Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations") and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules")

Chamber Ref: FTS/HPC/PR/20/1562

Re: Property at 19 Kepplehills Drive, Bucksburn, Aberdeen, AB21 9PS ("the Property")

Parties:

Miss Adele Ashton, 19 Kepplehills Drive, Bucksburn, Aerdeen, AB21 9PS ("the Applicant")

Mrs Amanda Mackenzie, 24 Teaninch Paddock, Alness, Ross-shire, IV17 0NA ("the Respondent")

The Mackenzie Law Practice, 2nd floor, Highland Rail House, Station Square, Inverness, IV1 1LE ("the Respondent's Representative")

Tribunal Member:

Ms. Susanne L. M. Tanner Q.C., Legal Member and Chair

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that an order must be made in terms of Regulation 10 of the 2011 Regulations requiring the Respondent to pay to the Applicant the sum of ONE THOUSAND ONE HUNDRED AND NINETY TWO POUNDS AND FIFTY PENCE (£1192.50) Sterling

1. Procedural background

1.1. On 21 July 2020, the Applicant made an application ("the Application") to the tribunal in terms of Rule 103 of the 2017 Rules, namely an application for an order for payment where the landlord (Respondent) has failed to carry out duties in relation to tenancy deposits.

1.2. The Applicant attached to the Application:

1.2.1. A Short Assured Tenancy agreement dated 23 September 2017.

1.3. On 18 August 2020, the Application was considered by a legal member acting with the delegated power of the President and the Application was accepted for determination.

1.4. On 4 September 2020, the tribunal notified the parties that the Application had been referred to the tribunal and that a Case Management Discussion ("CMD") teleconference had been fixed for 2 October 2020 at 1400 which both parties were required to attend. Parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the application. Parties were advised that if they did not attend the CMD, this would not stop a decision or order from being made by the tribunal if the tribunal considered that it has sufficient information before it to do so and the procedure has been fair. The Respondent was invited to submit any written representations she wished by 25 September 2020. The Application paperwork and notification of the teleconference was served on the Respondent by Sheriff Officers on 4 September 2020.

1.5. The Respondent's Representative submitted written representations and documents to the tribunal's administration prior to the CMD, together with notice of appointment of him as the Respondent's legal representative, but these were not processed by the administration team prior to the CMD due to an error in the case reference number (PR/20/1582 rather than PR/20/1562) on the Respondent's Representative's letter.

2. Case Management Discussion ("CMD") – 2 October 2020 at 1400h – by teleconference

2.1. The Applicant attended the CMD.

2.2. The Respondent attended the CMD. She was represented by Mr Donald McKenzie, The Mackenzie Law Practice, 2nd floor, Highland Rail House,

Station Square, Inverness, IV1 1LE, whom she said she wished to be her representative. Mr McKenzie advised that he had sent a letter and attachments to the tribunal dated 24 September 2020, as referred to above.

2.3. The tribunal clerk discussed the matter with the tribunal's administration and confirmed that the documents were in the system but had not yet been processed as the wrong number was on the letter. The tribunal chair advised the Respondent that the Case Management System would be updated with details of her representative.

2.4. The Respondent's Representative's letter and documents were forwarded to the tribunal chair. They comprised:

2.4.1. A letter dated 24 September 2020 in which it was admitted that the Respondent had breached the duty imposed on her under the 2011 Regulations to timeously lodge the deposit in one of the deposit protection schemes;

2.4.2. A Deposit Protection Certificate dated 4 September 2020;

2.4.3. Two emails from the Respondent to the Applicant; and

2.4.4. An email from the DWP to the Respondent.

2.5. The tribunal chair asked the Applicant if she would be able to access emails if the documents were forwarded to her by the tribunal clerk. She stated that she was at a friend's property to use the telephone and did not have wifi so could not access documents until she returned home.

2.6. The chair directed that the CMD would continue in order to discuss matters so far as possible and that the documents submitted on behalf of the Respondent would be sent to the Applicant by email by the tribunal's administration.

2.7. The tribunal chair explained the nature and purpose of the CMD.

2.8. Respondent's Representative's submissions

2.9. Mr MacKenzie read out the content of the letter submitted to the tribunal in full and it is reproduced below.

2.10. The Respondent admits that she acted in breach of the duties imposed upon her under the Tenancy Deposit Schemes (Scotland) Regulations 2011 by her failure to lodge timeously the deposit with one of the recognised schemes.

2.11. *Background*: the Respondent is 46 years of age. She lives at 24 Teaninich Paddock, Alness, Ross-shire, IV 17 ONA. She is on the non-academic staff of the University of the Highlands and Islands.

2.12. The house was bought in 2008 with a former partner. For a time they cohabited in the house. After they separated, the co-owner refused to agree to either sell the property or to acquire the Respondent's interest in it. Also, they soon realised when consulting with an estate agent they had bought at the top of the market. The purchase price was funded by a 5% deposit provided by my client and a 95% mortgage. Therefore a sale, even if the co-owner had agreed to it, would have been unlikely to realise sufficient sale proceeds to clear the mortgage.

2.13. Due to a downturn in the oil industry, the Respondent and the co-owner both had to move from Aberdeen to find employment. The house then lay empty for a number of years with the Respondent only visiting periodically to check the property and collect mail.

2.14. The house was occupied between May 2015 and May 2017 by a friend of the co-owner. The Respondent was not involved in the making of that arrangement.

2.15. The mortgage on the property is on an interest only basis. The monthly repayments have varied with time, ranging as high as £981.00. For the past twelve months they have been of the order of £500.00 per month. The co-owner does not contribute to the mortgage or insurance payments nor to the cost of any property maintenance.

2.16. *History of the Tenancy*: The Respondent entered into a Tenancy Agreement with the Applicant. The decision to let the property was taken out of necessity to help defray the outgoings associated with the house which my client felt she was 'stuck with'. She had not previously let out any other property. She was a first time landlord.

2.17. The failure by the Respondent to lodge the tenancy deposit with a recognised scheme on time was simple inadvertence on her part.

2.18. The Applicant last paid rent for the property on 5th November 2019. A copy rent statement is enclosed. Since then just one payment of £414.60 has been received. That was from Universal Credit. It came about as the result of assistance being given by the Respondent to the tenant. Further such payments to the Respondent from Universal Credit have been frustrated because the Applicant has falsely advised DWP that the Respondent is no

longer her landlord. A copy email from DWP to my client of 14th September 2020 confirming this is enclosed. In this connection, Mr Mackenzie attached copies of emails from the Respondent to the tenant of 7th and 16th July 2020. These refer to the support given by the Respondent and the efforts she made to assist the Applicant in addressing the issue of arrears.

2.19. Reference was also made to the lodging of the deposit with Safe Deposit Scotland. This issue was raised by the Applicant in an apparent attempt to deflect attention from the rent arrears issue. A copy of the receipt in respect of the lodging of the deposit with Safe Deposit Scotland was enclosed.

2.20. The tenant has not responded to the Respondent's offers of assistance.

2.21. It is stated in the Applicant's claim that she requested details of the deposit on several occasions. This is not the case. She requested it once, in an email of 3rd July 2020 and this was responded to in the Respondent's email of 16th July 2020.

2.22. *Submissions*: The fact that there are extensive arrears on the rent account is neither an explanation nor an excuse for the failure to lodge the tenancy deposit on time with a recognised scheme. The fact that the Applicant raised the issue in an apparent attempt to deflect attention from the arrears issue does not provide mitigation either. However, the Respondent's reaction to the matter being raised with her does mitigate matters because she responded perfectly appropriately to that by taking steps to lodge the deposit with a recognised scheme. Therefore, there has been no loss occasioned by the Tenant.

2.23. Given the assistance and support which the Respondent has, for the past ten months, consistently offered to the Applicant to address the arrears issue it is a particularly bitter pill for her to swallow that the Tribunal, the breach having been admitted, is bound to impose a penalty.

2.24. There is also the fact that the Respondent is a first-time 'amateur' landlord. She is in the position of landlord out of, as she sees it, necessity rather than choice. Now that she has been advised of her rights, it is her intention to commence proceedings to terminate the tenancy on the grounds of the substantial rent arrears. After the termination of the tenancy, if the co-owner of the house continues to offer resistance to the idea of the house being sold, she will instruct the raising of an action of division and sale to secure the disposal of the property.

2.25. In the circumstances, the receipt of the Tribunal papers in and of itself has been a salutary and upsetting experience for the Respondent. The tenancy as a whole has been an expensive failure for her. She has no intention of letting out property again.

2.26. Mr Mackenzie invited the Tribunal to dispose of this matter on as lenient a basis as the circumstances permit.

2.27. The Deposit Protection Certificate lodged with the Respondent's Representative's letter shows that the Applicant's deposit of £795.00 was lodged with Safe Deposits Scotland on 4 September 2020.

2.28. In relation to a question from the Chair, Mr Mackenzie confirmed that the Respondent intends to commence proceedings to terminate the tenancy and seek an order for possession on the basis of the Applicant's considerable rent arrears.

2.29. Applicant's submissions

2.30. The Applicant stated that all of the information presented in the letter had been a lot to take in. The tribunal chair stated that as the Respondent had admitted the breach, the only matter was the amount of the penalty and that there were a number of matters which she wished to ask the parties questions about. The Applicant confirmed that she was content to proceed on that basis.

2.31. The Applicant confirmed that as the tenancy agreement started at the end of September 2017 and it was admitted that the deposit had not been paid into the scheme until 4 September 2020, it had been unprotected for almost three years.

2.32. The Applicant accepted she is in rent arrears to the Respondent but did not consider that to be relevant to whether or not the Respondent protected her deposit. She stated that she began to get into rent arrears in December 2019 due to being moved onto Universal Credit which was a difficult process. Shelter had been advising her. She accepts that she told the Universal Credit team that the Respondent is no longer her landlord as she has a new property that she has moved into. She stated that she had written a letter to the Respondent around 6 weeks ago confirming that she would be moving out on 1 October 2020. She stated that she has not spoken to Shelter recently. She stated that she still has the keys to the property as moving was delayed due to Covid-19. She stated that she would return the keys as soon as possible to the Respondent. The Chair indicated to parties that this matter could be discussed

after the CMD had concluded as it was not directly relevant to the appropriate sanction to be imposed for the admitted breach of the 2011 Regulations.

2.33. The Applicant stated that she does not accept that the Respondent has tried to assist her. She stated that the Respondent visited the property over the summer period. The Applicant needed a letter to give to the Council that the landlords were looking to evict her which she never got.

2.34. The Applicant stated that when she took over the Property it was clearly stated in the tenancy agreement what was to happen with the deposit. She stated that she had discussed the matter more than once, including when the deposit was handed over to the Respondent and when she received the keys. She stated that it was raised in July 2020 after correspondence had been sent about rent arrears. However, she stated that the rent arrears are a separate situation that also needs to be addressed.

2.35. She stated that the deposit protection certificate was not issued to her by the landlord and that she did not have a copy by email from the deposit protection company. The Chair advised that it was in the documents submitted by Mr Mackenzie which had been referred to in the CMD and that the tribunal's administration would send a copy.

2.36. The Applicant stated that the information about deposit protection was with the tenancy pack.

2.37. The Applicant wished to query the statement that the Respondent was a new first-time landlord as she said that she had met the previous tenants and the next door neighbours had discussed previous tenants.

2.38. Response by Respondent / Respondent's Representative

2.39. Mr Mackenzie stated that he does not recall seeing anything amounting to a notice from the Applicant to end the tenancy.

2.40. The Respondent stated that no communication has been received from the Applicant to end the tenancy of the property and she did not know that the Applicant had left the property yesterday (1 October 2020).

2.41. In relation the deposit information, the Respondent confirmed that it was in the original pack, provided to the Applicant at the time that the tenancy started. She stated that when she lodged the deposit she gave the Applicant's email address and that they advised her that the Applicant would also receive

a notification from the Deposit Protection Company. The Respondent stated that she sent the reference number, deposit protection company details to the Applicant. She stated that she started the process on 16 July 2020 and the money was lodged until 4 September 2020.

2.42. Mr McKenzie stated that this is the first and only property that the Respondent has let out. The same property has been occupied by friends of the co-owner between May 2015 and May 2017. The Respondent was not involved in that arrangement. This was her first and only involvement as an amateur landlord.

2.43. Having heard from both parties, and given the Respondent's admitted breach of the Regulations, the tribunal Chair considered that there was sufficient information on which to reach a decision on the Application.

3. Findings in Fact

3.1. The Applicant and the Respondent entered into a short assured tenancy agreement for the Property which started on 30 September 2017.

3.2. Prior to the start of the tenancy, the Applicant paid a deposit of £795.00 to the Respondent, as required by the terms of the tenancy agreement.

3.3. The prescribed information in terms of Regulation 42 of the Regulations was issued to the Applicant by the Respondent at the start of the tenancy.

3.4. The deposit was not lodged by the Respondent in a deposit protection scheme until 4 September 2020.

3.5. The Applicant moved out of the Property on 1 October 2020.

3.6. The reason for the late lodging of the deposit was oversight on the part of the Respondent.

3.7. When the Applicant asked the Respondent in July 2020 about where the deposit was lodged, the Respondent realised her failure to lodge the deposit and took steps to lodge the deposit in a scheme.

3.8. A Deposit Protection Certificate has been issued by the tenancy deposit protection scheme.

3.9. The Property is the Respondent's only rental property and this is the first tenancy in which the Respondent has been involved as landlord.

4. Discussion

4.1. The tribunal took account of the Applicant's written and oral submissions; and the Respondent's written and oral submissions.

4.2. In assessing the appropriate amount for a payment order, the tribunal had regard to the fact that the Applicant's deposit was unprotected for a period of almost three years and that the deposit should have been protected within 30 working days of the start of the tenancy. The tribunal also took account of the fact that the deposit has now been lodged and a deposit protection certificate has been issued. It was unclear whether the tenancy has ended as the Respondent denied receiving written notice from the Applicant as referred to at the CMD. However, if and when the tenancy ends, the Applicant's deposit will be dealt with through the proper mechanism offered by the deposit protection scheme. The tribunal also took account of the fact that the prescribed information had been provided to the Applicant at the start of the tenancy. The tribunal took account of the Respondent's Representative's position that the failure had been due to oversight and the matter had been rectified by the Respondent once the failure was recognised in July 2020. The tribunal also took account of the fact that this is the only rental property owned by the Respondent and that this is the first tenancy in which she has been a landlord. The tribunal did not consider the matter of rent arrears to be relevant to the determination of the penalty. The only relevance of the rent arrears to the Application was that it was during correspondence between the parties in July 2020 about rent arrears that the Applicant asked the Respondent where the deposit was lodged.

4.3. For the reasons outlined and on the basis of the findings in fact, the tribunal decided to make an order for payment by the Respondent to the Applicant of the sum of £1192.50, which represents one and a half times the tenancy deposit of £795.00. That sum was considered to be reasonable in all of the circumstances.

4.4. The tribunal chair informed the parties that the Payment Order could be enforced by the Applicant against the Respondent after the expiry of the permission to appeal period.

4.5. The parties were permitted the opportunity to have a discussion after the CMD had concluded, outwith the presence of the tribunal Chair, in relation to the keys for the Property.

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.

_____ **2 October 2020**

Ms. Susanne L M Tanner Q.C.
Legal Member/Chair