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 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011/176 and under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/23/3934

Re: Property at 19 Ballindean Crescent, Dundee, DD4 8PH ("the Property")

Parties:

Ashley Leiper, 16 Castleview Park, Dundee, DD4 0FB ("the Applicant")

Michelle Reeves, 6 Soyaux Avenue, Monifieth, Dundee, DD5 4HE ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

1. This is an application by the Applicant for an order for payment where a landlord has not complied with the obligations regarding payment of a deposit into an approved scheme or provision of prescribed information under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* in terms of rule 103 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Rules").

2. The tenancy in question was a Private Residential Tenancy ("PRT") of the Property by the Respondent to the Applicant dated 15 September 2020 and commencing on 1 October 2020. This PRT was entered into to replace an earlier PRT between the Applicant and her sister with the Respondent of September 2018, commencing on 1 November 2018. Neither PRT agreement was in standard terms, both being headed "Assured shorthold tenancy agreement", including termination dates, and having incomplete schedules describing the deposit arrangements. Parties were not agreed when the 2020 PRT terminated, but were agreed that the Applicant had left and removed her belongings, and

informed the Respondent of this, by in or around 30 September to 4 October 2023.

3. The application was dated 2 November 2023 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £750 was due in terms of the original tenancy as well as the 2020 Tenancy, and that it was paid to the Respondent but never paid into an approved scheme. Prior to the case management discussion ("CMD"), the Respondent provided evidence that the deposit had been lodged with MyDeposits Scotland. In response to that, the Applicant produced an email from MyDeposits Scotland confirming that a deposit was indeed lodged but that it was not protected until 7 October 2022. The application sought "the maximum penalty" (which in this case would be £2,250).

The Case Management Discussion

4. On 8 February 2024 at 14:00, at a CMD of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Applicant and the Respondent. The Applicant had with her a supporter but the supporter did not address the Tribunal.

5. It took some time to clarify with the parties what points were agreed and which were disputed, following the further documents that had been lodged prior to the CMD. This time was well-spent however. The Applicant confirmed that she still insisted on the application notwithstanding that it was now confirmed that her deposit was protected, on the basis that the deposit was not protected until October 2022. At first, the Applicant submitted that this meant the deposit was lodged around four years late (counting from the 2018 PRT) but conceded during the CMD that it was only two years late, as the 2020 PRT was a new tenancy which she had sought in her sole name. She confirmed that the parties had agreed that the deposit paid for the earlier tenancy was rolled over to the 2020 Tenancy. The Applicant conceded that any claim for a payment under the 2011 Regulations regarding the 2018 PRT was long out of time and accepted that the relevant deadline on which any remaining claim under the 2011 Regulations stood to be counted was from the relevant dates of the 2020 Tenancy. (Considering the 2020 Tenancy says it does not start until 1 October 2020, it is likely that the time-limit for lodging should be counted from 1 October 2020. Though both parties treated the deposit as rolled over on 15 September 2020, a plain reading of the two agreements mean the Applicant was technically still a tenant under the original joint tenancy on that date through to 30 September 2020.)

6. The Respondent confirmed that she conceded that the 2011 Regulations applied to the deposit, and that she had failed to make payment into an approved tenancy deposit scheme until 7 October 2022.

7. In regard to a failure to provide relevant information under the 2011 Regulations, the Applicant was adamant that none had been provided. The Respondent stated that she had provided the Applicant's contact details to MyDeposits Scotland and was told that information would be provided to her by email following the lodging in October 2022. The Applicant responded to this by pointing out that the

documents from MyDeposits Scotland lodged by the Respondent showed that the Respondent had provided MyDeposits Scotland with an incorrect email address and telephone number for the Applicant. (The Respondent said she had not noted this prior to the Applicant's submissions. She did not dispute that there were errors once they were pointed out.) As stated above, neither the 2018 or 2020 agreements contain completed information about any deposit scheme. The Respondent did not seek to argue that the Tenancy agreements satisfied the requirements of the 2011 Regulations.

8. In response to questions, the Respondent gave the following further information and submissions relevant to the application:
   a. The Property had been her home until she required to seek new accommodation at short notice in 2018. At the time of leaving and letting out the Property, she was seven months' pregnant.
   b. She had never been a landlord before, and since the end of the Tenancy, she has sold the Property and has no intention of becoming a landlord again, having found the experience stressful and worrisome.
   c. She had been a tenant herself in the past but had never known of the 2011 Regulations from her experience of being a tenant.
   d. She has only had to administer a tenant's deposit once, being the £750 taken from the Applicant and her sister in 2018, which was then rolled over to be the Applicant's deposit in 2018.
   e. Until 7 October 2022, the deposit was kept by her in a savings account, along with other personal savings.
   f. She accepted that the 2018 and 2020 Tenancy agreements both have references to the 2011 Regulations but that these references "went over my head" and she did not take note of the obligations upon her regarding the deposit.
   g. In 2022 she commenced steps to repossess the Property and issued a Notice to Leave which was subsequently withdrawn. Prior to it being withdrawn, on 5 October 2022 - in correspondence with the Applicant over this first Notice to Leave - the Applicant made reference to having sought advice from Shelter Scotland and that they had told her to request information on the tenancy deposit protection.
   h. The Respondent said that when she read the email she felt "silly" that she had been unaware of the requirements of the 2011 Regulations. She took immediate steps to lodge the deposit and did so with MyDeposits Scotland on 7 October 2022.
   i. She was told by MyDeposits Scotland that they would provide the Applicant with all relevant information by email, further to the email address for the Applicant that the Respondent had provided to them.
   j. The deposit remained with MyDeposits Scotland, as the Respondent had not sought to uplift it. She said she had hoped to have had a discussion with the Applicant on the money and about unpaid rent for the final month.
   k. Since the raising of this application, the Respondent took no further steps on the deposit funds because she was unsure whether it was proper for her to do so while the application was still being considered.
   l. The Applicant was to have left the Property under the subsequent Notice to Leave on 8 September 2023 but did not do so. Communication was

received from the Applicant on 4 October 2023 stating that she had left on 1 October 2023.

9. In response to questions, the Applicant gave the following further information and submissions relevant to this application:
   a. She had checked all three authorised providers about her deposit, as shown in the papers lodged with the application. All had said they had no trace of funds lodged.
   b. It was only after receipt of the Respondent's submissions in early January 2024 that she made fresh contact with MyDeposits Scotland and, armed with the new information, MyDeposits Scotland confirmed they did have the funds but (a) they had only received the funds on 7 October 2022, and (b) her details were incorrect on their system and this was why they could not find her record previously.
   c. She said that she was told by MyDeposits Scotland that she could not request the deposit returned at this time because of the incorrect details.
   d. The Applicant accepted that she was to have left the Property under the subsequent Notice to Leave on 8 September 2023. She said she had stopped living at the Property on 6 September, but required time to move out her belongings. The removal of belongings was completed on 30 September 2023 and she communicated with the Respondent on that date to tell her that she was no longer there.

10. Neither party provided submissions as to an appropriate level for the order.

11. No motion was made for expenses or interest.

Findings in Fact

12. The Respondent, as landlord, let the Property to the Applicant under a Private Residential Tenancy dated 15 September 2020 and commencing on 1 October 2020 ("the Tenancy").

13. The Tenancy was brought to an end subsequent to the Respondent serving a Notice to Leave which had expired, and the Applicant moving out. This occurred in or around 30 September to 4 October 2023.

14. In terms of clause 1.1 of the Tenancy, the Applicant was obligated to pay a deposit of £750 at the commencement of the Tenancy.

15. The Applicant and her sister had previously tenanted the Property under a Private Residential Tenancy commencing on 1 November 2018. Under that earlier PRT, the Applicant and her sister paid a deposit of £750 to the Respondent at the commencement of the earlier tenancy.

16. The Respondent had failed to place the deposit for the 2018 tenancy into an approved Tenancy Deposit Scheme. She held the funds in a personal savings account along with other personal savings.

17. The Applicant and the Respondent agreed that the deposit already held for the 2018 tenancy would be “rolled over” to the 2020 Tenancy between the parties, and it was treated as such from 15 September 2020.

18. The Respondent failed to place the deposit under the 2020 Tenancy into an approved Tenancy Deposit Scheme until 7 October 2022. Until that date she continued to hold the funds in a personal savings account along with other personal savings.

19. The Respondent provided MyDeposits Scotland with an incorrect telephone number and email address for the Applicant despite those details being held by the Respondent (and stated within the 2018 and 2020 Tenancy agreements).

20. The Respondent provided no note of the prescribed information on the tenancy deposit to the Applicant (nor did she provide any such prescribed information in regard to the deposit under the 2018 tenancy).

21. The failure to lodge the deposit timeously after the commencement of the 2020 Tenancy, and the failure to provide the prescribed information under the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176,* was in breach of the said Regulations in regard to the lodging and the provision of prescribed information.

22. The Property had been the Respondent’s family home prior to the commencement of the 2018 tenancy. She decided at short notice in 2018 to leave the Property, and let it out, due to personal circumstances related to becoming pregnant.

23. The Applicant and her sister have been the Respondent’s only tenants during her period as a landlord.

24. The Respondent has since sold the Property and does not intend to be a private residential landlord again.

25. The Respondent lodged the deposit on 7 October 2022 having been prompted to do so by a reference in an email sent by the Applicant which, amongst other matters, sought details of the deposit’s protection.

26. The 2018 and 2020 Tenancy agreements contain references at clause 3 and Schedule 1 to tenancy deposit schemes but the schedule is incomplete in both agreements.

27. The 2018 and 2020 Tenancy agreements are both in non-standard form, containing terms not consistent with a private residential tenancy.

28. The Applicant is afforded access to the adjudication scheme under Tenancy Deposit Scheme should she seek to utilise it.

Reasons for Decision

29. I sought submissions from both parties on further procedure and both sought a decision made at the CMD. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by the parties, I was satisfied both that the necessary level of evidence had been provided through the application, further papers, and orally at the CMD, and that it was appropriate to make a decision under regulation 10 of the 2011 Regulations at the CMD. I sought further final submissions and information from the parties before making my decision.

30. There was little dispute between the parties on the material points, though there were a number of issues relating to the Respondent's circumstances that the Applicant understandably neither disputed nor conceded.

31. I was satisfied that the evidence provided by both parties was credible and reliable on the material issues of this application.

32. It was a matter of concession that the Respondent held a deposit from before the commencement of the Tenancy (as it was already held unlodged in regard to the earlier tenancy), and that she did not lodge it until 7 October 2022. This was just under two years late. Further, though the Respondent believed that her obligations to provide the prescribed information were to be satisfied by MyDeposits Scotland by email (similarly late), it was clear she had provided inaccurate contact details for the Applicant. Therefore, it could not be disputed that there was no compliance with providing the prescribed information at all. This resulted in the Applicant incurring further worry and inconvenience trying to locate the funds until she was able to track them down in early January 2024. There has been a clear breach of both the lodging and information requirements of the 2011 Regulations, though the money was protected almost a year before the Tenancy terminated, and the Applicant should now be able to avail herself of the adjudication service (though she claims that she has been told that she cannot, for reasons that are not clear to me).

33. In coming to a decision, I reviewed decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, *2019 Hous LR 75*, Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that "[e]ach 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." (paragraph 9)

34. In regard to that "factual matrix", Sheriff Ross reviews with approval the reasoning of the Tribunal at first instance in that case (at paragraph 10). Generalised for my purposes, the Tribunal made consideration of:
    a. the purpose of the 2011 Regulations;
    b. the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    c. whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;

d. the reasons given for the failure to comply with the 2011 Regulations;
e. whether or not those reasons affected the landlord's personal responsibility and ability to ensure compliance;
f. whether the failure was intentional or not; and
g. whether the breach was serious.

Applying that reasoning, the Tribunal held – and the Upper Tribunal upheld – an award of two times the deposit. In analysing the "factual matrix" in that case, Sheriff Ross noted:

> *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. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer* [of the letting agent in *Rollett*] *also tends to lessen culpability, as it affects intention. The finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.*
>
> *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. None of these aggravating factors is present.* (paragraphs 13 and 14)

35. The Upper Tribunal considered a case where the Tribunal regarded a low level of culpability in *Wood v Johnston, [2019] UT 39*. The Tribunal at first instance had awarded £50 (though it is not possible from the UT's opinion to determine what this was as a multiplier of the original deposit). Sheriff Bickett noted that parties to the appeal were agreed that "the award is a penalty for breach of Regulations, not compensation for a damage inflicted" (paragraph 6) and, like Sheriff Ross in *Rollett*, analysed the nature of the breach, though in briefer terms. In *Wood*, it was noted that the Tribunal at first instance had made the award in consideration that "the respondent owned the property rented, and had no other property, and was an amateur landlord, unaware of the Regulations. The deposit had been repaid in full on the date of the end of the tenancy." Sheriff Bickett refused permission to appeal and thus left the Tribunal's decision standing.

36. The approach in these two cases is accepted in other UT cases: by Sheriff Fleming in *Hinrichs v Tcheir, [2023] UT 13*, *2023 Hous LR 54* (which considered *Rollett*), and by Sheriff Cruickshank in *Ahmed v Russell, 2023 UT 7*, *2023 SLT (Tr) 33* (considering both *Rollett* and *Wood*). In the latter case, Sheriff Cruikshank made the additional observation (at paragraphs 32 to 33) that there is no difference in law between how the "amateur" and "professional" landlord is to be treated but:

> *It will be a matter of fact in each case what the letting experience, or level of involvement, of a landlord is and it might, or might not, be a factor which*

aggravates or mitigates a sanction to be imposed under the 2011 Regulations. Indeed, by way of a general observation, with the increasing passage of time since the 2011 Regulations became operative, the letting experience of a landlord, and his working knowledge of the regulatory requirements, may hold less weight in mitigating a penalty than it previously did. (paragraph 33)

37. Applying Sheriff Ross's reasoning in *Rollett* to the current case, the purposes of the 2011 Regulations are to ensure that a tenant's deposit is insulated from the risk of insolvency of the landlord or letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, both were achieved and the belated protection of the deposit has protected the Applicant. There is certainly no suggestion of her intentionally breaching the Regulations and there is no chance of any repeat of the issue as the Respondent has decided to cease being a landlord. In considering Sheriff Bickett's reasoning in *Wood*, the Respondent's ignorance of the 2011 Regulations was understandable, she was clearly an "amateur landlord" of a single property. Indeed, I was willing to accept her evidence that she was effectively an unexpected landlord, due to a change in personal circumstances. Considering the comments of Sheriff Cruickshank in *Ahmed*, I do hold the Respondent's inexperience and ignorance of the Regulations to be a mitigating factor, though it remains an aggravating factor that the Respondent did so much wrong (such as not reading her own agreements, failing to complete the sections in Schedule 1 on the deposit, failing to protect the deposit the first time round, using an inaccurate and misleading tenancy agreement style in general, and giving MyDeposits Scotland inaccurate contact details for the Applicant).

38. In the circumstances, I am satisfied that this falls in the lower range of breaches and I am awarding £700 under regulation 10 of the 2011 Regulations, being just under the deposit amount. I hold this as an appropriate award in consideration of the law and all the facts.

Decision

39. I am satisfied to grant an order against the Respondent for payment of the sum of £700 to 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.

8 February 2024

Legal Member/Chair **Date**