**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011**

**Chamber Ref: FTS/HPC/PR/19/0441**

**Re: Property at 58 Potterhill Gardens, Perth, PH2 7ED ("the Property")**

**Parties:**

**Miss Samantha Perry, 38 Breadalbane Terrace, Perth, PH2 8BY ("the Applicant")**

**Mrs Linda Pringle, Tayfletts Mews, Isla Road, Perth, PH2 7HG ("the Respondent")**

**Tribunal Members:**

**Neil Kinnear (Legal Member)**

**Decision**

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

**Background**

This is an application dated 2nd February 2019 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* ("the 2011 Regulations").

The Applicant provided with her application copies of the short assured tenancy agreement, form AT5, form AT6, and various e-mails and correspondence.

**The Case Management Discussion**

A Case Management Discussion was held on 25th April 2019 at The Inveralmond Business Centre, Auld Bond Road, Perth. Both the Applicant and the Respondent appeared, and neither was represented.

The lease commenced on 16th February 2016, and the Applicant quit the Property on 16th November 2018. In terms of the lease agreement, the Applicant paid a deposit of £400 to the Respondent. This application was accordingly brought timeously within the 3 month period provided in terms of regulation 9(2) of the 2011 Regulations.

It became obvious to the Tribunal during the course of the Case Management Discussion that each of the parties felt strongly aggrieved at the actings of the other, though it should be noted that both were courteous throughout the hearing.

Both parties clearly felt very strongly about the circumstances surrounding the ending of the tenancy, and were anxious to tell the Tribunal the full background from each of their perspectives to their respective grievances.

The Respondent advised the Tribunal that she owned the subjects, which since she bought it has been used by various members of her immediate family. She does not let it out on a commercial basis to third parties.

The Applicant has family ties with the Respondent's family. As a result of that connection the Respondent was content to rent her the Property, and at a rental less than the commercially going rate. Ultimately, the Applicant left the Property to take up a council let.

The Applicant did not dispute this account of the background to the tenancy of the Property.

However, the Respondent also submitted to the Tribunal that the Applicant has breached the agreement, and that she is entitled to withhold the cost of remedial work from the deposit. She alleged that the property was left in a dirty and badly-maintained condition and needed extensive cleaning and remedial work, which entitled her to retain the deposit.

The Applicant took a very different view of events post-termination of the lease, and submitted that she was not in breach of the agreement, and that she was entitled to return of the deposit.

The Respondent very candidly accepted that she has not paid the deposit into an approved scheme, and further accepted that she was obliged to do so by the 2011 Regulations.

She explained that she was simply unaware of the 2011 Regulations and of her obligation to pay the deposit into an approved scheme, and again with candour recognised that ignorance of the law is no defence.

**Reasons for Decision**

This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

> "(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."

The Respondent as landlord was required to pay the deposit into an approved scheme. She accepts that she failed to do so.

Regulation 10 of the 2011 Regulations provides as follows:

> "If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal -
> (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and
> (b) may, as the First-tier Tribunal considers appropriate in the circumstances of the application, order the landlord to—
> (i) pay the tenancy deposit to an approved scheme; or
> (ii) provide the tenant with the information required under regulation 42."

The Tribunal is satisfied that the Respondent did not comply with her duty under regulation 3, and accordingly it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the facts that the Respondent does not run any form of substantial commercial letting business, has no specialised knowledge of housing law or regulations, is a relatively inexperienced landlord, was unaware (as she candidly accepted that she should have been) of the need for the deposit to be placed with an approved scheme, and accepted at the first opportunity before the Tribunal that she was at fault and had contravened Regulation 3 of the 2011 Regulations.

In these circumstances, the Tribunal considers that albeit ignorance of the terms of the 2011 Regulations is no excuse or defence, the foregoing factors do represent mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

However, balanced against these mitigating factors, are the fact that the Respondent entered into the lease entirely unaware of her legal obligations as a landlord with respect to the 2011 Regulations, which regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease, and the fact that the period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (two years and nine months).

The Respondent had prepared a properly drafted written short assured tenancy agreement and had the Applicant sign a form AT5 prior to the commencement of the lease, so she had been aware of and complied with other legal formalities in entering the lease. Indeed, page 3 of the short assured tenancy agreement narrates the Landlord's obligation to pay the deposit into an approved scheme within the time period required by the 2011 Regulations.

Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £800.00 (twice the amount of the tenancy deposit) is an appropriate sanction to impose.

In terms of regulation 10(b)(i) of the 2011 Regulations, the Tribunal may, if it considers it appropriate in the circumstances of the application, order the landlord to pay the tenancy deposit into an approved scheme.

As earlier noted, it became clear in the course of the Case Management Discussion that there is a sharp factual dispute between the parties as to how much of the returnable deposit (if any) should be repaid to the Applicant by the Respondent.

One of the mechanisms provided for in the 2011 Regulations, is a dispute resolution procedure operated by the approved scheme holding the deposit in terms of Part 6

of the 2011 Regulations. The purpose of this part of the 2011 Regulations is to provide a mechanism to resolve disputes about how much of the deposit should be repaid to the tenant, and how much might be repaid to the landlord, in the event of dispute on that matter.

In the circumstances of this application, the Tribunal considers it appropriate to order the Respondent to pay the tenancy deposit of £400.00 into an approved scheme. Once that has been done, the parties can then utilise the approved scheme dispute resolution mechanism to determine to whom the sums representing the deposit should be repaid, standing the obvious dispute regarding its potential retention in respect of the matters above-mentioned.

**Decision**

For the foregoing reasons, the Tribunal orders the Respondent in respect of her breach of Regulation 3 of the 2011 Regulations:

(1) to make payment to the Applicant of the sum of £800.00 in terms of Regulation 10(a) of the 2011 Regulations; and

(2) to make payment of the tenancy deposit of £400.00 into an approved scheme in terms of Regulation 10(b)(i) of the 2011 Regulations.

**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.**

Neil Kinnear — 25/04/19

**Legal Member/Chair** — **Date**