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 Regulations 9 and 10 Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/22/3367

Re: Property at Unit 2b, Dildawn House, Dildawn Estate, Castle Douglas, DG7 1SE ("the Property")

Parties:

Miss Joanne Parker, Unit 2b, Dildawn House, Dildawn Estate, Castle Douglas, DG7 1SE ("the Applicant")

Mr William Moultrie, Dildawn House, Dildawn Estate, Castle Douglas, DG7 1SE ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member)
Janine Green (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £1000 should be made in favour of the Applicant.

Background

1. The Applicant seeks an order in terms of Regulation 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). A signed tenancy agreement was lodged with the application.

2. The Tribunal served a copy of the application on the Respondent. Both parties were advised that a case management discussion ("CMD") would take place by telephone conference call on 11 January 2023. Prior to the CMD both parties lodged written submissions and documents. The Respondent lodged a receipt for the deposit which stated that it related only to the land, stables, and workshop. Both parties also lodged a copy of a Repairing Standard Enforcement Order (RSEO) issued by the Tribunal.

3. The CMD took place at 10am on 11 January 2023. The Applicant participated, joining the call late. The Respondent also participated.

Summary of discussion at the CMD

4. The Legal Member noted that the application is based on an alleged failure by the Respondent to lodge a deposit of £500 in an approved scheme. The parties were agreed that the tenancy started on 13 October 2021 and that a deposit of £500 was paid and not lodged in an approved scheme. At the date of the CMD the Applicant was still in occupation of the property.

5. Ms Parker told the Legal Member that the lease included a paddock which is about an acre in size, stables, and a workshop, all located about 150 metres from the house. The apartment is in the basement of the Mr Moultrie's house. There is another apartment which is also rented out. Her apartment is on the right-hand side. It has its own entrance and there are no shared areas. It is self-contained. There is an internal door which leads to the main house, but it is locked on both sides and neither she nor Mr Moultrie use it. It leads to the basement of his house. Ms Parker said that Mr Moultrie had insisted that she pay 6 months rent in advance, together with the deposit of £500, in cash. She had to borrow some of this from her mum. Her mum and son were present at the property when she signed the lease and paid the cash to Mr Moultrie. She asked him to sign the top of the lease to acknowledge receipt of the cash, on her mum's advice. There were no discussions about the deposit and what it was for. When repair issues developed at the property, Mr Moultrie gave her notice to terminate the tenancy. Ms Parker also advised the Legal Member that she was not provided with a receipt for the deposit and had not seen the receipt lodged by Mr Moultrie until it was lodged by him at the Tribunal. She also stated that the property has its own heating provision.

6. Mr Moultrie told the Legal Member that the living accommodation is a lodging within his own property and not a separate property. He had not advertised the unit for let – only the paddock, stables, and workshop. Ms Parker asked him about living accommodation for a short period and he agreed. He said that he uses the door which links the apartment to the house as there is a storage room there with items belonging to his family. The other apartment in the house is separate and has its own postal address. The unit occupied by Ms Parker does not have a separate address from the main house and shares utilities with the main house. The entrance to the unit is the back door of the house. His family currently only use the front door. Mr Moultrie initially said that the land was about an acre but then stated that, when account is taken of the whole area – stables, workshop etc – it is at least 2 acres. It is therefore an agricultural tenancy and therefore excluded from the regulations. It is also excluded as a commercial lease, as there is a workshop, and a business is run from the property. Although he conceded that the tenancy agreement does not stipulate that the deposit only related to the other property, not the apartment, this was discussed and agreed in advance. The receipt was signed by him in duplicate. He retained one copy and issued the other to Ms Parker when she signed the lease. Her mother and son were not present. However, his partner and children

were there. Clause 5 of the tenancy agreement states that a receipt would be given for the deposit. Mr Moultrie told the Legal Member that it was Ms Parker who insisted on cash, not him. She said that she did not have a bank account.

7. Following discussion with the parties, the Legal Member determined that the application should proceed to a hearing. The issues to be determined at the hearing were identified as: -

(a) Is the Applicant's occupation of the property a relevant tenancy for the purposes of the 2011 Regulations?

(b) Is the Respondent a resident landlord?

(c) Is the tenancy excluded from the obligations imposed by the Regulations because it is an agricultural tenancy, commercial tenancy, or lodger agreement?

(d) If the tenancy is a relevant tenancy for the purposes of the 2011 Regulations, did the parties agree that the deposit of £500 related only to the workshop, land and stables also let to the Applicant in terms of the agreement.

(e) If the deposit did not relate to the residential part of the let property, was the Respondent obliged to lodge the deposit in an approved scheme.

(f) If the Respondent was required to lodge the deposit in an approved scheme, what is the level of penalty which should be imposed and should the Respondent also be ordered to lodge the deposit.

8. The parties were notified that if they wished to rely on any additional documents these should be submitted no later than 14 days before the hearing. The Legal Member indicated that these might include photographs and plans of the let property, and relevant documents submitted in connection with the related repairing standard case including the inspection report issued by the Tribunal in connection with that case. The parties were also notified that they should provide the Tribunal with the names and contact telephone numbers of any witnesses who would give evidence at the hearing no later than 7 days before the date of the hearing.

9. The parties were notified that a hearing would take place by telephone conference call on 3 April 2023 at 10am. Prior to the hearing both parties lodged further submissions and documents. Both also confirmed that the Applicant had now vacated the property.

The Hearing

10. At the start of the hearing, the Legal Member asked Mr Moultrie about three applications lodged by him with the Tribunal seeking an eviction order, a payment order for rent arrears and assistance under the Right of Entry provisions of the Housing (Scotland) Act 2006. It was noted that the Tribunal does not have jurisdiction to deal with commercial leases, agricultural tenancies, or lodger agreements. The three applications had been submitted on the premise that the agreement between the parties is a private residential tenancy under the 2016 Act. Mr Moultrie confirmed that these applications had been lodged, although only the payment order was still required, but maintained that the 2011 Regulations do not apply to the parties' agreement.

Ms Parker's evidence

11. Ms Parker told the Tribunal that her mum saw an advert on Facebook marketplace for the paddock and stables. The advert also mentioned a flat and parking space. Her mum contacted Mr Moultrie and sent Ms Parker the details. Ms Parker visited the property. She noted that the paddock and stables were about 200 or 300 metres from the house. She told Mr Moultrie that she had dogs and pigs, and he was fine with that. He showed her the workshop, which he described as a commercial unit, and she said it would be ideal for her dogs. He then showed her the apartment. At the time she had 8 dogs. During the time she lived at the property she did not run a business. She did have 2 litters of puppies, the maximum that you can have a year, without a license. She also re-homed rescue dogs and Mr Moultrie was also aware of that and did not object. In response to questions from the Tribunal, Ms Parker said that she did not specifically discuss breeding puppies with Mr Moultrie but that he was aware that she had a litter when she moved into the property and she had exchanged text messages with him about the rescue dogs.

12. Ms Parker told the Tribunal that she paid the £500 deposit to secure the property. She paid it in cash and was on her own when she did so. Mr Moultrie emailed her the tenancy agreement and told her to print it off. She then went back to the property, with the agreement. It was signed and she paid the 6 months rent in cash, some of which she borrowed from her mum. Her mum and son were present. The deposit receipt lodged by Mr Moultrie was not given to her. She was not provided with a receipt for it. The 6 months rent was acknowledged by a note at the top of the tenancy agreement. There was no discussion about what the deposit was for, and she assumed it was for the flat, as that would be usual. Ms Parker said that when she first viewed the flat, she was told by Mr Moultrie that the internal door would always remain locked. She would not have taken the flat if she thought that Mr Moultrie would be using the door and going into the flat. In response to questions from the Tribunal, Ms Parker said that she believes that Mr Moultrie used the door and entered the flat on three occasions. She was not present on any of these occasions but there was evidence that someone had been in the house. Money went missing on the second occasion. The last time was just before she moved out when he switched off the electricity or tripped the switch. She had put cable ties on the

door to secure it, on the advice of the police, rather than her own lock as this would have involved drilling into the door. The cable ties had been snapped. Mr Moultrie did not have permission to come into the flat through the door. The electrical switches for the flat are next to the internal door. In response to questions from the Tribunal, Mr Parker said that her electricity costs were included in the rent. £150 per month of the rent of £1450 was for this. She did not pay Council Tax and was not asked to do so. She didn't give that any thought. When she moved in, she asked about the address of the flat. Mr Moultrie told her that it was Unit 2B and that she should buy a mailbox and put it at the gate. She did this. There is a house next door called the Courtyard. The other apartment is called the Den. Both are rented out. Mr Moultrie has ten rental properties.

13. Ms Parker told the Tribunal that, although she has not measured the paddock, it is not as much as 2 acres. At most, it is one and a half. She said that Mr Moultrie had submitted a calculation but that he had not arranged for an engineer to measure it. When asked about the Repairing Standard application, Ms Parker said that the Local Authority landlord registration team had submitted the application, following a visit to the property. The work specified in the RSEO was not completed. She denied that she had asked to pay the rent in cash. She has a bank account. It was Mr Moultrie who wanted cash. In response to further questions from the Tribunal she stated that the deposit had been paid a few days before rent. She was on her own when she paid the deposit. Her mum and sons were present when she paid the rent. There was no discussion about what the deposit was for. Mr Moultrie is an experienced landlord and knows that deposits must be lodged in schemes. He knows the difference between a lodger and a tenant. She moved out of the property 2 weeks ago. The deposit has not been returned to her.

Evidence of Kane Parker

14. Mr Parker told the Tribunal that he is 25 years of age and is the Applicant's son. He said that over the last six months he had lived part time with his dad in Bolton and part time at the property with his mum.

15. When asked about the internal door between the flat and the house, Mr Parker said that this door was never used. He was only aware of it being used once, the day before they moved out of the flat. They had been out. They returned to the flat and the lights were off and there was no electricity. He went to the fuse box which is next to the internal door and noticed that the cable ties had been snapped. As he was not present, he does not know whether the Respondent came into the property via the external door or if he managed to snap the ties and enter via the internal door, but someone had been in the property. The main electricity switch had been flicked off. He thinks that the fuse box only relates to the flat as there are not enough switches to cover the house.

16. Mr Parker said that he was present when his mum signed the lease and paid the rent money. He brought his nan to the house, as she was lending his mum some of the money. He was looking about the flat while his mum and nan handed over the money and it was counted. He was not in the room with them.

In response to questions from the Tribunal, Mr Parker said that the only time he knew about Mr Moultrie entering the property via the internal door was the day before they moved out. However, his mum had mentioned that it had happened before and that's why the cable ties had been attached. They had wanted to fit a lock but that might have damaged the door. He told the Tribunal that he has never measured the paddock but thinks it's unlikely to be as much as 2 acres. He said that the water was cut off by Mr Moultrie so his mum could not breed puppies or run a business.

Evidence of Mr Moultrie

17. The Legal Member of the Tribunal referred Mr Moultrie to the agreement lodged with the application. This is headed "tenancy agreement" and mostly contains standard clauses found in residential tenancies. Mr Moultrie said that he had understood that the Applicant was looking for a short term lease of 6 months. The advert was for the stables and workshop and paddock. The flat was only mentioned because it was Facebook Marketplace. The Applicant got in touch about the paddock and stables. She then asked if there was any accommodation that she could have for 6 months. She said that she was building a property on land that she owned so only needed a short lease. That was why he offered the accommodation. He had not let it out before. He had used the tenancy agreement because he was familiar with it. However, the accommodation is a lodging in his house. The reason he has had to make applications to the Tribunal is that she denied that it was a lodging, so it was going to be easier and quicker to go through the tribunal process than apply to the Court. As the Tribunal has no jurisdiction in relation to the land and stables, different notices had to be served to end the lease.

18. Mr Moultrie said that the lodging is part of his house. He pays the Council Tax and the utilities. It is not separate. It is not included in his landlord registration. When asked whether he had raised this with the Tribunal that determined the repairing standard application, he said that he cannot remember what argument he put forward but thinks that he did raise it. He did not appeal the decision. He also made a right of entry application because he could not get access to do the work specified in the RSEO. The electricity costs are included in the rent charge.

19. The Tribunal asked for further information about the claim that the property is a commercial lease. He said that the workshop is a commercial unit. However, the Applicant said that she intended to keep animals in it. The agreement said that she could not run a business from the accommodation. She did not have permission to run a puppy breeding business from the premises but did so anyway. She was therefore in breach of the agreement. He said that he found out that she had been evicted from her previous tenancy for this and that her claim that she was building a property turned out to be untrue. He found out that she was advertising the sale of puppies which he had not agreed to as a license is required for that.

20. The Tribunal asked about the measurements he had provided for the land. He said that he had measured it himself, as discussed at the CMD, with a tape

measure. The area measured included the stables and workshop which are on the corner of the paddock. He told the Tribunal that he had not entered the property via the internal door or interfered with the electrics or taken money. The only time he went in was with workmen to get work done in terms of the RSEO. They went in the main door. He had given notice that he intended to do so. He did not have permission from her to go in. They could not do the work as there was a large puppy pen in the hall. He does not know anything about the cable ties. If the electricity was off the switch must have tripped. The only time he used the internal door was when there was an emergency situation with the electricity, and he was concerned that it was unsafe.

21. Mr Moultrie said that the account given by the Applicant about paying the rent and deposit was not accurate. He stated that the rent and deposit were both paid at the same time. He then advised that some of the rent and the deposit were paid on the same date, when the lease was signed, and the receipt handed over for the deposit. The Applicant was on her own and her mum and son were not present. They discussed the deposit and he said that it was a part deposit for the land and workshop only. It was taken because of the pigs and dogs and to cover any damage which was caused. With regard to the receipt, he said that he didn't think that Ms Parker needed to sign it. He conceded that the tenancy agreement should have specified what the deposit was for. He said that the remainder of the rent was paid later. He stated that he has 9 rental properties and has been a landlord for 20 years. He is fully aware of his obligations and all other deposits taken are lodged with My Deposit Scotland. The other apartment in the building is completely separate. It has its own Council tax and utilities. Mr Moultrie advised the Tribunal that he has not repaid the deposit yet. The property was only vacated 2 weeks ago. The lawyers contacted the Applicant and served notices to cover the land and workshop because the Tribunal does not have jurisdiction.

Louise Gardener's evidence

22. Ms Gardener said that the internal door which leads from the main house to the apartment occupied by Ms Parker was kept locked. There is a room beyond the door, in the apartment, which is used for storage of some of their belongings. This door is also locked. She told the Tribunal that she and Mr Moultrie did not use the internal door to enter the apartment, they couldn't have done so. She said that she remembered well the day in October when Ms Parker came and paid the rent and deposit. They were about to leave the house to go to her sister's house. Ms Parker came to the house by herself. She signed the lease and Mr Gardener witnessed it. She paid the 6 months rent and the deposit. The money was counted, and the deposit receipt was signed and handed over by Mr Moultrie.

Findings in Fact

23. The Applicant occupied the property from October 2021 until 19 March 2023.

24. The Applicant paid a deposit of £500. She also paid 6 months rent in advance, the sum of £8700.

25. The parties signed an agreement described as a "tenancy agreement" The agreement was signed by the Respondent and witnessed by Louise Gardener on 14 October 2021. It was signed by the Applicant and witnessed by Linda Parker on 13 October 2021.

26. The tenancy agreement is in the format of a residential tenancy agreement and the majority of the clauses are relevant only to residential tenancies.

27. The tenancy agreement also includes a section which is headed "grazing agreement".

28. The lease between the parties is not a commercial lease.

29. The lease between the parties is not an agricultural tenancy.

30. The agreement between the parties is a private residential tenancy and not a lodger agreement or license.

31. The deposit paid by the Applicant related to the residential accommodation which was the subject of the private residential tenancy between the parties.

32. The Respondent did not lodge the tenancy deposit in an approved scheme and has not repaid the deposit to the Applicant following the termination of the tenancy.

Reasons for Decision

33. Regulation 3 of the 2011 Regulations states –

(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.

(1A) Paragraph (1) does not apply –

(a) Where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
(b) The full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,
Within 30 working days of the beginning of the tenancy.

34. The Tribunal is satisfied that that a deposit of £500 was paid and not lodged in an approved deposit scheme within 30 days of the start of the tenancy. The Tribunal notes that the application was lodged with the Tribunal while the tenancy was ongoing. The Applicant has therefore complied with Regulation (9)(2) of the 2011 Regulations, which requires an application to be submitted no later than 3 months after the tenancy had ended.

35. The Respondent has opposed the application on two grounds. Firstly, he states that the agreement between the parties is not a "relevant tenancy" in terms of the 2011 Regulations. He relies on Section 83(6) of the Antisocial Behaviour etc (Scotland) Act 2004 which lists the circumstances in which a landlord does not require to register with the Local Authority or comply with the 2011 Regulations. In particular, he relies on Sections 83(6)(e) – the house is the only or main residence of the relevant person, and (f) – the house is on agricultural land and is therefore an agricultural tenancy. Although not one of the specified exemptions under Section 83(6), the Respondent also claims that the agreement is a commercial lease and therefore the 2011 Regulations do not apply. The second part of the defence to the application is that the deposit which was taken did not relate to the residential accommodation but was for the workshop and stables. As such, it did not require to be lodged in a scheme.

36. During the hearing, it became clear that there is very little upon which the parties are agreed. The Tribunal noted that the relationship between the parties was very poor by the time the Applicant vacated the property and the issue of the tenancy deposit is only one of several matters which are in dispute. There are four other Tribunal applications involving the parties. A repairing standard application was made by the Local Authority on the Applicant's behalf and a repairing standard enforcement order was issued. The Respondent lodged a right of entry application. A hearing is due to take place in connection with applications for an eviction order and payment order for rent arrears. The Tribunal noted that three of these applications were made by the Respondent. Furthermore, the repairing standard application proceeded on the premise that the Applicant is the tenant of the property, and that the repairing standard applies.

37. The definition of a "relevant tenancy" does not require the tenancy to be a tenancy under the Private Housing Tenancies (Scotland) Act 2016 Act, the Housing (Scotland) Act 1988 Act or the Rent (Scotland) Act 1984. However, the Tribunal only has jurisdiction to deal with applications regarding these specific tenancies in relation to eviction and civil matters. In terms of Section 16 of the Housing (Scotland) Act 2014 Act, the functions and jurisdiction of the Sheriff Court were transferred to the Tribunal in relation to tenancies under the 1984 Act and assured tenancies under the 1988 Act. Part 5 and section 71 of the 2016 Act stipulates that the Tribunal has jurisdiction for all eviction and civil proceedings arising from a private residential tenancy. The Tribunal's jurisdiction is restricted to those tenancies. It does not have jurisdiction over agricultural tenancies, commercial leases or lodger agreements which remain within the jurisdiction of the Sheriff Court. It also has exclusive jurisdiction to deal with applications under the 2011 regulations. It therefore follows that the Tribunal must be satisfied that the tenancy is not only a "relevant tenancy", but

also (since it started after 1 December 2017, when the 2016 Act came into force) a PRT, if it is to determine that the 2011 Regulations apply. This being the case, the Tribunal not only considered the tenancies specifically excluded from the 2011 Regulations but also the provisions of schedule 1 in relation to tenancies which cannot be PRTs.

38. During the hearing, it emerged that the Respondent has had the benefit of legal advice in relation to some the disputes between the parties. He is aware of the limited jurisdiction of the Tribunal and has made three separate applications which relate to this tenancy. In each of these, he has indicated that that the agreement between the parties is a private residential tenancy. His position in relation to those applications contradicts the defence he has put forward in relation to this application. In the view of the Tribunal, this undermines the credibility of his evidence at the hearing and the CMD.

39. In addition to the concerns raised in paragraph 38 regarding the credibility of the Respondent, the Tribunal found both parties and their witnesses to be lacking in both credibility and reliability during the hearing. In particular, the Tribunal noted the following:-

(a) At the CMD Mr Moultrie said that he had only advertised the paddock, stables, and workshop. The Applicant lodged evidence that the advert included a flat. At the hearing Mr Moultrie conceded this to be the case.

(b) The parties gave very different accounts about the handover of the rent and deposit and the signing of the tenancy agreement. The Respondent said initially that there was one visit. He then said that there were two. On the first occasion, the Applicant paid the deposit and part of the rent. On the second, she paid the remainder of the rent. He was adamant that she was on her own. Ms Gardner said just one visit. She said that the tenancy was signed during this visit. In response to a question from the Tribunal, she said that the receipt was signed and handed over as well. The Tribunal notes that the receipt is dated 13th October. The lease was not signed and witnessed by the Respondent and Ms Gardener until 14 October. However, it appears to have been signed by the Applicant and witnessed by a Linda Parker on the 13 October, which suggests that she was present on at least one occasion. It also seems illogical that a typed, signed and dated receipt was produced for the deposit, but nothing for the substantial advance rent payment which was made.

(c) The Applicant was also vague about the handover of the money. She thought that there were a few days between the two visits. Although adamant that only the deposit was paid on the first occasion, and all the rent on the second. The Tribunal notes that there are two figures at the top of the copy tenancy agreement. £8100 and £9200, which seems to suggest that she paid £8100 and then the remainder on a different date.

(d) At the CMD, Mr Moultrie said that he used the internal door between the properties to access a storage room. Prior to the hearing he lodged a plan which indicated that it was used as a fire escape. During the hearing, he said that he had only used the door once during the tenancy, to let in workmen. When

pressed, he said that he had actually used the main door to the property on that occasion and that he had only used the internal door once, in an emergency situation. His partner claimed that it had never been used and said that they "couldn't" do so.

(e) The Applicant was evasive when asked about whether she told the Respondent that she intended to breed puppies. She mentioned several times that she told him about re-homing dogs and alleged that he knew about her plans because she had a litter when she moved in.

(f) The Applicant's evidence was supported in part by her son. However, he was unable to tell the Tribunal about the handover of the money or signing of the tenancy as he said that this took place when he was elsewhere.

Is the lease a commercial lease?

40. The Respondent's argument on this point was somewhat difficult to follow. It appears to be based on the fact that one of the units, a workshop, has been leased out in the past as a commercial unit. However, although the agreement mentions the workshop, it is described as a "workshop storage shed". Furthermore, there was no evidence that the parties discussed or agreed that it would be used for commercial purposes by the Applicant. The Applicant was evasive when asked about her plans for the workshop when she signed the lease. It appears that she intended to breed puppies. It also appears that her plans in this regard were halted when there was an issue regarding the supply of water, which meant she could not apply for a license. It was also evident that she did not discuss using the workshop for any kind of commercial purpose with the Respondent. Both parties mentioned that she said that the workshop would be ideal for the dogs, but this appeared to be a reference to where they would live. The Respondent was quite clear that the Applicant did not have permission to run a puppy breeding business, although he then qualified this by stating that the agreement only said a business could not be run from the house. The written agreement between the parties is silent on the use or occupation of the workshop. Most of the terms and conditions are only relevant to residential property. The Tribunal is therefore satisfied that the agreement between the parties was not a commercial lease.

Is the tenancy an agricultural tenancy.

41. The exemption for agricultural tenancies in Section 83(6) is similar to the provisions in Schedule 1, paragraph 4 which states that an agricultural tenancy cannot be a private residential tenancy. The basis of the Respondent's argument is that the Applicant also leased a paddock and stables. In order to qualify as an agricultural tenancy under Section 83(6) , the house has to be on "agricultural land which is land comprised in a lease constituting a 1991 Act tenancy within the meaning of the Agricultural Holdings (Scotland) Act 2003 or comprised in a lease constituting a short limited duration tenancy, a limited duration tenancy, modern limited duration tenancy or repairing tenancy." Paragraph 4 of Schedule 1 of the 2016 Act also indicates that a tenancy can be

an agricultural tenancy if the let property includes 2 acres of agricultural land. The exemption is designed exclude tenant farmers from the protection of the residential tenancy legislation as they are already protected by other legislation. The Tribunal notes the following:-

(a) The basis of the argument is that the Applicant also leased a paddock and stables.

(b) No evidence was produced that the lease in question qualified as one of the types of leases specified in paragraph 41.

(c) The acreage of the paddock is disputed. The Applicants says that is less than 2 acres, although she did not measure it. The Respondent claims that it is over 2 acres. However, this is not verified by any expert or independent evidence, and it appears that the 2 acres include the stables and workshop which would not constitute “agricultural land”.

(d) It appears to be now accepted that the “lease “ of the workshop, paddock and stables was a separate matter from the living accommodation. Separate notices were served to terminate the lease with a view to court action if the Applicant did not vacate.

(e) The Respondent has raised other applications with the Tribunal on the basis that the agreement is a private residential tenancy.

42. The Tribunal is satisfied that the agreement is not an agricultural tenancy .

Was the Respondent a resident Landlord?

43. Most of the evidence led by the parties related to this aspect of the defence. It was argued by the Respondent that the 2011 Regulations do not apply because “ the house is the only or main residence” of the landlord. Again, there are similar (if more detailed) provisions in schedule 1 of the 2016 Act as a tenancy cannot be a private residential tenancy if the landlord is a resident landlord. The Tribunal noted the following:-

(a) It is not in dispute that the unit occupied by the Applicant was self-contained. She did not share any areas with the Respondent and had her own entrance to the apartment, although this had previously served as the back door to the main house.

(b) The Respondent and his family did not use the entrance/back door when the Applicant was in occupation of the property to access the main house. This door was used exclusively by the Applicant.

(c) There is an internal door which leads to from the apartment into the main house.

(d) The property does not appear to have its own postal address and the Applicant did not receive a demand for Council Tax during her occupation of the property.

It would have been the Respondent's responsibility to notify the Local Authority that there was another dwellinghouse which should be registered for Council Tax.

(e) The Applicant did not pay a separate utility bill. Electricity was included in the rent but there was a separate fuse box in the property.

44. Although the absence of Council Tax bills and a separate utility bill tend to suggest that the property was a "lodging" rather a private residential tenancy, there are a number of more persuasive factors which establish that this was not the case. The flat was completely self-contained and there were no shared or common areas. Under both the 1988 Act and 2016 Act, a tenancy is not an assured or private residential tenancy where there is "an ordinary means of access" between the house and the tenanted property. It is accepted by both parties that an internal door exists, but the evidence led about the use of the door was conflicting. The Applicant claimed that the door was locked, on the Respondent's side, but that he used it to access the apartment on three occasions, without consent. The Landlord also stated that the door was locked, and that he had only used it once in an emergency. Ms Gardener said it had never been used. What was clear from the evidence was that both parties expected the door to remain locked and that neither party expected the door to be used by either party to enter the other property. In the circumstances, the Tribunal is satisfied that there was not an "ordinary means of access".

45. The key evidence in relation to this issue, is the document signed by the parties. It is not a Scottish Government model tenancy agreement but that does not invalidate it. It is described as a tenancy agreement. It has a start date, but no end date, although the Respondent claims that it was to be a short term let. PRTs are characterised by the absence of an end date as it is not possible to insist on a fixed term. Tenants are entitled to remain in occupation until an eviction order is granted following service of a valid Notice to leave. Most of the clauses in the agreement are standard residential tenancy conditions. The parties are described as landlord and tenant. There is a landlord registration number. The agreement requires the Applicant to occupy the property as her only or principal home, a legal requirement for a PRT in terms of the legislation. The statutory repairing standard obligations are incorporated. The agreement stipulates that recovery of possession can only be granted in accordance with legislation relating to " private sector residential tenancies".

46. The Tribunal also had regard to the other applications lodged with the Tribunal. As previously noted, three of these were submitted by the Applicant on the basis that the agreement was a tenancy over which the Tribunal has jurisdiction. The Tribunal also considered the implications of the repairing standard application. The Respondent could not recall but thought that he had told the Tribunal that the Applicant was a lodger. If he did so, it is not recorded in the Tribunal's decision with statement of reasons. Instead, the Respondent appears to have conceded that the repairing standard applied, and that work was required. The application was submitted by the Local Authority following a visit to the property. The Tribunal inspected the property before it issued the order. The repairing standard only applies to tenancies and the Respondent

did not appeal the decision.

47. It appears to the Tribunal that the Respondent may have intended for the agreement between the parties to be something other than a PRT. He said that he had not let it out before. In the absence of a separate postal address or an arrangement for it to be registered for Council Tax, it is possible that he thought that it could be regarded as part of the main house. As an experienced landlord, he ought to have taken proper advice on the matter. There is also no evidence that the Respondent communicated this intention to the Applicant or discussed it with her. He signed her up to a tenancy agreement for a self-contained residential unit. The terms and conditions of the agreement confirm that a tenancy was being created. It appears that the Respondent has now accepted that he made mistakes, as he has applied to the Tribunal for both an eviction and a payment order.

48. Even if the Respondent intended otherwise, the Tribunal is satisfied that the agreement between the parties is a private residential tenancy. As such, the 2011 Regulations apply, and the Respondent was obliged to lodge a deposit taken for the residential property in an approved scheme.

Was the deposit taken for the non-residential property?

49. The Tribunal is not persuaded by the claim that the deposit was for the workshop and stables. The only reliable evidence on this issue is the tenancy agreement which was signed by both parties. It does not specify that the deposit related to the other parts of the property. The deposit taken was £500, which was the equivalent of one months rent for the flat (not including the electricity). It is usual for Landlords to take a deposit for residential tenancies. If the Respondent intended it otherwise, this should have been recorded in the agreement. Even if the receipt dated 13 October was given to the Applicant, she did not sign it or acknowledge her agreement with what it said. The receipt has a different date to Respondent's signature of the tenancy agreement which calls into question when, and if, it was handed over. The Tribunal is satisfied that the deposit was for the residential accommodation.

50. Regulation 10 of the 2011 Regulations stipulates that if the Tribunal is satisfied that the landlord did not comply with a duty in terms of regulation 3, it "(**a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit."** The Tribunal therefore determines that an order must be made in favour of the Applicant.

51. The Tribunal notes that the deposit was not secured in an approved tenancy deposit scheme throughout the tenancy, a period of 17 months. The deposit has not been returned, although the tenancy has only recently come to an end and the Respondent has not indicated that will not return it. However, the failure to lodge the deposit has deprived the Applicant of the opportunity to go through the scheme adjudication process to seek recovery of it. Furthermore, the Respondent is an experienced landlord who told the Tribunal that he is well aware of his obligations. That said, there is no evidence that the Respondent has failed to comply with the regulations before. It also appears that he thought

that he did not require to do so in this case, although he ought to have taken proper advice before coming to that conclusion.

52. In the case of Rollett v Mackie (2019 UT 45), the Upper Tribunal refused an appeal by the Applicant who argued that the maximum penalty ought to have been imposed. Sheriff Ross commented that the "level of penalty requires to reflect the level of culpability" and that "the finding that the breach was not intentional…tends to lessen culpability" (13). He goes on to say, "Cases at the most serious end of the scale might involve repeated breaches against a number of tenants, fraudulent intention, deliberate or reckless failure to observe responsibilities, denial of fault, very high financial sums involved, actual losses caused to the tenant."

53. In the present case, none of the aggravating factors highlighted by Sheriff Ross appear to be present. In the circumstances, the Tribunal is satisfied that an award of twice the deposit should be made**.**

Decision

54. The Tribunal determines that an order for payment of the sum of £1000 should be made in favour of the Applicant.

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.

Josephine Bonnar, Legal Member **5 April 2023**