First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application in terms of Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the Rules") for an Order for Payment under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/18/2960

Property: 134, Motherwell Road, Bellshill, ML4 2LB ("the Property")

The Parties:- Mrs. Jacqueline Allison, residing at 93, Bluebell Wynd, Wishaw, Lanarkshire ML2 0PP ("the Applicant") represented firstly by Mr J Melvin of Coatbridge CAB, Unit 10, Fountain Business Centre, Ellis Street, Coatbridge, MI5 3AA and thereafter by Mr. William Allison, her husband, residing at 93, Bluebell Wynd, Wishaw, Lanarkshire ML2 0PP

And

Mr. John Brown and Mrs. Christine Brown, both residing at 93, Avon Street, Motherwell, ML1 3JA ("the Respondents")

hereinafter together referred to as "the Parties"

Tribunal Members

Karen Moore (Chairperson)

Gordon Laurie (Ordinary Member)

Decision

The Tribunal determined that the Respondents had not complied with Regulation 3 of the 2011 Regulations and made an Order of Payment amounting to ONE THOUSAND AND EIGHT HUNDRED POUNDS (£1,800.00) Sterling.

Background

1. By application received on or around 1 November 2018 ("the Application"), the Applicant applied to the Tribunal for an Order for Payment against the Respondents under Regulations 9 and 10 of the 2011 Regulations on the grounds that the Respondents had not complied with Regulation 3 of the 2011 Regulations. The

Application sought an Order for the full amount of payment due in terms of the 2011 Regulations, being three times the amount of the tenancy deposit.

2. The Application was accepted by the Tribunal and a Case Management Discussion ("CMD") was fixed for 15 February 2019 and later postponed to 25 March 2019 at 10.00am at Glasgow Tribunal Centre, 20 York Street, Glasgow G2 8GT.

3. The Tribunal issued two Directions. On 26 January 2019, the Tribunal directed the Applicant to submit details of the tenancy between the Parties, evidence of the last three payments of rent made to the Respondents by her, evidence of payment of the rent deposit paid to the Respondents by her; evidence of the end date of the tenancy, a copy of an email referred to in correspondence from SafeDeposits Scotland which correspondence formed part of the Application and copies of any other documentation provided to her by the Respondents in compliance of Regulation 42 of the 2011 Regulations. The Applicant complied with the Direction in part.

4. The CMD was held on 25 March 2019 at 10.00 at the said Glasgow Tribunal Centre. The Applicant was present at the CMD along with her husband, Mr William Allison, as a supporter in terms of Rule 11 of the Rules. Both Respondents were present. The outcome of the CMD was to fix a Hearing to make a finding on the three key issues of dispute between the Parties, namely, the date on which the tenancy deposit was paid, whether or not there had been a failure on the part of the Respondents to comply with any duty under Regulation 3 of the 2011 Regulations and the amount of payment, if any, to be awarded.

5. A Direction was issued at the CMD to the Respondents to submit a full copy of the tenancy agreement between the Parties and to both the Applicant and the Respondent to submit any additional written submissions, to confirm if oral submissions were to be made and to provide a short of note of what those will be, to submit a paginated and indexed folder of documentary evidence to be relied on at the Hearing and to submit a list of witnesses. The Respondents submitted a copy of the tenancy agreement. The Applicant complied with the other aspects of the Direction. A Note of the CMD ("the CMD Note") was issued to the Parties and is referred to for its terms.

6. The Applicant appointed Mr Jim Melvin of Coatbridge CAB, Unit 10, Fountain Business Centre, Ellis Street, Coatbridge, Ml5 3AA as a representative in terms of Rule 10 of the Rules. This was intimated to the Respondents.

Hearing

7. A Hearing took place on 3 May 2019 at 10.20 am at the said Glasgow Tribunal Centre, the start of the Tribunal being delayed by the Parties' conduct out with the Tribunal room. The Applicant was present at the CMD along with her husband, Mr William Allison, as a supporter in terms of Rule 11 of the Rules and represented by Mr. Melvin in terms of Rule 10 of the Rules. Both Respondents were present.

8. The Tribunal outlined the procedure it would adopt which was that the Applicant's case would be presented, the Respondents would be given an opportunity to test that case and then the Respondents would present their case which the Applicant would be given an opportunity to test. The Tribunal explained that, unlike a court, the Tribunal's role is inquisitory and not adversarial and that the Tribunal members would ask questions where they saw fit.

9. The Tribunal explained that the Hearing was in respect of the Application and so was restricted to Rule 103 of the Rules and Regulations 3, 9, 10 and 42 of the 2011 Regulations, with reference to the wording of those Rules and Regulations.

10. The Tribunal advised the Parties that the Tribunal members had read all of the background papers and were familiar with the facts and that, as narrated in the CMD Note, the issue for the Tribunal was which version of events was more likely to have occurred based on all of the evidence and that the standard of proof required is the balance of probabilities. The Tribunal advised the Parties that whilst Parties would not be on oath, as this was matter of credibility given the two opposing positions, Parties should be truthful and factual in their evidence. The Tribunal, being aware from the background papers and the late start of the proceedings that relations between the Parties were not cordial, cautioned the Parties that they should not make personal comments to or about one another.

Preliminary Matter

11. Mr. Melvin advised the Tribunal that in the course of his dealings with the Applicant he had taken a call from Mrs Brown of the Respondents in respect of a tenancy matter but not the matter which is the subject of the Application. However, it became clear to Mr. Melvin that the tenancy matter related to the tenancy between the Parties and so he advised Mrs Brown that he could not advise her as he would be in conflict. Mr. Melvin's position is that he was not conflicted as he had not discussed that Application with Mrs. Brown, and had he been conflicted, he would recuse himself from acting for the Applicant. Mrs. Brown agreed that conversations had taken place with Mr. Melvin about a tenancy matter and, in the first instance, advised the Tribunal that she thought there was a conflict. The Tribunal explained that circumstances of instruction to an advisor from both parties to a dispute do occur from time to time and that Mr. Melvin's approach was the correct one and that if the Tribunal thought that there was a possibility of conflict, the Tribunal would not allow Mr. Melvin to continue. The Tribunal offered to allow the Respondents an opportunity to move to adjourn but the Respondents accepted the position and preferred to continue.

12. Both Respondents then raised an issue of fairness in respect of the Applicant having a representative and advised the Tribunal that, if they had known that Mr. Melvin would be present to represent the Applicant, they would have instructed a lawyer or representative to act on their behalf. The Tribunal clerk produced a copy email to Mrs. Brown intimating to the Respondents that the Applicant had appointed Mr. Melvin who would represent her at the Hearing. The Tribunal offered the Respondents the opportunity to adjourn to allow them to appoint a lawyer or

representative, but they declined and advised the Tribunal that they would prefer to continue.

13. Mr. Melvin advised the Tribunal that the approach he would take in his role would be mediatory rather than adversarial.

Applicant's Evidence in Chief.

14. Mr. Melvin led evidence from the Applicant with reference to the Applicant's productions as lodged.

15. The Applicant identified the following:-
i)a copy of the bank statement of her daughter, Carina, and the sum of £700.00 shown as a withdrawal on 27 February 2015 from a bank in Bellshill;
ii)the sum of £600.00 specified as the deposit in the tenancy agreement between the Parties, the date of this tenancy agreement as 27 February 2015 and the wording in the deposit clause which states "on execution of this Agreement the Tenant will pay the tenancy deposit";
iii) a copy of her husband's bank account showing monthly payments of £600.00 to "Christine";
iv) a copy of her husband's bank account showing various entries for the week 26 July 2018 to 3 August 2018, which did not show a cash withdrawal of £600.00 and
v) prints of text messages from her to the Respondents on 14 and 20 August 2018 asking where the tenancy deposit had been lodged.

16. The Applicant confirmed that she does not have a bank account but uses that of her husband or daughter.

17. The Applicant gave evidence that she had seen the Property advertised on Gumtree and had arranged a viewing, that other people were interested in the Property and were also viewing it and that Mrs. Brown had advised her that if she could pay the deposit, she could move in. The Applicant continued that there was a tenant in the Property who was leaving on 14 or 15 March 2015 and that she and her family moved in on that same day. The Applicant's evidence was that Mrs. Brown arranged to meet her in the café of Morrisons Supermarket in Bellshill to collect the deposit of £600.00 and that she and her daughter, Carina, met with Mrs. Brown, that Carina counted out the £600.00 deposit and gave this to Mrs. Brown, that Mrs. Brown gave her a tenancy agreement which had been signed by Mr. Brown and that she and Mrs. Brown signed the tenancy agreement in the café and that Carina completed the details on the front agreement and signed her father's signature. The applicant advised the Tribunal that she and Carina had chatted in conversation to Mrs. Brown about Mrs. Brown's job as a beautician and about her family. The Applicant confirmed to the Tribunal that only Mrs. Brown of the Respondents was present.

18. The Applicant continued in evidence that she and her family moved in to the Property on the same day the previous tenant moved out, being 14 or 15 March 2015, and that she paid Mrs. Brown the first month's rent in cash on that day, which Mrs. Brown gave to the outgoing tenant, who the Applicant referred to as "Mrs. Delahunt".

19. The Applicant confirmed to Mr. Melvin that she was aware of the 2011 Regulations as she had been a tenant before and knew that tenancy deposits had to be lodged.

20. The Applicant continued in evidence that there had been a water leak problem in the Property which resulted in her family having to move into, first, hotel accommodation, and, then, a two-bedroom flat, both provided by the Respondents, whilst repair work was carried out, and, that the effect of this temporary accommodation strained the landlord/tenant relationship culminating in a meeting on 3 August 2018 at the Property and attended by the Applicant, her husband and both Respondents. The Applicant, in response to questions from the Tribunal, advised the Tribunal that the purpose of the meeting was a face-to face meeting to discuss what would happen next with the repair to the Property and when the temporary accommodation would end. The Applicant explained that although she and her family loved the Property, the strain of the temporary accommodation was taking its toll as it was not suitable.

21. In response to direct questions from Mr. Melvin and the Tribunal, the Applicant stated that she had not paid a deposit of £600.00 to the Respondents on that day and that there was no discussion on the deposit as the only discussion was in respect of the Property.

22. In response to questions from the Tribunal for the purpose of clarifying the Applicant's evidence, the Applicant confirmed that the deposit was paid in cash on 27 February 2015 and the first month's rent was also paid in cash on the day she moved into the Property. She confirmed that no receipts were given for either payment and further confirmed that the meeting on 3 August 2018 dealt only with the condition of the Property and no reference was made to the deposit as evidenced by the bank statements which had been lodged as productions.

Applicant's evidence in cross-examination.

23. The Respondents, with the assistance of the Tribunal asking direct questions of the Applicant in respect of the Respondents' position, cross-examined the Applicant's evidence.

24. The Respondents' position that the meeting on 27 February 2015 in the café of Morrisons Supermarket in Bellshill did not take place was put to the Applicant who reaffirmed that it did take place as she had set out in her evidence.

25. The Respondents' position that the signing of the tenancy agreement probably took place at the Property when the Applicant moved in was put to the Applicant who denied that this had happened as it was signed by her at the café on 27 February 2015 and that she had been given a copy of it that time.

26. The Respondents' position that, as Mrs Brown was a business woman and had premises in the locality, it was unlikely and illogical that she would meet in café to carry out a transaction was put to the Applicant who maintained that the tenancy and deposit exchange did take place as she had set out in her evidence.

27. The Respondents' position that, if the Applicant was aware of the 2011 Regulations as she had claimed to be in her evidence in chief, she would have contacted the Respondents soon after paying the deposit to find out where it had been lodged but had not done so was put to the Applicant who said that she had trusted the Respondents. The Respondents' position that this level of trust was unlikely as they had just met and did not know one another was put to the Applicant who said that she had trusted Mrs. Brown.

28. The Respondents' position that the Applicant's emails of 14 and 20 August 2018 were prompted by the payment of the deposit on 3 August 2018 and not by the Applicant deciding to terminate the tenancy was put to the Applicant who denied this and reaffirmed that she had paid the deposit in February 2015.

29. The Respondents' position that at the meeting of 3 August 2018, the Parties discussed the repairs to the Property and the return of the Applicant and her family to the Property and that there was no mention of the Applicant terminating the tenancy was put to the Applicant who agreed that this was discussed but that the Applicant's unhappiness at the temporary situation had also been discussed.

30. The Respondents' position that at the meeting of 3 August 2018, the Respondents raised the matter of Mr. Brown attending at the Property on the day that the leak had been reported and finding it in a poor condition and that the Respondents consequently insisted on the deposit being paid at that meeting was put to the Applicant who denied that this had happened.

31. The Applicant agreed with the Respondents that she had been given a choice of temporary accommodation and that this had been paid by the Respondents or their insurers and confirmed to the Tribunal that the tenancy had continued by her paying the monthly rent.

32. The Applicant agreed with the Respondents that she had indicated to them that her family required accommodation in Bellshill, that her family now lodged with her father in Wishaw and that she had advised the Respondents that her father's home had one bedroom where, in fact, it has three bedrooms but explained that she had meant that only one bedroom was available for her family's use.

Applicant's evidence in re-examination.

33. In re-examination of the Applicant, Mr Melvin confirmed with her that the Applicant, her husband and both Respondents had all appeared to have signed the tenancy agreement on 27 February 2015, that the Applicant herself had signed it in the café of Morrisons Supermarket in Bellshill and that she had been given a copy of the tenancy agreement. The Applicant explained that she had returned this copy to Mrs. Brown in May 2015 as Mrs. Brown could not find her own copy and needed it for the insurance claim.

Evidence in chief of Carina Allison, witness for the Applicant.

34. At the invitation of Mr. Melvin, the Tribunal led the evidence of Carina Allison ("Carina").

35. Carina stated in evidence to the Tribunal that she is 24 years old and resides with her parents, being the Applicant and the Applicant's husband, at 93 Bluebell Wynd, Wishaw.

36. Carina stated in evidence to the Tribunal that she recalled meeting Mrs Brown with her mother in the café of Morrisons Supermarket in Bellshill. She stated to the Tribunal that she and her mother had gone to Bellshill by taxi in the morning of 27 February, arriving possibly around 10.30 and that she had withdrawn £700.00 from a local bank to pay for the tenancy deposit for her parents' new house. Carina identified her bank statement and the entry showing a withdrawal of £700.00 on 27 February 2015 and identified the bank sort code as the Bellshill branch, explaining that she knew this from working locally and making bank deposits. She continued in evidence that she and her mother walked around the shopping area in Bellshill until Mrs. Brown texted at around 11.30 -12.00 to advise that she was the Morrisons café. Carina continued in evidence that she and her mother went to the café and met Mrs. Brown, that she counted out the £600.00 deposit which she gave to Mrs Brown and that her mother signed a tenancy agreement. Carina stated that she wrote the details on the front of the agreement and identified her handwriting on the first and last page, but stated that she had not signed her father's signature. Carina stated in evidence that she recalled having a conversation with her mother and Mrs. Brown about the décor in the new house, Mrs. Brown's job in hairdressing, nails and tanning and explained that, although she worked in Sports Direct at that time, she was planning to study beauty therapy.

37. In response to direct questions from the Tribunal, Carina agreed that she had knowledge of the Application but denied that her mother had told her what to say to the Tribunal or that her mother had asked her to fabricate evidence for the Tribunal. She accepted that the withdrawal from her bank account only showed money taken out and did not prove payment. Carina confirmed again to the Tribunal that she had paid the deposit to Mrs. Brown and that she had completed parts of the tenancy agreement but had not signed for her father.

38. In response to further questions from the Tribunal, Carina explained that her family used her bank account and that the student loan credit was that of her mother and that her and her father's wages were also paid into that account.

Cross – examination of evidence of Carina Allison, witness for the Applicant.

39. Mrs. Brown of the Respondents, with the assistance of the Tribunal at times, cross-examined Carina's evidence.

40. In response to Mrs Brown's question if she signed her father's name on the tenancy agreement, Carina said she did not but confirmed that she had completed parts of it and pointed to her handwriting on the document.

41. Prompted by the Tribunal to put the Respondents' position that the that the meeting in Morrisons café on 27 February 2015 did not take place to Carina, Carina replied that it 100% did take place.

42. Carina confirmed to Mrs. Brown that she was not aware of the 2011 Regulations.

43. In response to Mrs Brown's question if Carina was given a receipt for the deposit, Carina stated that they were given a copy of the tenancy agreement which she had seen Mrs. Brown sign.

Re – examination of evidence of Carina Allison, witness for the Applicant.

44. There were no questions for Carina from Mr. Melvin and no re-examination by the Tribunal.

Respondents' Evidence in Chief.

45. The Respondents both gave evidence to the Tribunal by statements and in response to direct questions from the Tribunal.

46. At the outset, Mr Brown stated that the Respondents sought expenses of the proceedings as they were out of pocket in resect of loss of income and in respect of damage to the Property. The Tribunal explained the basis on which expenses could be awarded under the Rules and that it was open to the Respondents to make their own applications to recover costs arising from the tenancy.

47. Mr. Brown advised the Tribunal that he had not attended a meeting at Morrisons café on 27 February 2015 and did not recall signing the tenancy agreement before it was given to the Applicant.

48. Mrs. Brown advised the Tribunal that the meeting at Morrisons café on 27 February 2015 with the Applicant and Carina did not happen and that she would not have a meeting in a café but would have meetings such as this in either her shop or at the tenancy address.

49. Mrs. Brown strongly disputed that the Applicant and her family moved into the Property on the same day that the previous tenant moved out and disputed that the rent paid to her by the Applicant was given to the outgoing tenant as a refund of deposit on that day. Mrs. Brown explained that same day tenancy handovers do not happen as the properties are cleaned and checked before a new tenant moves in.

50. In response to questions from the Tribunal, Mrs. Brown could not recall when Applicant was given the tenancy agreement to sign but thought it was probably when she viewed the Property and that the Applicant would have been given a copy tenancy to look over. Mrs. Brown could not recall when she met Carina and when

Carina completed parts of the tenancy agreement or indeed if Carina had done so, but, accepted that she had not challenged this part of Carina's evidence. Mrs. Brown could not recall when the previous tenant had left the Property but was certain that it was not on the day the Applicant moved in. With regard to payment of the first month's rent at the Property, Mrs. Brown said that this was probably paid in cash and she usually would give a receipt but was not certain if she had done so.

51. In response to questions from the Tribunal, the Respondents confirmed that they have other properties which they lease and that they manage leased properties for Mrs. Brown's father but declined to give further detail. The Respondents stated that they usually take tenancy deposits but sometimes this depends on the type of properties and the ability of tenants to pay, particularly if tenants are in receipt of benefits. The Respondents stated that they always give tenants a copy tenancy agreement to read over and confirmed to the Tribunal that they advise tenants to take legal advice before signing.

52. Mrs. Brown advised the Tribunal that she joined the Scottish Association of Landlords at the beginning of this year and is now clearer on landlord duties. She also advised the Tribunal that she takes advice from friends who are estate agents, is aware of the 2011 Regulations and always uses Safe Deposit Scotland. Mrs. Brown agreed with the Tribunal that the tenancy agreement between the Parties mentions the landlord's right to make deductions from the deposit during the tenancy and is not wholly compatible with the 2011 Regulations.

53. With regard to the Applicant's tenancy, Mrs. Brown said in evidence that she had not had an issue with the condition of the Property and had carried out regular inspections which were pre-arranged and so the Applicant had advance notice to make sure the Property was tidy. For this reason and as the rent was always paid on time, she had not pressed the Applicant to pay the deposit. She explained further in evidence that it was only when Mr Brown called at the Property in connection with the leak and found the Property in a dire state, that it was realised that the deposit had not been paid and might be necessary. The Respondents explained that by "dire state" they meant that there were carpets and blinds missing, the walls were marked and the kitchen lights were "hanging down". Mrs. Brown advised the Tribunal that Mr. Brown had been very displeased with her for not pursuing the deposit with the Applicant and Mr. Allison and that she regretted accepting the on-going excuses for non-payment by the Applicant and Mr. Allison.

54. With regard to the meeting on 3 August 2018, the Respondents explained to the Tribunal that the Applicant and her family had been in temporary accommodation at the personal cost of the Respondents of £1,575.00 as their insurance no longer covered this cost. The temporary accommodation was a two- bedroom, two-bathroom new build in Bellshill at the choice of the Applicant. Mrs. Brown explained that she had called the meeting to discuss the completion of the work and the Applicant's return to the Property as the Applicant's son appeared to remain in the Property and was preventing the contractors from completing the work. Mrs. Brown's recollection of that meeting was that the Parties left it on good terms, that the Applicant and her husband appeared keen to return as they asked about decoration

of the Property and no mention had been made of the Applicant terminating the tenancy.

55. In response to questions from the Tribunal in respect of payment of the deposit at that meeting, Mrs. Brown stated in evidence that she had told the Applicant by phone to bring the deposit of £600.00 to the meeting, which the Applicant did. The Respondents advised the Tribunal that the deposit was lodged with SafeDeposits Scotland on 22 August 2018 as they were too busy to lodge it before as they were getting their children ready to start or return to school. The Respondents stated that they did not issue a receipt for the deposit at that meeting.

56. With regard to the copy tenancy agreement lodged by them, the Respondents stated in evidence that the amount of the deposit had been blank until the deposit was paid and had been completed by them to show the amount of £600.00 at the request of SafeDeposits Scotland.

57. In response to questions from the Tribunal in respect of the duty set out in Regulation 42 of the 2011 Regulations, the Respondents accepted that they had not complied with this duty but had relied on SafeDeposits Scotland issuing a receipt to the Applicant.

58. The Respondents stated in evidence that it was illogical for them to have held on to the deposit for years and stressed that they had learned from this experience and now always take a deposit from all tenants and "do everything through the books".

59. The Respondents advised the Tribunal that the whole matter was stressful for them and again explained their considerable financial loss. Mr. Brown asked if anything could be done. The Tribunal explained that the proceedings could only be halted if the Applicant withdrew the Application and the Parties might consider if reaching agreement to settle the matter might be a practical solution. Mr. Melvin indicated that the Applicant might consider a "without prejudice" settlement.

Adjourned Hearing

60. The Tribunal, due to lack of time, adjourned the Hearing at the close of the Respondents' evidence in chief.

Resumed Hearing

61. The Hearing resumed on 20 June 2019 at 10.00 am. Prior to that date, the Applicant advised the Tribunal that Mr. Melvin was no longer acting on her behalf and that her husband would represent her.

62. The Tribunal explained that the Hearing would resume with Mr. Allison cross-examining the Respondents on their evidence in chief, that the Respondents would then have an opportunity to clarify any points, the Parties would both sum up their key points and would both have an opportunity to make submissions in respect of the amount of compensation if an Order were made. The Tribunal advised that if it considered it possible to make a decision at the close of the Hearing, there would be

a short adjournment for this purpose and the decision would be given orally with the written decision to follow. The Tribunal reminded the Parties that the issue for the Tribunal was which version of events was more likely to have occurred based on all of the evidence, that the standard of proof required is the balance of probabilities and so the credibility of the Parties in giving evidence was crucial. The Tribunal advised the Parties that, in the same manner that the Tribunal had assisted Mrs. Brown with questioning during the Hearing on 3 May 2019, the Tribunal would assist Mr. Allison.

Respondent's evidence in cross-examination

63. Mr. Allison questioned Mrs. Brown in respect of her landlord registration and in respect of whether or not a tenant information pack had been given at the start of the Applicant and his tenancy. The Respondents agreed that only Mr. Brown was a registered landlord at that time and Mrs. Brown could not recall if she had given the Applicant and Mr. Allison tenant information pack. Mr. Allison agreed with the Tribunal that the purpose of these questions was to demonstrate that the Respondents as landlords were not fully compliant with the relevant legislation.

64. Mr. Allison questioned Mrs. Brown in respect of the number of prospective tenants who viewed the Property and, although Mrs. Brown could not recall exact numbers, she agreed that there were many viewers as it was an open viewing.

65. Mr. Allison questioned Mrs. Brown in respect of the meeting at Morrison's café to sign the lease on 27 February 2015. Mrs. Brown maintained that the meeting did not take place. Mr. Brown stated that he would not send his wife to collect a deposit in cash as it was not safe. Mrs. Brown agreed with her husband that she would not collect cash as it would not be safe to do this.

66. The Tribunal asked the Respondents why the point about safety had not been mentioned in their evidence in chief or at any time during the Hearing on 3 May 2019, but the Respondents could not provide an answer.

67. Mr. Allison questioned Mrs. Brown in respect of her statement during the Hearing on 3 May 2019 that, if the Parties had met anywhere on 27 February 2015, it would have been at the Property or at her shop and put to Mrs. Brown that she did not own a shop in Mossend, Bellshill at that time. Mrs. Brown explained that the premises were owned by her cousin from whom she rented and explained that she would not have left the premises and her clients.

68. In response to clarification questions from the Tribunal in respect of where the tenancy agreement was signed, Mrs. Brown could not recall the location but could not recall having signed the tenancy agreement at her cousin's premises.

69. Mr. Allison returned to his questions in respect of the number of prospective tenants and asked the Respondents, why, if they had so many to choose from, did they choose the Applicant and him if they were not able to pay the deposit? Mrs. Brown responded that although there were a lot of viewers, most appeared not to be reliable in respect of a long-term tenancy and the Applicant and Mr. Allison appeared to be

looking for permanent accommodation as she recalled them saying that their current tenancy was coming to an end as the property was being sold and they had to wait for the deposit to be returned to pay to the Respondents.

70. In response to a direct question from the Tribunal, the Applicant said she could not recall mentioning the deposit and was likely to have said this as she still had to give notice and then recover the deposit.

71. Mr. Brown advised the Tribunal that he specifically remembered the Applicant and Mr. Allison saying that they lost the deposit from the previous tenancy and couldn't pay the deposit to the Respondents. In response to direct questions from the Tribunal, Mr. Brown could not recall where, when or by whom this was said, but confirmed that he could recall it being said.

72. Mr. Allison returned to his questions in respect why the Respondents chose the Applicant and him without carrying out checks, without a deposit and without a signed tenancy agreement. Mrs. Brown stated that the tenancy agreement had been signed before the entry date and recalled that the Applicant and Mr. Allison had visited the Property a second time with their son. In response to a direct question from the Tribunal, the Applicant said that there had only be one viewing on 14 February 2015 and that her son had accompanied her and her husband.

73. In response to a direct question from the Tribunal as to how and when they chose the Applicant and Mr. Allison as tenants, the Respondents advised the Tribunal that they based their decision on the permanency aspect. In response to a direct question from the Tribunal as to how they told the Applicant and Mr. Allison that they had been selected as tenants, the Respondents advised the Tribunal that they did this by phone. The Applicant and Mr. Allison agreed that this was the case.

74. In response to a direct question from the Tribunal as to how the tenancy agreement was given to the Applicant and Mr. Allison as tenants, the Respondents could not recall. Mrs. Brown said that it would have been before the entry date as she always made sure that tenants had an opportunity to read over the lease before signing.

75. Mr. Allison asked the Respondents if the rent had always been paid and paid by bank transfer, other than the first month's rent which was paid in cash on the entry date. The Respondents agreed that this was so.

76. Mr. Allison asked the Respondents if Mr. Brown called out to carry out repairs to the Property during the tenancy, in particular had he carried out work to remedy mould in the bathroom and asked why he had carried out the work which he did and had not investigated it further and why on his visits had he not commented on the condition of the Property. Mr. Brown agreed that he had attended to carry out work and always did so promptly. Mr. Brown explained to the Tribunal that he is a plumber to trade and that a treatment for mould was the correct response and the leak which occurred in January 2018 would not have caused this and could not have been detected without intrusive investigation. The Tribunal, from its own technical knowledge

agreed with Mr. Brown, that his response to the mould issue was reasonable and proper.

77. Mr. Allison agreed with the Tribunal that the purpose of these questions was to demonstrate that Mr. Brown had attended at the Property on several occasion but had not commented on its condition and so doubt was cast the Respondents claim that the Property was in a poor condition and that this comment by the Respondents during the Hearing on 3 May 2019 was intended to discredit the Applicant. Mr. Brown advised the Tribunal that on his visits he had only paid attention to the rooms requiring the repair and had not inspected the whole Property. He stated that it was not until January 2018 that he had occasion to go into the bedrooms and living room of the Property to try to ascertain the cause of the leak and it was then that he noticed that the Property was untidy. He stated fairly that it was the Applicant's children's bedrooms that were untidy and that "doors were not off their hinges or anything like that". In response to a direct question from the Tribunal that there was no obvious damage, Mr. Brown agreed and reiterated that it was untidy but doors were not off their hinges or anything like that.

78. The Tribunal reminded Mrs. Brown that her evidence on 3 May 2019 had been that the Property was in a dire state as there were carpets and blinds missing, the walls were marked and the kitchen lights were hanging down and that it was her evidence that this was what prompted the Respondents to realise that no deposit had been paid. Mrs. Brown said that Mr. Brown had been angry that no deposit had been paid but that it was she who noticed the missing carpets when she later visited the Property, possibly the following day. The Tribunal reminded the Respondents that credibility was a matter in these proceedings.

79. In response to a direct question from the Tribunal, the Applicant said that Mrs. Brown had not visited the Property the following day. In response to further questions from the Tribunal, Mrs. Brown could not recall when she had visited the Property. Both the Applicant and Mrs. Brown agreed that Mrs. Brown had visited the Property during the course of the Respondents' insurance claim, both agreed that one carpet had been removed and that the Applicant had advised Mrs. Brown that she had removed the carpet as she intended to decorate. There was no agreement that the Applicant had advised Mrs. Brown that she had removed the carpet as it had been damaged by the leak. All Parties agreed that the room from which the carpet had been removed was close to the bathroom where the leak had occurred. However, there was no agreement between the Parties in respect of the Respondents' assertion that the Applicant and Mr. Allison had advised a dispute resolution procedure with SafeDeposits Scotland that builders had removed the carpet.

80. With regard to the dispute resolution procedure with SafeDeposits Scotland, the Parties advised the Tribunal that this had concluded and that the Respondents had been awarded the deposit. However, the Parties disagreed on the reason for that award. The Parties also disagreed on whether the tenancy ended with rent still due and owing.

81. Mr. Allison continued with his questioning of Mrs. Brown and asked if she had told the Applicant during a telephone conversation which took place during the period when the Applicant and her family were in hotel accommodation pending the works being carried out at the Property if she had advised the Applicant that "she would cancel the tenancy". Mrs. Brown responded that she had not. Mr. Allison asked Mrs. Brown if she had been told by Mr. Melvin, the Applicant's previous representative, that it was not lawful for her to cancel the tenancy and Mrs. Brown responded that she had not had any such conversations with Mr. Melvin. Mr. Allison asked Mrs. Brown why she had not mentioned the unpaid deposit to Mr. Melvin. Mrs. Brown again responded that she had not had any such conversations with Mr. Melvin. The Tribunal advised Mr. Allison that Mr. Melvin was not present to give evidence and that the Tribunal would not hear hearsay evidence. The Tribunal also advised Mr. Allison that as the tenancy of the Property appeared to be a short-assured tenancy, it could be terminated at any time by the Respondents giving notice, but that that matter was not relevant to the current proceedings.

82. Mr. Allison continued with his questioning of the Respondents and asked if builder work had been carried out prior to the meeting which the parties had at the Property on 3 August 2019 and if Mr. Brown had advised the Applicant and him that they would only be placed in temporary accommodation for a period of 8 days or so. Mr. Brown responded that his initial estimate as a building professional was that it would take 8 days to carry out the work and that work had begun on the Property before 3 August 2018. Mr. Allison disputed the veracity of this. The Tribunal intervened to advise Mr. Allison that from its own technical and professional knowledge, Mr. Brown's initial estimate appeared reasonable, that it was usual that the extent of work to repair a slow leak which caused extensive unseen damage might not be known until the work had begun and that it was likely that the Respondents' insurers and not the Respondent were the party controlling the work and the timescales.

83. Mr. Allison resumed his questioning of the Respondents and disputed that the deposit had been paid by the Applicant and him on 3 August 2018. Mr. Brown maintained that it had been but in response to a direct question by the Tribunal could not recall if it had been in an envelope or not but could recall that it was paid in cash.

84. In response to direct questions from the Tribunal, the Applicant and the Respondents agreed that there had been a series of telephone calls between them whilst the Respondents were on holiday in Spain to arrange the meeting on 3 August 2018 and that there had been texts between them which confirmed the arrangement, which texts had been lodged in evidence by the Applicant. The Respondents, and Mr. Brown, in particular, maintained that the Respondents had advised the Applicant and Mr. Allison that they would require to pay the deposit at that meeting, a fact disputed by the Applicant and Mr. Allison. The Parties agreed that the said texts did not refer to the requirement to pay the deposit. The Parties further agreed that no receipt had been given for any deposit on 3 August 2018.

85. Mr. Allison resumed his questioning of the Respondents and asked if the deposit had been paid in cash on 3 August 2018, why had the Respondents not paid it immediately to an approved scheme, why had they not provided proof that they had

banked it and if they had accounted for it by using Quickbooks, which the Tribunal explained is an accounting software package. The Respondents, and Mr. Brown, in particular, explained that they had not banked it as they often kept large sums of cash at home and that they did not use accounting software.

86. Mr. Brown advised the Tribunal that he had not paid the deposit into an approved scheme until 22 August 2018 as the Respondents had 30 days to do so and that he had been looking around to find out which scheme was the best one to use. Mrs. Brown advised the Tribunal that Mr. Brown had been phoning around to find out which scheme to use. The Tribunal reminded Mrs. Brown that her evidence on 3 May 2019 had been that that the deposit was lodged with SafeDeposits Scotland on 22 August 2018 as they were too busy to lodge it before as they were getting their children ready to start or return to school and that she always uses Safe Deposit Scotland. The Tribunal again reminded the Respondents that credibility was a matter in these proceedings.

87. In response to a direct questions from the Tribunal as to why the Respondents had required to look around for an approved scheme, Mrs. Brown advised the Tribunal that she had heard from people who said that some schemes were better than others and that she took advice from friends and relatives who are estate agents but, on being pressed for details of this could not provide answer. The Tribunal again reminded Mrs. Brown of her evidence on 3 May 2018 that she always uses Safe Deposit Scotland. Mrs. Brown explained that she meant she always uses Safe Deposit Scotland when acting on behalf of her mother and father and not necessarily for herself. When asked by the Tribunal why Mr. Brown's reason for the time lapse between receiving the deposit and lodging it had not been mentioned on 3 May 2018, Mr. Brown responded that only Mrs. Brown had stated that they were too busy but accepted that he had been present and could have mentioned the reason he had now given. The Tribunal again reminded the Respondents that credibility was a matter in these proceedings and that the Tribunal had now heard three different versions to explain how Mr. Brown selected Safe Deposit Scotland: looking at websites, phoning and by hearing from other people.

88. Mr. Allison had no further questions. The Tribunal asked the Respondents if there was anything they wished to clarify in respect of the cross-examination or if everything had been clarified during the questioning and they agreed that it had.

Summing Up by Parties

89. The Tribunal, to assist the Parties in summing up asked first the Applicant and Mr. Allison if it was fair to say that the Applicant's position is that the Applicant's case was the more credible as the Applicant had produced evidence in support of her position that the tenancy deposit had been paid on 27 February 2015 and that Carina had vouched for this. They agreed that this was so.

90. The Tribunal then asked the Respondents if it was fair to say that their position is that their case was the more credible as the Applicant's case had inconsistencies. They agreed that this was so.

91. The Applicant went on to read a statement and referred the Tribunal to the evidence lodged by her and the evidence given.

92. Mrs. Brown of the Respondents went on to read a statement and submitted that it would be illogical for the Respondents to retain a deposit for 3 years before lodging. She read from texts from the Applicant which had been lodged in evidence in which the Applicant stated that the Respondents were great landlords and referred the Tribunal to an inconsistency in the Applicant's evidence that the Applicant stated that she knew the legal requirements for tenancy deposits yet waited for 3 years to ask where the deposit was lodged. Both Respondents submitted that they had been successful at a tenancy deposit dispute resolution and that this should be taken by the Tribunal as evidence of their credibility.

93. The Applicant submitted that she became aware of the legal requirements after the tenancy ended and that the Respondents' success in the dispute resolution related to the notice period.

Views of the Parties in respect of Compensation

94. The Tribunal then sought the Parties' views on the level of compensation it should award if it were to find in favour the Applicant.

95. The Tribunal asked first the Applicant for her views. The Applicant advised that she would leave it to the Tribunal to determine.

96. The Tribunal then asked the Respondents who indicated that any award should be mitigated by their losses in respect of damage caused to the Property by the Applicant and their cost in marketing the Property for a new tenant.

97. Both Parties indicated that they lost wages as a consequence of the CMD and Hearings.

Matters not in dispute

98. The Tribunal found the following facts to be agreed or accepted by the Parties:-

i) There had been a tenancy agreement dated 27 February 2015 between the Parties in respect of the Property, which tenancy commenced on or around 16 March 2015;

ii) The Applicant had viewed the Property as a prospective tenant along with other prospective tenants;

iii) The rent in terms of that tenancy agreement was £600.00 per month;

iv) Rent for the first month was paid in cash and thereafter rent was paid by bank transfer;

v) There had been a repairs issue at the Property which resulted in the Applicant and her family being moved into temporary accommodation from around April to August 2018 whilst the repair works to the Property were being carried out;

vi) In general, landlord/tenant relations had been cordial until mid-July 2018;

vii) There had been a meeting of the Applicant and her husband and both Respondents at the Property on 3 August 2018 which meeting had been arranged by text messages and phone calls;

viii) The said texts arranging the meeting on 3 August 2018 did not refer to the tenancy deposit;

ix) No receipt was given to the Applicant on 3 August 2018;

x) The Applicant gave notice to terminate that tenancy shortly thereafter and she and her family did not return to reside in the Property;

xi) A tenancy deposit of £600.00 was paid in cash by the Applicant to the Respondents;

xii) There was an email exchange between the Applicant and the Mrs. Brown of the Respondents between 14 and 20 August 2018 enquiring where the tenancy deposit was lodged;

xiii) The tenancy deposit of £600.00 was paid by the Respondents to SafeDeposits Scotland on 22 August 2018 and

xiv) The Respondents did not notify the Applicant as they were required to do in terms of Regulation 3(b) of the 2011 Regulations

Matters in dispute

99. The matters in dispute and so the issue for the Tribunal to determine are :-

i) Did the Applicant and her daughter meet Mrs. Brown of the Respondents at Morrisons' café in Bellshill on 27 February 2015? and

ii) Did the Applicant pay the tenancy deposit of £600.00 to Mrs. Brown of the Respondents at a meeting in Morrisons' café in Bellshill on 27 February 2015? or

iii) Did the Applicant pay the tenancy deposit of £600.00 to the Respondents at a meeting at the Property on 3 August 2018?

100.As the Tribunal explained to the Parties throughout the Hearing and the adjourned Hearing, as the position of the Parties are diametrically opposed with Mrs. Brown of the Respondents denying that a meeting took place at Morrisons' café in Bellshill on 27 February 2015 and denying that the tenancy deposit was paid at that meeting and on that date and with the Applicant denying that the tenancy deposit was paid to the Respondents at the meeting at the Property on 3 August 2018, the Tribunal's decision would be based on its view of the credibility of the Parties which in turn would be based on the way in which the Parties presented their evidence, on the quality of the evidence itself and that, as the standard of proof required by the Applicant to prove her case is the balance of probabilities, the Tribunal would weigh the evidence against this test.

101. The Tribunal considered, firstly, the evidence of the Applicant as set out at length in this Decision. The Tribunal took the view that the Applicant gave her evidence in a straightforward manner and was precise and unequivocal in her responses to all of the questions asked of her throughout her evidence. She held firm to her position that the that a meeting had taken place at Morrisons' café in Bellshill on 27 February 2015, the meeting was attended by her, her daughter, Carina, and Mrs. Brown of the Respondents and that the tenancy deposit was paid at that meeting and on that date. She also held firm to the date and detail of her and her husband's and son's viewing of the Property and the detail of the day on which she moved into the Property. With regard to the Applicant's rebuttal of the

Respondents' position that the tenancy deposit was paid to them at the meeting at the Property on 3 August 2018, the Tribunal took the view that on the balance of probabilities it was unlikely that the Applicant would have paid a deposit at that time if she had been contemplating terminating the tenancy.

102. The Tribunal considered the evidence of the Applicant's daughter, Carina, again as set out at length in this Decision. The Tribunal took the view that the Carina gave her evidence in a straightforward manner, was not exaggerated and was unequivocal in her responses to all of the questions asked of her throughout her evidence. She also held firm to her position that the that a meeting had taken place at Morrisons' café in Bellshill on 27 February 2015, the meeting was attended by her, her mother and Mrs. Brown of the Respondents and that the tenancy deposit was paid at that meeting and on that date. With regard to being given a receipt at that date, the Tribunal accepted that it was reasonable for Carina to assume that the tenancy agreement itself could be regarded as a receipt.

103. With regard to the discrepancies between the Applicant's evidence that Carina had signed her father's name on the tenancy agreement and Carina's evidence that she had not, the Tribunal took the view that this discrepancy was not critical to the credibility of these witnesses and pointed to a lack of collusion between them rather than a conspiracy.

104.The Tribunal had regard to the productions lodged by the Applicant and spoken to by her and Carina, again as set out at length in this Decision. The Tribunal took the view that the productions lodged supported the evidence of the Applicant and Carina. With regard to Carina's bank statement which showed the withdrawal of £700.00 on the same day on which the tenancy agreement was signed, the Tribunal took the view that the fabrication of this would be an elaborate ruse and so unlikely on the balance of probabilities.

105. The Tribunal then had regard to the evidence of Mrs. Brown of the Respondents, again as set out at length in this Decision. The Tribunal took the view that Mrs. Brown's evidence was not so precise as that of the Applicant, was vague and that she could not recall many of the key details in respect of the Applicant viewing the Property, the day on which the Applicant moved into the Property, the manner in which she provided the Applicant with the tenancy agreement and where and when she signed the tenancy agreement. Much of Mrs. Brown's evidence was what she would have done or said rather than what she actually did or said. The Tribunal found Mrs. Brown's evidence to be contradictory as at she times advised the Tribunal that she was an experienced and knowledgeable landlord and at times advised the Tribunal that she was learning from this experience, she said that she always took a tenancy deposit and, from this experience, now takes a tenancy deposit. With regard to how her husband selected SafeDeposits Scotland before lodging the deposit on 22 August 2018, she gave three different explanations in immediate succession. With regard to the questions put to Mrs. Brown by Mr Allison in respect of the Respondents selecting them over other prospective tenants if they were unable to pay the tenancy deposit, the Tribunal agreed with the point being made by Mr. Allison that, on the balance of probabilities, it was unlikely that the Respondents would do so.

106. The Tribunal then had regard to the evidence of Mr. Brown of the Respondents, again as set out at length in this Decision. The Tribunal took the view that Mr. Brown's evidence although more precise than that of his wife in parts, was not so precise as that of the Applicant. The Tribunal accepted his evidence that, when called out to the Property with regard to repairs, he attended but found that aspects of his evidence were vague and

contradictory, particularly in respect of evidence relating the condition of the property when he attended to investigating the toilet leak and the selecting of SafeDeposits Scotland. in much the same way as that of his wife.

107. The Tribunal found that the Respondents' position that, although they maintained that the Property was in a poor condition when the toilet leak was reported, they were happy for the Applicant and her family to return, to be unlikely on the balance of probabilities.

108. With regard to the Respondents' position that it was payment of the deposit on 3 August 2018 which prompted the Applicant to enquire with which approved scheme the deposit was lodged, the Tribunal found it more likely that it was the Applicant's enquiry which prompted the Respondents to lodge the deposit.

109. Having so considered the evidence of the Parties, the Tribunal had no hesitation in finding the Applicant and her daughter to be credible and reliable and so accepted their evidence. The Tribunal had no hesitation in finding the Respondents to be neither credible nor reliable and so did not accept their evidence.

110. The Tribunal, therefore, found that Applicant and her daughter had met Mrs. Brown of the Respondents at Morrisons' café in Bellshill on 27 February 2015 and had paid the tenancy deposit of £600.00 to Mrs. Brown of the Respondents on that date.

Decision and Reasons for Decision

111. Having found that the tenancy deposit was paid on 27 February 2015 and having established that the tenancy deposit was paid by the Respondents to SafeDeposits Scotland on 22 August 2018, the Tribunal determined that the Respondents had not complied with Regulation 3(a) of the 2011 Regulations. Having established that Respondents did not notify the Applicant as they were required to do in terms of Regulation 3(b) of the 2011 Regulations, the Tribunal determined that the Respondents had not complied with Regulation 3(b) of the 2011 Regulations.

112. Having determined that the Respondents had not complied with Regulation 3 of the 2011 Regulations, the Tribunal had regard to 10 of the 2011 Regulations which states that the Tribunal must make an Order of compensation of a maximum of up to three times the amount of the tenancy deposit.

Payment Order

113. The Tribunal then had regard to the level of compensation which it should award. The Tribunal noted the Respondents' position that any award should be mitigated by their losses in respect of damage caused to the Property by the Applicant and their cost in marketing the Property for a new tenant. The Tribunal had regard to the purpose of the 2011 Regulations and the intention of the Scottish Parliament in passing the 2011 Regulations and noted that the purpose and the intention were to protect and safeguard the tenancy deposit for both tenant and landlord and to penalise landlords who failed to comply with the duty to protect and safeguard the tenancy deposit as opposed to criminalising this failure. The Tribunal had regard to the fact that the compensation element of the 2011 Regulations was a punitive measure to ensure that landlords complied with the duty to protect and safeguard the tenancy deposit. Accordingly, matters of loss were not relevant.

114. The Tribunal then had regard to its finding that the Respondents were neither credible nor reliable in their evidence to the Tribunal and its determination that the Respondents had failed to comply with Regulation 3 of the 2011 Regulations for over three years. It follows, therefore, that the compensation as punitive measure should reflect the severity of both the Respondents' conduct before the Tribunal and their failure to comply with the 2011 Regulations for the duration of the tenancy. Accordingly, the Tribunal had no hesitation in making the maximum award of three times the amount of the tenancy deposit, being an award of £1,800.00.

115. This Decision is unanimous.

Appeal

In terms of section 46 of the Tribunals (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

Ms Karen Moore

Karen Moore

Chairperson

2 July 2019