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 of the Tenancy Deposit Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3255

Re: Property at Flat 1, 151 King Street, Aberdeen ("the Property")

Parties:

Miss Morven Bruce, 22M Market Street, Aberdeen, AB11 5PL ("the Applicant")

Mr Gordon Bruce, Managers House, Knockdhu Distillery, Knock, Huntly, AB54 7LJ ("the Applicant's Representative")

Mr Kenny Hill, Woodside House, Pannure Estate, Carnoustie, DD7 6LW ("the Respondent")

Tribunal Members:

Ruth O'Hare (Legal Member)
Gordon Laurie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to make an order for payment against the Respondent in the sum of One hundred and seventy five pounds (£175) Sterling.

Background

1 By application dated 11th October 2019 the Applicant sought an order for payment as a result of the Respondent's failure to lodge her deposit in an approved tenancy deposit scheme. In support of the application the Applicant provided copy Tenancy Agreement between the parties which was unsigned.

2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 17th January 2020.

3 Attempts by Sheriff Officers to serve the application paperwork upon the Respondent were unsuccessful as he had vacated the address held by the Applicant. Accordingly the Tribunal agreed to allow service by advertisement. The application paperwork together with notification of the date, time and location of the Case Management Discussion was served by advertisement on the Tribunal website.

The Case Management Discussions

4 The first Case Management Discussion took place on 17th January 2020. Mr Gordon Bruce was present and representing the Applicant. Mr Hill was present. Mr Hill advised that he had received an email advising him of the date and time of the Case Management Discussion however he had not had sight of the application paperwork. He advised that two payments of £350 had been received from Ms Bruce at the start of the tenancy, however these were in relation to advanced rent, not a deposit. Mr Hill then produced a tenancy agreement which differed from that lodged with the application which he stated was the agreement that governed the relationship between the parties and confirmed no obligation on the tenant to pay a deposit. Mr Bruce had not had sight of the tenancy agreement produced by Mr Hill. Accordingly the Legal Member adjourned the Case Management Discussion for both parties to consider the issues and take advice on their respective positions if they wished to do so.

5 Following the Case Management Discussion, Mr Hill submitted, by email dated 23rd January 2020, further documentation to the Tribunal, which consisted of two legal authorities, Johnson v Old (EWCA Civ 415) and Cordiner v Al Shaibany (2015 SC 51) and a copy Tenancy Agreement with accompanying cover email dated 2nd December 2018. By email dated 31st January 2020 Mr Bruce submitted further documentation which consisted of a chronology of the matter, copy signed Tenancy Agreement dated 13th December 2018, screenshots from an Outlook email account belonging to the Applicant and chain of email correspondence between Mr Bruce and Mr Hill.

6 The second Case Management Discussion took place on 11th March 2020 by tele-conference. Mr Bruce appeared again on behalf of the Applicant. Mr Hill was personally present. The Tribunal noted that the property was held in three names – Kenny Hill, Debbie Hill and Claire Hill – and all three owners were noted on the lease as joint landlords. However the application was only against Mr Kenny Hill. The Tribunal queried whether the Applicant wished to amend her application to include the other two landlords. Mr Bruce confirmed he did not wish to do so on behalf of the Applicant at that stage. Having then discussed matters with the parties, the Tribunal determined that a hearing was required to resolve the dispute between the parties.

7 Following the Case Management Discussion, the Tribunal issued a Direction requiring the Applicant to provide any further documentary evidence to support the contention that she provided a tenancy deposit to the Respondent and, in the event that she wished to amend her application to include the other two landlords, a written request to that effect in writing. The Tribunal further directed the Respondent to provide any further documentary evidence to support his contention that the £350 paid to him by the Applicant was in respect of an additional month's advance rent, rather than a tenancy deposit together with a copy of the rent statement referred to at the first Case Management Discussion. The parties were directed to lodge a list of any witnesses they wished to call no later than 16th April 2020.

Issues to be Resolved

8 The Tribunal identified the issues to be resolved as follows:-

(a) Which of the three versions of the tenancy agreement before the Tribunal was the agreement which governed the relationship between the parties?
(b) Was a tenancy deposit (as defined by section 120 of the Housing (Scotland) Act 2006) paid by the Applicant to the Respondent?
(c) If a tenancy deposit was paid, what sanction should be applied by the Tribunal in terms of Regulation 10 of the 2011 Regulations for the failure to comply with the duty in Regulation 3 of the 2011 Regulations.

9 The Tribunal noted the following matters as agreed between the parties:-

(a) The Tenancy Agreement between the parties commenced on 15th December 2018.
(b) The rent payable under the Tenancy Agreement was £350 per month.
(c) The Applicant made two payments to the Respondent of £350 on 3rd or 4th December 2018 and on 18th December 2018.
(d) One of the payments of £350 had been repaid by the Respondent to the Applicant.
(e) The Respondent was not under an obligation to take a tenancy deposit from the Applicant.
(f) No deposit was paid into an approved tenancy deposit scheme by the Respondent in relation to the tenancy between the parties.

The Hearing

10 The hearing took place on 4th August 2020 by teleconference. Mr Bruce appeared on behalf of the Applicant and confirmed that he was representing her and giving evidence on her behalf. Mr Hill was personally present.

11 As a preliminary matter, the Tribunal confirmed that neither party had submitted any further documentation in response to the Direction. The Tribunal noted therefore that the rent statement requested had not been provided by the Respondent however on the basis that the payments received by the Respondent from the Applicant were not in dispute the Tribunal considered it could proceed with the hearing in its absence. The Tribunal further confirmed that both parties were in receipt of all of the documentary evidence that had been lodged to date and that neither party intended on calling any witnesses.

12 The Tribunal acknowledged the case law submitted by the Applicant and confirmed it was a matter of agreement that payment of rent in advance was not a tenancy deposit.

13 The Tribunal then heard evidence from the parties on the three issues to be resolved which can be summarised as follows:-

13.1 *Which of the 3 different versions of the tenancy agreement before the Tribunal was the agreement which governed the relationship between the parties?*

(i) Mr Bruce explained that the only tenancy agreement signed by the Applicant was the one that had been submitted to the Tribunal. Both the Applicant and the witness would be content to sign affidavits to that effect but it had not been possible to do this due to the restrictions imposed by the Covid-19 pandemic. The agreement was signed by the Applicant and witnessed by Brandon Ross. The principal copy had been left in the property for collection by Mr Hill. Mr Bruce did not know if Mr Hill had subsequently collected it. The Applicant had taken a copy. Mr Bruce had not been aware of the version of the agreement produced by Mr Hill until the first Case Management Discussion in January. The Applicant had never seen it either. Mr Bruce referred to the screenshots of the Applicant's inbox that had been lodged over the period Mr Hill had alleged to have sent it. There was absolutely no trace of the email. He confirmed that the screenshots were from the Applicant's email account.

(ii) In response to questions from the Tribunal, Mr Bruce confirmed that the witness, Brandon Ross, was a long term family friend and father of the Applicant's boyfriend. He further advised that Mr Hill would have had access to the property to collect the tenancy agreement as he would attend to carry out minor repairs during the tenancy. Mr Hill then had the opportunity to put questions to Mr Bruce. He queried why a blank tenancy agreement had been submitted with the application, but a signed version had then been submitted at a later date. He noted that the application had been submitted to the Tribunal after the Applicant had left the property. Mr Bruce advised that he wasn't aware that the signed copy of the agreement was available until after the application had been lodged. The Applicant was in possession of it. After the first

Case Management Discussion she had scanned and emailed it through to Mr Bruce. Mr Bruce reiterated that he would be willing to provide affidavits from the Applicant and the witness to support their position. Mr Hill then challenged the screenshots of the email inbox, concluding that they were not conclusive in evidencing that the email he sent to the Applicant was not received.

(iii) Mr Hill then gave his evidence. He explained that he and his wife had met with the Applicant for coffee in late November 2018 and had let her view the property. It was his daughter's flat previously. On 29th November 2018, Mr Hill had emailed the Applicant a lease for review. The email confirmed that he would compile a schedule of the contents of the property and send that on at a later date. The Tribunal asked Mr Hill to confirm the wording of that email which was not before it. Mr Hill did so, and the Tribunal noted it was not explicit in stating that a further version of the tenancy agreement would be sent to the Applicant at a later date. Mr Hill had then emailed the revised lease to the Applicant on 2nd December 2018 with the schedule of items. It was sent to the same email address as the email on 29th November 2018.

Mr Hill explained he was not retrospectively trying to create a defence. He had put forward the same position and had provided the documentation at the first Case Management Discussion in January at which point he had not had sight of the application and had no idea what it was about. He explained the problems he had experienced with tenancy deposit schemes in the past which had led to his decision to revise the tenancy agreement to remove the obligation to take a deposit. The Tribunal noted the reference in the email of 2 December 2018 to discussions between the Applicant and Mr Hill, and asked when these had taken place. Mr Hill advised he didn't have a specific date. He had met the Applicant with his wife. The Tribunal asked again how and when Mr Hill had told the Applicant that there would be an amended lease. Mr Hill then said it was just a phone call at some point between 29th November 2018 and 2nd December 2018. It was quick courteous call, just to say he had the schedule of contents and a revised lease and would be emailing these over to her. The Tribunal asked Mr Hill why he had not chased up the signed version of the lease, noting that he leased other properties. Mr Hill stated that he hadn't done so, but would make sure he did in future. He explained that he was self-employed, not a professional landlord. He advised that the Applicant had not told him that the signed version of the tenancy agreement was available in the property. He now has an agent to manage the property on his behalf.

13.2 *Was a tenancy deposit paid by the applicant to the respondent?*

(i) Mr Bruce explained that there was only one version of the lease agreed between the parties and it was the version that provided for payment of

a deposit. The Applicant had transfer the deposit by BACS payment on 3rd or 4th December 2018 on that basis. Mr Bruce then referred to the email correspondence between himself and Mr Hill, where Mr Hill had made reference to the deposit, and to checking with two deposit companies. There was nothing in the correspondence from Mr Hill to suggest that the payment was advanced rent. The Tribunal noted that Mr Bruce was also a landlord and asked whether it rang alarm bells when the Applicant did not receive the required information regarding the deposit. Mr Bruce explained that there was a lot happening at the time and it didn't cross their minds. Mr Bruce confirmed that the payment on 3rd December was marked as the deposit, to secure the property. The first payment of rent was then paid on 14th December 2018. Thereafter rent was paid every month by standing order in accordance with the provisions of the tenancy agreement.

(ii) Mr Hill reiterated his position that the payment of £350 on 3rd or 4th December was advanced rent. In the past, he dealt with two deposit schemes. He experienced problems with recovering a deposit from one of the schemes which had caused him to rethink taking deposits. In reference to the email correspondence produced by Mr Bruce, Mr Hill accepted that this was accurate however at the time he was building a house and renting temporary accommodation. All of his files were in disarray. When Mr Bruce was referring to a deposit, he was simply responding using the same terminology. Mr Hill explained that the revised tenancy agreement referred to rent in advance, and that sum had been repaid. He did not therefore consider the payment of £350 to be a deposit. The Applicant was effectively paying the first two months in advance. This was to mitigate against any problems with rent at the end of the tenancy. The purpose of the terms of the tenancy agreement was to require the tenant to effectively pay two months rent in advance, as opposed to one month.

(iii) In response to questions from the Tribunal, Mr Hill confirmed that rent was paid every month by the Applicant. He did not raise the issue of the additional payment of rent at the end of the tenancy. It was not clear when the Applicant was going to be leaving therefore Mr Hill had said to her that he would calculate what was to be paid back to her once things were settled. Mr Hill then advised he had intimated to Mr Bruce that he had to arrange for cleaners to clean the property and he had hoped that Mr Bruce would have consented to deducting some sums from the money held for this cost. However Mr Bruce had not agreed. Mr Hill did not believe that he could actually hold the money back for cleaning costs because it was not a deposit. It was advanced rent.

13.3 *If a tenancy deposit was paid, what sanction should be applied by the Tribunal in terms of the Tenancy Deposit Scheme (Scotland) Regulations 2011?*

(i) Mr Bruce advised that he did not have anything to put to the Tribunal regarding the level of sanction. The Applicant had raised this action purely out of frustration at the delay and lack of correspondence from Mr Hill when seeking refund of the deposit and overpaid rent. They had finally received £400 back from him on 16th October 2019, six weeks after the tenancy had ended. It was purely by chance Mr Bruce had noticed the sum received, when checking his bank account. Mr Hill hadn't advised him what the money was for. Mr Bruce advised that whilst the deposit had now been repaid, there was still a question mark over whether Mr Hill had complied with the regulations. Mr Bruce felt the sanction was still required. Mr Hill had to follow the rules, in the same way as every other landlord, for the good of everybody. They were not difficult rules to follow.

(ii) Mr Hill explained that no money was due to the Applicant. The money had been paid back, sooner than it would have been if it was in a tenancy deposit scheme. He had taken the payment as advanced rent, purely because of problems he had previously experienced with the tenancy deposit scheme. Mr Hill then made reference to the case law he had submitted. He reiterated that there was no obligation upon him to take a deposit and in this case, there was no requirement for the Applicant to pay a deposit. The money was paid in advance for rent and had been paid back. If the Tribunal were to find he was in breach of the 2011 Regulations, it should take an approach that was fair, just and proportionate in the circumstances of the case. He referred to the case of Cordiner v Al Shaibainy in which the Sheriff had suggested an appropriate sanction would be £100 in similar circumstances. Mr Hill advised that a similar approach should be taken if the Tribunal were to find he was in breach of the regulations and the absolute minimum penalty should be imposed.

Findings in Fact and Law

14 On 29th November 2018, the Respondent emailed a copy tenancy agreement to the Applicant.

15 On 13th December 2018 the Applicant signed the tenancy agreement at the property, in front of witness Brandon Ross.

16 The tenancy agreement which governs the relationship between the parties is that version signed by the Applicant and dated 13th December 2018.

17 The Applicant paid £350 to the Respondent on 3rd or 4th December 2018. The sum was a tenancy deposit as defined by section 120 of the Housing (Scotland) Act 2006.

18 The Respondent did not pay the deposit into an approved tenancy deposit scheme.

19 The Applicant vacated the property on or around 4th September 2019.

20 The Respondent has paid the sum of £400 to the Applicant.

21 The Respondent is in breach of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.

Reasons for Decision

22 The Tribunal determined the application having regard to the application paperwork, the written representations from both parties and the evidence and verbal submissions at the Hearing. The Tribunal was satisfied that it had sufficient information upon which to determine the application.

23 On the issue of the three tenancy agreements, the Tribunal preferred the evidence of Mr Bruce regarding the events that took place at the commencement of the tenancy. The Tribunal found it difficult to accept that Mr Hill, as an experienced landlord, would have gone ahead with the tenancy in the absence of a signed agreement. When questioned by the Tribunal, Mr Hill appeared inconsistent in his account of the events that transpired and the discussions that had taken place between himself and the Applicant. He did not appear to be entirely clear himself on when he had spoken to the Applicant and what was discussed regarding the revised version of the agreement. The Tribunal therefore found Mr Bruce's account to be a more credible version of what had taken place.

24 The Tribunal did not consider it was in a position to make a conclusive finding as to whether or not the email of 2nd December 2018 had been sent by Mr Hill to the Applicant. The Tribunal agreed with Mr Hill that the evidence produced by Mr Bruce in the form of excerpts from her email account were not supportive in this respect. However, even if the Tribunal had concluded that the Applicant had received the email, it considered that the signed tenancy agreement produced by Mr Bruce took precedent over the latter version produced by Mr

Hill in the absence of any other evidence before the Tribunal that signalled the Applicant's acceptance of the revised terms.

25 Having been satisfied that the tenancy agreement produced by the Applicant was that which governed the relationship between the parties, the Tribunal accepted that the payment made by the Applicant on 3rd or 4th December 2018 was a tenancy deposit. The terms of the tenancy agreement clearly provided for such a deposit to be paid and the pattern of payments made by the Applicant supported this.

26 It should be said that even if the Tribunal had accepted that the version of the tenancy agreement produced by Mr Hill was that which governed the relationship between the parties, it would still have reached the conclusion that the said payment was a tenancy deposit. Whilst that agreement did not require payment of a tenancy deposit, the Tribunal had to look at the intention and conduct of the parties regarding the payment and it is clear that a landlord cannot purport to circumvent the requirements of the 2011 Regulations by calling a deposit by any other name. The email correspondence produced by Mr Bruce, which was accepted by Mr Hill, was particularly persuasive in that respect. Mr Hill's language throughout the email chain consistently implied he was treating the payment held as a deposit. Mr Hill had stated that he was simply reflecting the language of Mr Bruce, and also that his circumstances at the time were such that he was unable to recall what the exact position was regarding this tenancy. However, on questioning by the Tribunal as to exactly what the advanced payment of rent was being held for, Mr Hill appeared unclear. His evidence suggested that he was holding the sums as security for performance of the Applicant's obligations under the lease, namely the payment of rent. The wording of the revised tenancy agreement was also vague in that respect. Accordingly the Tribunal considered that when taking into account the conduct and apparent intent of the parties regarding the sum held, the lack of clarity from Mr Hill as to exactly what the payment was for and the imprecise wording of the revised tenancy agreement, on balance the payment fell within the definition of a tenancy deposit.

27 The Tribunal therefore made a finding that the Respondent, Mr Hill, was in breach of his duties under Regulation 3 of the 2011 Regulations. Accordingly under Regulation 10, the Tribunal had to consider what sanction would be appropriate in the circumstances of the case. The Tribunal noted the purpose of Regulation 10, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The provisions of Regulation 10 left no discretion where a landlord is found to have failed to comply and permitted an award of up to three times the deposit where a finding of breach is made

28 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained unprotected for the entire term of the tenancy. Regardless of the fact that it had since been returned to the Applicant, it should have been lodged with a scheme.

29 The Tribunal did not however consider there to be any malicious intent on the Respondent's part. Having heard his evidence, the Tribunal instead considered that there had been some confusion and misunderstanding on his part regarding the purpose of the payment held. The Tribunal further noted that the sum had since been repaid to the Applicant in full therefore she had not suffered any detriment as a result of not having access to the dispute resolution mechanism which would have been available had the deposit been lodged in a scheme.

30 The Tribunal therefore considered this to be a case where an award at the lower end of the scale would be appropriate. The Tribunal therefore make an order against the Respondent in the sum of £175, being half the deposit.

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.

R. O'Hare

12/08/2020

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Legal Member/Chair **Date**