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 Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/21/2601

Re: Property at 17, Craigwell Cottahes, Fisherie, Turriff, AB45 3PT ("the property")

Parties:

Ms Janette Banks, Caulwells Croft, Mew Blyth, Turriff AB53 5UD ("the applicant")

Mr Thomas Marshall, Smiddy Cottage, Pitgairt, Fisheries, Turriff AB53 5SA ("the respondent")

Tribunal Member:

David Preston (Legal Member)

Decision:

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

- **The respondent had failed in his duty to pay the deposit paid by the applicant to the scheme administrator of an approved scheme under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"); and**
- **Orders the Respondent to pay to the Applicant the sum of £825 in terms of Regulation 10(a).**

Background:

1. By application dated 28 October 2021 under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 and Regulation 9 of the Regulations the applicant sought an order for payment under Regulation 10.

2. By Notice of Acceptance dated 10 November 2021 a legal member of the First-tier Tribunal with delegated powers so to do, accepted the application for determination

by the First-tier Tribunal and appointed the case to a Case Management Discussion ("CMD").

3. A CMD took place by telephone on 4 May 2022. The applicant attended on her own behalf. Ms Donna Finnie, Solicitor, Grant Smith Law Practice, The Old Bank Buildings, Balmellie Street, Turriff AB53 4DW attended on behalf of the respondent.

Discussion.

4. The papers before the tribunal comprised: application dated 28 October 2021; Private Residential Tenancy Agreement dated 1 December 2018; copy extract from the applicant's bank statement.

5. The applicant's position was as set out in the application and supporting documentation.

6. Ms Finnie advised that she had been recently instructed by the respondent for whom she had not previously acted. She said that she had been advised that the applicant had instructed Brown & McRae, Solicitors to prepare the lease with the applicant and he thought that this would include making the necessary arrangements to deal with the deposit, and it was only at the end of the lease that he discovered that it had not been placed in an approved scheme. She said that she had been informed that the applicant had sent a cheque to Brown & McRae which appeared to have been lost or mislaid. She had been advised that when the respondent discovered that the deposit had not been properly lodged, he had repaid it in full to the applicant and had not deducted the cost of damage which had been sustained to the back door during the tenancy. He maintained that he had been a good landlord and had carried out shopping for the tenant during the lockdown.

7. In response, the applicant said that there had been minor damage to a wall or light switch behind a door which had been slammed by her daughter. She maintained that the damage had not been significant. She acknowledged that the respondent had done some shopping for her.

8. The tribunal sought to ascertain further details of the circumstances surrounding the preparation of the lease and the handling of deposit as well as further information regarding the landlord's experience in letting out properties to enable it to assess a reasonable sanction to be imposed in terms of the regulations. To this end the tribunal directed that the respondent should lodge written representations providing such further information within a period of 7 days from the date of the CMD which would be copied to the applicant for comment. Thereafter the tribunal would determine whether it was able to make a determination or fix a continued CMD.

9. Following the CMD and in accordance with the Direction, the respondent's solicitor submitted representations by email which were copied to the applicant for comment. The applicant did not submit any further representations within the

timescale provided and the tribunal has resumed consideration in the light of the respondent's submissions. It considered that it had sufficient information to enable it to make a determination without a further CMD.

10. The respondent has only this property which is let out and he accordingly does not operate a business of property letting. Nonetheless it is incumbent on landlords to make themselves familiar with the regulations surrounding the letting of private tenancies. The submissions refer to the requirement for deposits to be lodged as having come into effect following the Private Residential Tenancy (Scotland) Act 2016. This is not the case. The requirement has been an obligation on landlords since the Tenancy Deposit Schemes (Scotland) Regulations 2011 came into force on 7 March 2011.

11. A letter dated 18 January 2019 from Brown & McRae was produced to the tribunal which returned the deposit cheque and advised the respondent that the firm no longer managed deposit monies and that he should make his own arrangements in that regard. The respondent maintains that he did not receive that letter in 2019 and was given a copy of it when he enquired about the deposit at the end of the lease.

Reasons for Decision:

12. This application related to the failure of the respondent to place a tenancy deposit within an approved tenancy deposit scheme. Landlords have been required since the introduction of the 2011 Regulations to pay tenancy deposits into an approved scheme within 30 working days of the commencement of the tenancy. In this case it was accepted by the landlord that this had not been done under explanation that he had understood that his agents were attending to it and that it was only at the end of the lease that he discovered that it had not been lodged. Nonetheless, he was in breach of the duties contained in Regulation 3 of the 2011 Regulations which are an absolute requirement.

13. Regulation 10 of the 2011 Regulations indicates that if a landlord does not comply with any duty in regulation 3 then the tribunal *must* order that a landlord makes payment to the tenant of an amount "not exceeding three times the amount of the tenancy deposit".
14. Accordingly in this case the tribunal is required to make an order for payment. The only matter to be determined by the tribunal is the amount of the payment.

15. In this case the Tribunal carefully considered the evidence which had been produced. There was clear evidence that the respondent had failed to pay the tenancy deposit into the appropriate scheme for the whole period of the tenancy (a period in excess of three years). The deposit has never been lodged in accordance with the requirements of the 2011 Regulations. It was said that the respondent had repaid the deposit without deduction when he discovered that it had not been lodged. However, the tribunal noted that the applicant had found it necessary to raise a separate application for return of the amount of the deposit which she did not receive until shortly before the CMD in that case in December 2021 although the tenancy had ended some 5 months previously in July 2021.

16. The Tribunal noted that in an Upper Tribunal decision (reference 2019 UK 39 UTS/AP/19/0023) that Sheriff David Bickett sitting on the Upper Tribunal had indicated that it was appropriate for the Tribunal to differentiate between a landlord who has numerous properties and runs a business of letting properties as such, and a landlord who has one property which they own and let out. The Sheriff indicated in the decision that it would be "inappropriate" to impose similar penalties on two such landlords. In this case the respondent advised the tribunal that he was a landlord who had only one property available for rent which he had let out for some years.

17. Prior to the jurisdiction to determine these applications becoming part of the jurisdiction of the First-tier Tribunal, the applications were determined in the Sheriff Court. There are numerous Sheriff Court decisions which have been reported.

18. In many of these cases, the Sheriff Courts indicated that the Regulations were introduced to address what was a perceived mischief and that they will be meaningless if not enforced.

19. In a decision by Sheriff Principal Stephen at Edinburgh Sheriff Court in December 2013, the Sheriff Principal indicated that the court was "entitled to impose any penalty including the maximum to promote compliance with Regulations". (Stuart Russell and Laura Clark v. Samdup Tenzin 2014 Hous.L.R. 17) The Regulations were introduced to safeguard deposits paid by Tenants. They were introduced against a background of Landlords abusing their position as the holder of deposit moneys. The parliament decided that it should be compulsory to put the deposit outwith the reach of both the Landlord and the Tenant to ensure that there was a dispute resolution process accessible to both Landlord and Tenant at the end of a tenancy and which placed them on an equal footing. The Regulations make it clear that the orders to be made by Tribunals for failure to comply with the Regulations are a sanction or a penalty.

20. The tribunal accordingly considered that this was a significant breach of the regulations in view of the length of time for which the deposit had been unprotected. The tribunal notes that the landlord considered that he had been a good landlord and had treated the tenant fairly, which was not dispute, but it does not regard these as relevant considerations in the context of the sanction to be imposed in terms of the Regulations. It appeared while the landlord had not simply ignored the provisions of the Regulations, it was apparent that he had paid insufficient regard to his obligations as a landlord.

21. The tribunal was not persuaded that the award should be made at the maximum level available to the tribunal which based on the deposit being £550 would have been £1,650. The tribunal took the view that the appropriate award should be £825 being 1.5 times the amount of 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.

David Preston: Chairman

30 May 2022