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 Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/20/0786

Re: Property at Hattrick Farm, Craigbet Rd, Bridge of Weir, PA11 3SF ("the Property")

Parties:

Miss Kimberly Sneddon, Mr Martin Friel, 2 Stepends Cottage, Lochwinnoch Road, Kilmacolm, PA13 4TA ("the Applicant")

Mr Robert Baxter, Hattrick Farm, Craigbet Rd, Bridge of Weir, PA11 3SF ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £2025 should be made in favour of the Applicants.

Background

1. By application received on 4 March 2020, the Applicant seeks an order in terms of Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 and Regulations 9 and 10 of the 2011 Regulations. The Applicant lodged a copy tenancy agreement and certificate from Safe Deposit Scotland in support of the application. In terms of the agreement, the tenancy started on 1 February 2018 and a deposit of £900 was to be paid. The certificate from Safe Deposit Scotland states that the deposit of £900 was lodged in the scheme on 2 January 2020.

2. A copy of the application and supporting documents were served on the Respondent. The application called for a case management discussion

("CMD") on 13 August 2020 by telephone conference call. Prior to the CMD both parties lodged written submissions. At the CMD the Legal Member noted that the parties were agreed that Applicants had been tenants of the Respondent since 2008. They had previously occupied a different property and had paid a deposit of £500. On 1 February 2018 they became the tenants of the property, which is the subject of the application, and paid a further deposit of £400, making a total of £900. This was not deposited in an approved scheme, Safe Deposit Scotland ("SDS"), until 2 January 2020. The tenancy ended on 20 January 2020. The Respondent accepted that he had failed to comply with the 2011 Regulations and that the Tribunal was required to impose a sanction. This being the case, the only matter in dispute was the amount of the sanction to be imposed. Following discussions with the Applicants and the Respondents representative, the Legal Member continued the application to a further CMD. This was to allow the application to call alongside a related application by the Applicants under Chamber Reference CV/20/1227. The Legal member also determined that parties should submit evidence in relation to the Respondent's experience as a landlord and his reasons for failure to comply with the 2011 Regulations. On 10 September 2020, the parties were advised that a further CMD would take place on 8 October 2020 at 10am by telephone conference call. Both parties submitted further written representations and documents in advance of the CMD.

3. The application called for a CMD on 8 October 2020 at 10am. Both Applicants participated. The Respondent was represented by Mr Wood, solicitor.

The written submissions

4. The Applicants lodged submissions dated 2 August, 27 September, and 7 October 2020. The submissions state that the Applicants' current home was previously occupied by the Respondent. The Respondent now lives at the property which is the subject of the application. He owns this property. The Respondent had caused them stress, misery, inconvenience and expense as a result of his refusal to allow them to view their current property or agree to a direct swap of properties, because he said he needed time to carry out work before he moved in. In addition, police have had to be called because of his conduct and verbal abuse toward the Applicants. He withheld £110 of their deposit, at the end of their tenancy, but has failed to provide any evidence of the cleaning or repairs he says were required. The Applicants also state that they object to the Respondent submitting and relying on documents relating to his divorce, as he appeared to be blaming his former spouse for the failure to lodge the deposit. They objected to this because they had paid the deposit to the Respondent, not Mrs Baxter. Furthermore, he was the owner of the business and had been for over 30 years. He was "solely" responsible for overseeing the running of the business. They stated that the deposit was only lodged when they asked for the certificate from the scheme, after they had been given notice to terminate the tenancy, and that none of their deposits for any of their 3 tenancies with the Respondent had been secured. They also indicated that the cases referred to by the Respondent, could be distinguished on the facts. They provided a letter from Mrs Baxter which states that she only dealt with the leases for the properties which were let out and did not have any

involvement in “managing deposits”.

5. The Respondent ‘s submissions are dated 4 August and 27 September 2020 and state that the Respondent is a director of RCB Property Services Ltd and that he uses this company to manage his properties. His former spouse was also involved in the company and was joint owner and joint landlord of the property. She dealt with the admin for the properties which they rented out. They divorced in December 2019. Since then the Respondent has managed the properties himself. The Respondent was unaware that the deposit had not been lodged in a scheme. Having been a landlord for many years, he was aware of his responsibilities regarding tenancy deposits. He lodged the Applicant’s deposit when he became aware of the position. The deposit was therefore secured at the time the tenancy ended, and most of it has been released back to the Applicants by SDS. As a result, the Applicants were not prejudiced by the failure to lodge the deposit and a “restricted finding” should be made by the Tribunal. The Respondent also states that he is primarily a farmer. The properties which are rented out are farm cottages, previously occupied by farm labourers. He did not purchase properties to build up a large portfolio. He is not a full-time landlord. The submissions refer the Tribunal to the case of Jenson v Fappiano 2015 SC EDIN 6, in which Sheriff Welch made an award of one third of the deposit, on facts which were similar to the present case. The Respondent also lodged an excerpt from the Respondent’s separation agreement with Mrs Baxter, an email exchange between their solicitors and a copy of another decision of Sheriff Welch in the case of Phoebe Russel-Smith and others v Ijeoma Uchegbu 2016 SC EDIN 64.

Case Management Discussion (CMD)

6. The parties are agreed as to the following relevant facts; -

(i) The tenancy started on 1 February 2018 and a deposit of £900 was paid by the Applicants.

(ii) The tenancy came to an end on 20 January 2020.

(iii) The deposit of £900 was not lodged in an approved tenancy deposit scheme until 2 January 2020

7. Mr Wood advised the Legal Member that, as mentioned by the previous Legal Member in the CMD note, there are two aspects to the mitigation being put forward by the Respondent. The first is his experience as a landlord. The second is his explanation for not compliance with the 2011 Regulations. Mr Wood explained that the Respondent and Mrs Baxter had owned 9 properties which they rented out. When they divorced, they split these between them. He now owns four. At the start of the Applicant’s tenancy, the Respondent and Mrs Baxter were joint owners and joint landlords, as stated in the tenancy

agreement. However, the point of contact was Mrs Baxter. The Respondent dealt with repairs and negotiated leases. Mrs Baxter dealt with the admin. Their separation agreement was only signed in December 2019 and the excerpt submitted shows that Mrs Baxter was to hand over "all tasks associated with running the firm" to the Respondent. The copy emails showed that the Respondent did not have control of his business bank accounts for several months before the separation agreement was signed. Mr Wood acknowledged that the claim that the administration associated with the tenancy was handled by Mrs Baxter is disputed by the Applicants. However, he pointed out that the Respondent is a farmer. Mrs Baxter is a chartered accountant and the division of tasks which he has described is logical. That said, the Respondent accepts that he was jointly responsible for the tenancy and the deposit. He was lax in his approach to these matters and accepts he is at fault. He cannot dispute that he has been a landlord for a long time. Mr Wood also pointed out that the parties had been landlord and tenant for a long time, and previously had a good relationship.

8. In response to questions from the Legal Member Mr Wood said he did not know exactly how long the Respondent had been a landlord but stated that he had lived in the area his whole life and thought that the farm had been inherited. That said, the regulations did not come into force until 2011 and there had been no obligation to lodge the deposit for the previous property when the lease started in 2008. He confirmed that this deposit had not been lodged in a scheme after the relevant provisions of the regulations came into force. With regard to the submissions about the day to day management of the property, Mr Wood advised the Legal Member that the information he had provided was relevant, but largely as background information. Whatever the Respondent's management arrangements, he was responsible for the properties and cannot avoid liability for the failure to comply with the regulations. However, the Tribunal should note that the deposit was secured by the end of the tenancy and the Applicants were not prejudiced by the failure.

9. Mr Wood referred the Legal Member to the Russell- Smith decision. He stated that Sheriff Welsh used a method for calculating the penalty to be imposed in a similar case. It was a two-stage process. The Sheriff firstly calculated the amount of time the deposit had been unsecured. This had been 270 days out of a lease which had lasted 334. He divided the deposit of £1550 by 334 and then multiplied by 270. This produced a figure of £1253. The Sheriff then added a weighting to reflect the circumstances of the case. He assessed this penalty at £600. He then added the figures together to impose a total sanction of £1853. Although similar, Mr Wood stated that the landlord in the Russell-Smith case had been sent reminders by the Local Authority regarding his obligations, which had not happened in the present case.

10. Mr Wood advised the Legal Member that the Respondent has learned his lesson and will not be so "dilatory" in the future. He did not have the benefit of a reminder regarding his obligations, although he should not have needed this. He invited the Legal Member to conclude that the failure was due to laziness, rather than wilful defiance of the law. Account should be taken of the fact that the breach has been admitted from the outset and, applying the method

outlined in the Jenson case, an appropriate sanction would be 25% of the deposit.

11. The Applicants advised the Legal Member that their deposit for the previous property, paid in 2008, was never secured in an approved scheme. They referred the Legal Member to the letter from Mrs Baxter which indicated that the Respondent had full control of the rented properties before the divorce. In any event, they had only dealt with the Respondent and only met Mrs Baxter on a handful of occasions. They pointed out that the Respondent had been a landlord for 30 years. They had been his tenants for 17 years. They were of the view that he knew what he was doing. They further advised that they had paid the additional part of the deposit to the Respondent personally and in cash, at his request, although their rent was always paid by bank transfer. They invited the Legal Member to conclude that the 2 cases referred to were quite different to the present case, as they involved first time landlords and shorter leases. They also advised the Legal Member that they had been good tenants, who had never missed a rent payment. They have suffered considerable inconvenience because of the Respondent's actions, they had to cancel their wedding and incurred storage costs for their furniture because he would not agree to a direct swap of properties. They added that the Respondent only submitted the deposit to SDS because they had asked him where it was lodged. Otherwise, it would not have been secured at the end of the tenancy.

Findings in Fact

12. The Applicants are the former tenants of the property in terms of a tenancy agreement dated.

13. The tenancy started on 1 February 2018.

14. The Respondent is the owner and former landlord of the property.

15. The Applicants paid a deposit of £900 in connection with the tenancy.

16. The tenancy terminated on 20 January 2020.

17. The deposit was lodged by the Respondent in an approved tenancy deposit scheme on 2 January 2020.

Reasons for Decision

18. Regulation 3 of the 2011 Regulations states –

"(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.

19. The Legal Member is satisfied that the Applicant's tenancy is a relevant tenancy in terms of the 2011 Regulations, that a deposit of £900 was paid and that it was not lodged in an approved deposit scheme until 2 January 2020, some 23 months after the beginning of the tenancy. The deposit was secured for less than three weeks before the tenancy ended. The Legal Member also notes that the application was lodged with the Tribunal on 4 March 2020. The Applicant has therefore complied with Regulation (9)(2) of the 2011 Regulations, which requires an application to be lodged no later than 3 months after the tenancy had ended.

20. Regulation 10 of the 2011 Regulations stipulates that if the Tribunal is satisfied that the landlord did not comply with a duty in terms of regulation 3, it " (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit." The Legal Member therefore determines that an order must be made in favour of the Applicant.

21. The Applicants are seeking an award of three times the deposit, the maximum which can be awarded in terms of the 2011 regulations. The Respondent invited the Legal Member to determine that the award should be restricted to 25% of the deposit paid. In his written submissions the Respondent referred the Tribunal to the decision of Sheriff Welsh in the Jenson case, where the tenant was awarded a sum equivalent to one third of the deposit paid. At the CMD the Respondent referred the Legal Member to the Russell-Smith case. This is also a decision of Sheriff Welch, in which he calculated the penalty to be imposed by reference to two factors – the length of time the deposit had not been secured, and the mitigating factors. He made an award for each of the two factors and then added these together. This resulted in an award of £1853, where the deposit had been £1550. The Applicant argued that both cases can be distinguished on their facts from the present case. The Legal Member notes that the Jenson case certainly involved quite different circumstances. The landlord had previously lived in the property and had let it out for the first time. He had been unaware of the 2011 Regulations and did not lodge the deposit until 6 months after the start of the tenancy, after taking legal advice. The Russell-Smith case contains more similarities, as it involved a more experienced landlord who failed to secure the deposit paid until 2 months before the end of an 11 month tenancy. However, there are differences, such as the length of the lease and the previous landlord/tenant relationship which existed in the present case. The method of calculating the award in the Russell-Smith

case does not appear to have been followed in other cases, either in the Sheriff Court or by the Tribunal, after the transfer of jurisdiction. Furthermore, the Legal Member is unaware of (and was not referred to) any Sheriff Principal or Upper Tribunal decisions which have endorsed this particular method. The Legal member also notes that Sheriff Welch indicates, at paragraph 7, that the function of the court, "is to impose a fair, proportionate and just sanction in the circumstances of the case, always having regard to the purpose of the regulations and the gravity of the breach."

22. In the Upper Tribunal decision Wood v Johnstone 2019 UT 39, Sheriff Bicket refused permission to appeal a decision of the Tribunal to impose a penalty of £50. Sheriff Bickett noted that the Tribunal had taken into account the fact that the landlord was an "amateur" and stated, at paragraph (7)," It does not appear to me to be an error in law to differentiate between landlords who have numerous properties and run a business of letting properties as such, and a landlord who has one property which they own and let out. It would be inappropriate in my view to impose similar penalties on two such landlords. Further, a number of factors appear to have been taken account of, and the First-tier Tribunal appeared to me to have taken account of valid matters in assessing the penalty imposed, and although they have not specified what weight they have given to each of the factors mentioned, they are not required to do so." In the Upper Tribunal decision in the case of Daniel Rollet v Julie Mackie 2019 UT 45, Sheriff Ross refused an appeal by the tenant against a decision of the Tribunal to impose a penalty of twice the deposit, rather than three times the deposit which he said should have been awarded. Sheriff Ross states, at paragraph 9 " The appellant referred to the existence of unidentified FtT cases which he says demonstrate that a "serious" breach should lead to an award of three times the deposit, and which therefore indicate that the FtT did not take the correct view of the seriousness of the case. However, other FtT cases were not binding on the FtT and the decision under regulation 10 is highly fact specific to each case. Accordingly, awards in other cases, even if the breach is described as "serious" or similar, are of limited assistance and do not establish any underlying principle. Each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a "serious" breach will vary from case to case – it is the factual matrix, not the description, which is relevant. Comparison with other cases is therefore of minimal assistance in the present case. The general principles of the law apply, and these include that for a discretionary decision to be overturned it must be one which no reasonable tribunal could make" At paragraph 13 the Sheriff states, "In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability". And at paragraph (14) "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 hight financial sums; actual losses caused to the tenant, or other hypotheticals. None of these aggravating factors in present" The Sheriff concluded that, in the absence of any of these factors, an award of twice the deposit could not be said to be "irrational or made in error".

23. The Legal Member is satisfied that some of the information provided by the parties is irrelevant and should not be taken into account in the assessment of the penalty to be imposed. In particular, the Applicant's submissions regarding the Respondents conduct toward them, police involvement, inconvenience and the financial losses incurred as a result of the direct house swap not taking place, have no bearing on the level of the penalty to be imposed. Similarly, the fact that part of the deposit is in dispute, is not a relevant consideration.

24. The Legal Member considered the information provided regarding the role of the joint landlord, Mrs Baxter. The Applicants dispute the Respondent's claim that administrative tasks, such as dealing with the deposit, were generally carried out by Mrs Baxter. They provided a letter from her saying that she only dealt with the leases. However, the Legal Member is not persuaded that the landlords management arrangements are a significant consideration. It was not suggested that Mrs Baxter told the Respondent that she had lodged the deposit in a scheme or that he had asked whether it had been secured. It may be that each assumed that the other had dealt with the matter, or perhaps neither gave it any thought. It is not unusual for landlords to delegate such tasks to an employee, or to a letting agent. Nonetheless, it is the landlord who is responsible for the deposit and for compliance with the 2011 Regulations. This is conceded by the Respondent and he accepts that, whatever arrangements were in place, he and Mrs Baxter were equally at fault in relation to the Applicants deposit. This failure is attributed to a lazy or dilatory approach on the part of the Respondent. The Respondent also claims that he did not have control of the business bank accounts for a period prior to the divorce. This may have been the case, although the evidence provided – copy emails - provide extremely limited information in support of this claim. In any event, the Legal Member is not persuaded that this affected the Respondent's ability to attend to the lodging of a deposit paid to him in cash in February 2018.

25. In determining the appropriate level of penalty to be imposed, the Legal Member took the following factors into account –

(a) The Respondent had been a landlord for a considerable period of time – something in the region of 30 years. He was therefore a very experienced landlord.

(b) Although letting out properties was not their sole occupation, the Respondent and Mrs Baxter had 9 properties which they rented out at the relevant time and which formed part of their business.

(c) The Respondent was fully aware of his obligations under the 2011 Regulations.

(d) The Respondent did not secure the Applicant's previous deposit when the 2011 Regulations came into force. This was therefore not the first time he had failed to comply with the regulations.

(e) The deposit was not secured for a considerable period – 23 months out of a possible 23 months and three weeks.

(f) The deposit was only secured when the Applicants were given notice to terminate the lease and enquired about the deposit.

(g) The failure to comply with the 2011 Regulations was the result of a lax and dilatory attitude to his obligations as landlord, rather than a deliberate decision on the part of the Respondent.

(h) The deposit was secured by the end of the tenancy. The Applicants received most of their deposit back from the scheme and had the option of using the scheme's adjudication procedure for the disputed amount, although they chose not to do so.

26. The Legal Member notes that none of the "aggravating factors" which Sheriff Ross refers to in the case of Rollet v Mackie are present. However, it should be noted that those factors were not intended to be an exhaustive list but rather, what cases at the "most serious end of the scale might involve". Furthermore, although there is no evidence of "repeated breaches against a number of tenants", the Respondent did fail to secure the Applicant's previous tenancy deposit. That said, in the absence of an "aggravating factor", and as the deposit was eventually secured, the Legal Member is satisfied that the maximum award would not be appropriate in this case. However, having weighed up the relevant factors referred to in paragraph 25, the Legal Member is not persuaded that the circumstances warrant the "restricted finding" proposed by the Respondent. The Legal Member concludes that an award of £2025, being two and a quarter times the deposit, should be awarded.

Decision

27. The Tribunal determines that an order for payment of the sum of £2025 should be made in favour of the Applicant.

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]

8 October 2020

Josephine Bonnar, Legal Member