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**

**Chamber Ref: FTS/HPC/PR/18/2051**

**Re: Property at 49 Wester Drylaw Drive, Edinburgh, EH4 2SS ("the Property")**

**Parties:**

**Miss Kimberley Whyte, Mr Marc Bleazard, 155 Telford Road, Edinburgh, EH4 2PX ("the Applicants")**

**Ms Linda Searle, 1 Northbank Cottages, Bathgate, EH48 4BX ("the Respondent")**

**Tribunal Members:**

**Graham Harding (Legal Member) and Eileen Shand (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Applicants are entitled to an order for payment by the Respondent in the sum of ONE THOUSAND EIGHT HUNDRED AND SEVENTY FIVE POUNDS (£1875.00)**

**BACKGROUND**

1. By application dated 9 July the Applicants complained to the Tribunal under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules") that the Respondent was in breach of the Tenancy Deposit Schemes (Scotland) Regulations) 2011("the 2011 Regulations") in that the Applicants' deposit that had been paid by them to the Respondent at the commencement of their tenancy in September 2013 had not been lodged in an approved scheme until September 2017. In support of their application the Applicants submitted to the Tribunal along with their application a copy of their tenancy agreement an email from My Deposits Scotland confirming the deposit was lodged within the scheme on 1 September 2017. The Applicants also submitted email correspondence between Ms Whyte and

the Respondent's son Mr David Searle confirming the amount of the deposit to be paid.

2. By Notice of Acceptance of Application dated 6 September 2018 a legal member of the Tribunal with delegated powers accepted the application and referred it to a Tribunal.

3. Intimation of a hearing was given to the Applicants by letter dated 9 October 2018. Intimation on the Respondent was made by Sheriff Officers on 9 October 2018. The parties were provided with information regarding the submission of written representations and productions in advance of the hearing.

4. A hearing was assigned to take place on 25 October 2018 at George House, 126 George Street, Edinburgh.

5. By email of 22 October the Respondent made written representation to the Tribunal. The applicants made no further written representations to the Tribunal beyond that submitted with their application.

**THE HEARING**

6. On the morning of the hearing the Tribunal received an email from the Respondent to advise that due to illness she was unable to attend the hearing but that she would be represented by her son Mr David Searle. Mr Searle attended the hearing on his mother's behalf. The Applicants appeared personally.

7. At the commencement of the hearing it was agreed between the parties that the Applicants had entered into a Short Assured Tenancy with the Respondent on 17 July 2013 that had endured for a period of 12 months and had then continued thereafter for some time by tacit relocation. It was also agreed that the Applicants had paid the Respondent a deposit of £625.00 in July 2013 but the Respondent had not lodged the funds in an approved Tenancy Deposit Scheme until 1 September 2017.

8. The Tribunal referred the applicants to the Respondent's written representation in which it was said that the original tenancy had commenced on 17 September 2013 but had ended on 16 September 2017 and been replaced by a new tenancy which had started on 17 September 2017. Both Applicants said that they had never agreed to a new tenancy and had not been aware of there being a new tenancy until they had seen the email from the Respondent of 22 October 2018.

9. Ms Whyte said that she had never met the Respondent and all of the Applicants dealings had been with the Respondent's son Mr David Searle. She said that Mr Searle had come around to the house on 1 September 2017 saying that he was updating his records. Ms Whyte said Mr Searle had told the Applicants that nothing was going to change and it was just a formality. She said that there had

been no mention of the original tenancy being terminated and a new lease taking its place.

10. According to Mr Bleazard he and Ms Whyte did sign a document but he thought it only consisted of about half a page and was certainly not a lease. Mr Bleazard said that he now thought that Mr Searle had discovered that he could not sell his mother's property without the deposit being lodged in a deposit scheme and referred to what he called a Section 21 notice. When asked further about this he explained that In June this year he and Ms Whyte had been forced to move out of the property as the Respondent had sold it and they had been served with Notices to Quit. Mr Bleazard said that he did not know what it was that he and Ms Whyte had signed. He thought that Mr Searle may have said that some regulations had changed but nothing about the tenancy had changed. The rent had not increased.

11. Mr Searle explained that his mother had six properties which had been rented out off and on over a ten year period. His mother was and had been at the time of entering into the lease with the Applicants a registered landlord. He said that he assisted his mother with the leasing of the properties and that his mother had been ill for some years. He said that in August 2017 he had become aware through the tenant of another property that tenants deposits had to be lodged in a Tenancy Deposit Scheme. Prior to that time he had not been aware of the requirement. He said that neither he nor the Respondent had ever received any communication from his local authority about the need to lodge Tenants deposits in an approved scheme.

12. Mr Searle said that he phoned the Applicants at the end of August 2017 to say that he would be drawing up a new contract and would be coming round to the house on 1 September to have it signed. When asked by the Tribunal if he could just tell the Applicants that he was drawing up a new lease without their agreement Mr Searle said that perhaps his earlier statement had been more forthright than he had intended and that in fact he had phoned the Applicants to say that he wished to discuss a new tenancy agreement with them.

13. When asked if the new agreement was on the same terms as the previous agreement Mr Searle said that the new agreement was for a period of six months not a year.

14. In reply to a question from the Tribunal as to the reason for entering into a new tenancy Mr Searle indicated that he was helping his mother out. He did not dispute that if the original tenancy was terminated and a new tenancy began and if the tenants deposit was lodged within 30 working days of the new tenancy commencing and the tenants took no action within three months of the old tenancy ending their right to make an application under the 2011 Regulations would prescribe. He accepted that that appeared to be the argument being put forward in the Respondent's defence. He did not think he explained to the Applicants at the time of his meeting with them on 1 September 2018 that if they signed a new tenancy agreement then any rights they may have had under

the 2011 Regulations could be affected. He did think he mentioned lodging the deposit in an approved scheme.

15. Ms Whyte said that it was she who had spoken to Mr Searle on the telephone at the end of August. As far as she could recall Mr Searle had said that he was coming round to the house as there was another document to be signed. She said he had said nothing was changing the rent is not going up it was something that should have been done a while ago. Ms Whyte said she was not sure if Mr Searle mentioned a new Tenancy agreement but he had certainly not mentioned a new end date as she would not have agreed to that as she had two children and needed to provide a home for them so would never have agreed to the tenancy being reduced to six months.

16. According to Ms Whyte Mr Searle made no mention of the deposit either during the telephone call or at the meeting on 1 September. The first she heard of the deposit was when she received a text from the scheme administrators with someone else's details. Ms Whyte said she contacted Mr Searle to advise him and was then sent the correct details.

17. Both Mr Bleazard and Ms Whyte remained of the view that the document that they had signed had only consisted of a single page. There was no witness to their signature and it had already been signed by the Respondent. They had been given a copy but this had been lost.

18. At this point Mr Searle produced a document said to be the tenancy agreement signed by the Applicants on 1 September 2017. As this document had not been lodged and intimated in accordance with Rule 22(1) and Mr Searle was unable to provide any excuse in terms of Rule 22(2) the Tribunal adjourned to consider whether in the interests of justice it should allow the document to be lodged late. Given that to a great extent the existence or otherwise of a second tenancy agreement went to the heart of the case the Tribunal decided to allow the Respondent to lodge the document and copies were provided to the Applicants.

19. The Tribunal noted that the document was headed "SHORT ASSURED TENANCY AGREEMENT". It provided on the first page that the tenancy would commence on 17/09/2017 and end on 1/03/2018 and if not brought to an end on the end date would continue thereafter on a monthly basis until ended by either party. The rent remained unaltered at £625.00 per calendar month. The document purported to be signed by the Applicants and the Respondent on the last page and all three signatures were apparently witnessed by Mr David Searle.

20. The Applicants confirmed that it was their signatures on the document and Mr Searle confirmed that he was the witness to the parties signatures.

21. According to Mr Searle the document lodged with the Tribunal was a copy of the document that he took to the Applicants' home on 1 September 2018. He said that he took his time going through the agreement page by page.

22. Mr Bleazard accused Mr Searle of telling lies and both he and Ms Whyte said that the meeting had been very informal and had lasted ten minutes at most. They had not gone through any such document at all.

23. Mr Searle agreed that the meeting might have lasted about ten minutes and that he had asked the applicants if they had any questions or concerns.

24. In reply to a question from the Tribunal Mr Searle said that the Applicants had also been given an AT5 and a Tenant Information Pack on 1 September but these had not been produced.

25. Mr Bleazard remained adamant that the first time he had seen the purported new tenancy agreement was at the hearing. He said that he would never have signed such an agreement. The document he signed was short he thought it consisted of a single sheet and certainly was not the document produced at the hearing.

26. Ms Whyte was similarly of the view that the hearing was the first occasion on which she had seen the document but she did now wonder if the document that she had signed had more than one page as she could recall something about having to put her initials on some pages but the document before the tribunal whilst having a space on each page for initials had not been initialled. She remained adamant that at no time had she agreed to enter into a new tenancy agreement with the Respondent.

27. The Applicants advised the Tribunal that the reason they had left the property was because they had been served with notices to quit because the Respondent had sold the property. Mr Searle said that it had not been the Respondent's intention to sell the property when he drew up the new tenancy agreement in August 2017.

28. The Applicants submitted that their tenancy had commenced on 17 July 2013 and had ended on 15 June 2018. The Respondent had failed to lodge their deposit of £625.00 in an approved scheme until 1 September 2017. The applicants left it to the Tribunal to determine an appropriate award of compensation in the event of the Tribunal upholding their claim.

29. For the Respondent Mr Searle submitted that if the Tribunal upheld the Applicants claim then any award of compensation was for the Tribunal to determine.

**FINDINGS IN FACT**

30. The parties entered into a Short Assured Tenancy that endured from 17 July 2013 for a period of 12 months. It continued thereafter by tacit relocation from year to year and ended on 15 June 2018 when the Applicants vacated the property.

31. The Applicants paid the Respondent a deposit of £625.00 at the commencement of the lease in July 2013. The Respondent failed to comply with Regulation 3 of the 2011 Regulations and did not lodge the deposit in an approved Tenancy Deposit Scheme until 1 September 2017.

32. The Respondent's son Mr David Searle became aware of the failure to lodge the Applicant's deposit and those of all six of the Respondent's tenanted properties in August 2017.

33. Mr Searle drew up a new Short Assured Tenancy Agreement between the Respondent and the applicants with a commencement date of 17th September 2017 and an end date of 16th March 2018 and on a month to month basis thereafter.

34. Mr Searle did not explain to the Applicants that he was wishing on the Respondent's behalf to reach an agreement with the Applicants to terminate the existing tenancy agreement and enter into a new Short Assured Tenancy Agreement on different terms particularly with regards to the duration of the tenancy.

35. Mr Searle did not explain to the Applicants that there was a problem with the deposit not being lodged timeously.

36. Mr Searle told the applicants that he was updating his records and that there had been a change in legislation and that the Applicants had to sign some further documents.

37. The document signed by the Applicants on 1 September 2017 was with the exception of the signing page probably not the same document that was produced by Mr Searle at the hearing.

## REASONS FOR DECISION

38. In order to be timeous the application required to be brought within 3 months of the end of the tenancy. If the Applicants original tenancy had been terminated by agreement between the parties on 16 September 2017 then any application would require to have been made by 16 December 2017. On the other hand, if the parties did not enter into a new tenancy agreement then the original agreement would endure until the Applicants left the property on 15 June 2018 and the Applicants would have until 15 September to submit an application.

39. The original tenancy agreement between the parties appeared to be in order. It worked to the Applicants advantage in that if it was not terminated by the landlord at the ish of 17 July 2014 then it would continue by tacit relocation for a further year thus providing them with a certain degree of security of tenure from year to year.

40. As far as the Tribunal could ascertain there could be two reasons why the Respondent might wish to terminate the original agreement and enter into a new agreement. The first might be because the Respondent had plans to sell the property and required vacant possession and as this would not be a ground for possession under Schedule 5 of the Housing Scotland Act 1988 a shorter period of let and a month to month let thereafter would be an obvious advantage to the Respondent. The second reason would be that by creating a new tenancy and lodging the Applicants deposit in an approved scheme there was a reasonable prospect that the Applicants would not be aware of the problem that had come to the Respondents attention and would not make an application to (at that time) the Court.

41. The Tribunal found the Applicants to be credible and largely reliable witnesses. Although their evidence did not entirely coincide with each other with regards to exact length of the document they signed on 1 September 2017 they were entirely consistent in their assertion that at no time had it been suggested to them that their existing tenancy agreement was to be terminated and that they were being asked to enter into a new tenancy agreement that would be for a six month period and on a month to month basis thereafter. It seemed to the Tribunal that the Applicants version of the events of the telephone call at the end of August and the meeting with Mr Searle on 1 September was to be preferred to that of Mr Searle.

42. The Tribunal thought it quite telling that Ms Whyte in her evidence said that she would never have agreed to the tenancy being for a period of six months when she had two children to provide a home for. Similarly, Mr Bleazard was compelling in his evidence that he had never previously seen the document submitted by Mr Searle at the hearing and had he been aware of the amendment to the duration of the lease he would not have agreed to it.

43. The Tribunal was of the view that if the Applicants had been made aware that the document they were being asked to sign was a new tenancy agreement they would not have agreed to sign it. The Tribunal also concluded that given the Applicants overall recollection of the nature of the document they were asked to sign it was likely that the document they had seen on 1 September was not the same document that was lodged by Mr Searle at the hearing other than the signing page.

44. The Tribunal did not find the Respondent's representative Mr Searle to be a credible witness. He provided no convincing reason for drawing up a new tenancy agreement. His initial recollection of his phone call at the end of August with Ms Whyte was very quickly changed when it was put to him that it might not have been open to him to unilaterally draw up a new agreement without the tenants' consent. His evidence that he went through the new agreement in detail, page by page, with the Applicants at their meeting on 1 September yet managed to do so in the space of just ten minutes quite simply did not seem to be at all likely. The fact that he said that he had also provided the Applicants at that meeting with an AT5 and Tenant Information Pack but had not submitted either of these to the Tribunal also demonstrated a lack of credibility.

45. Although Mr Searle advised the Tribunal that at the time of drawing up the new tenancy agreement it had not been the Respondent's intention to sell the property the Tribunal concluded that a new tenancy agreement reducing the duration to six months and month to month thereafter would be an advantage to the Respondent if she wished to sell the property and her tenants were unwilling to move. It was however the Tribunal's view that the primary motive for drawing up a new tenancy agreement was to try to avoid any claim by the Applicants by the failure on the part of the Respondent to lodge their deposit in an approved scheme timeously. It was the Tribunal's view that the Respondent through the actions of her son Mr David Searle adopted an underhand method of getting the applicants to sign a document which they believed was simply updating Mr Searle's records to comply with some changes in legislation. The Tribunal did not accept Mr Searle's evidence that he had explained to the Applicants that the original lease was being terminated and a new short assured tenancy for a period of six months was being substituted in its place. Even if Mr Searles actions were not fraudulent there was clearly no consensus in idem (the mutual understanding between the parties necessary to form a contract) and therefore the agreement of 1 September 2017 cannot be valid.

46. Having found that the Tenancy agreement of 1 September 2017 was not valid it follows that the original tenancy agreement of 17 July 2013 was never terminated and therefore the Applicants application to the Tribunal in terms of Regulation 9(2) of the 2011 Regulations is timeous.

47. It was accepted by Mr Searle on behalf of the Respondent that the Applicants' deposit of £625.00 paid in July 2013 was not lodged with an approved scheme until 1 September 2017. This was a period in excess of four years. The Tribunal noted that the Respondent had six properties that she had rented out over a ten year period and up until August 2017 no tenants deposits had been lodged in approved schemes. The Tribunal was of the view that a Landlord responsible for renting out six properties had an obligation to keep herself fully aware of the current legislation incumbent upon landlords and given that the Tenancy Deposit Scheme Regulations had been in force since July 2012 there was really no excuse for the Respondent's failure to lodge the Applicants deposit at the commencement of the lease. The Tribunal therefore took the view that this was a serious breach of the regulations.

48. In terms of Regulation 10 of the 2011 Regulations if satisfied that the Respondent did not comply with the terms of Regulation 3 the Tribunal must order the Respondent to pay the Applicants an amount not exceeding three times the tenancy deposit. The Tribunal was satisfied that the Respondent had breached Regulation 3.

49. The Tribunal carefully considered all the facts and circumstances presented to it and as indicated above considered this to be a serious breach of the Regulations at the upper end of the scale. Not only was there a very lengthy delay in lodging the Applicants deposit in an approved scheme the Respondent through the actions of her son went to considerable lengths to try to avoid

liability by substituting a new tenancy agreement without the consent and agreement of the Applicants and the Tribunal determined that a fair and proportionate sanction is to award the Applicants an amount three times the deposit making a total of £1875.00

**Decision**

50. For the foregoing reasons, the Tribunal orders the Respondent in respect of their breach of Regulation 3 of the 2011 Regulations to make payment to the Applicants in the sum of £1875.00 in terms of Regulation 10(a0 of the 2011 Regulations.

51. The Tribunals decision is unanimous.

**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.**

G Harding

**Legal Member/Chair**

28 October 2018

**Date**