

9. The tribunal is satisfied that a clear breach of regulation 3 has occurred and that an order in penalty is appropriate in terms of regulation 10. The tribunal has sufficient information before it to make a decision.

10. The tribunal considered the written and oral representations and submissions made by the parties. The Tribunal noted that the Respondent had stated that he had been aware of the requirement to lodge deposits, and his failure was as a result of inexperience and oversight. However, the duty on a landlord to lodge the deposit in an approved scheme is an absolute duty. In addition, it is incumbent on any potential landlord to familiarise themselves with all the requirements and duties of landlords. The respondent acknowledged that the letting agent had advised him of the requirements of the regulations, but it was said that they had not appraised him of the consequences of failure. The tribunal did not accept that this was credible and considered that he should have clarified that with the agents. The tribunal also rejected the assertion that the respondent was as inexperienced as he made out. It was clear from the letter of agreement between the parties that the landlord was intending to re-let the property once the applicants had moved out.

11. The tribunal considered the gravity of the breach. In the whole circumstances presented to the tribunal, it considered that while any default of this sort is a serious matter, this failure was not at the most serious end of the scale which would attract the maximum sanction of 3 times the deposit. It also had regard to the mitigating factors put forward by the respondent and considers that the fair, proportionate and just sanction in this case is a penalty of One thousand Two hundred pounds (£1200) was fair, proportionate and just in all of the circumstances.

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.

David Preston, Legal Member

4 December 2018