Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/PR/19/2178

Re: Property at Mill of Pitmedden, Oyne, Insh, AB52 6RT ("the Property")

Parties:

Mrs Lesley Jopp, Bennachie, Pitcaple, Inverurie, AB51 5EB ("the Applicant")

Mr Bruce Mackie, 40 Fyfe Park, Kemnay, Inverurie, AB51 5NG ("the Respondent")

Tribunal Members:

Ewan Miller (Legal Member) and Mike Scott (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent had failed to place the deposit in an approved scheme in accordance with the terms of the Regulations. The Tribunal (a) imposed the maximum penalty of TWO THOUSAND ONE HUNDRED (£2,100) POUNDS to be paid by the Respondent to the Applicant (b) ordered the Respondent to place the sum of SEVEN HUNDRED (£700) POUNDS on deposit with an approved scheme within 30 days of receipt of this decision.

<u>Background</u>

1. The Respondent was the owner of the Property. He had granted a Lease to the Applicant in August 2017 at a monthly rent of £700 per calendar month. A deposit of £700 had been transferred by the Applicant's husband to the Respondent's bank account on 22 August 2017. The Lease had come to an end some time during June 2019.

2. The Applicant sought the return of the deposit from the Respondent. The Respondent argued that there was no deposit to return to the Applicant as it had been returned directly to her on 16 September 2017 (and within the 30

day time limit in which a landlord is required to place a deposit in to an approved scheme in terms of the Regulations). The Applicant denied that the deposit had been returned to her. The Applicant then made an application to the Tribunal seeking a penalty to be imposed on the Respondent in terms of Paragraph 10 of the Regulations.

3. The Tribunal at the hearings had the following key documentation before it:-

    - The Applicant's application to the Tribunal dated 15 June 2019;
    - A copy of the Lease of the Property dated 11 August 2017;
    - An excerpt of a bank statement showing payment of the deposit of £700 on 22 August 2017;
    - A Notice to Quit dated 30 April 2019;
    - A "Deposit Return" form dated 16 September 2017 purporting to be signed by the Applicant;
    - A copy of a Facebook message from the Applicant to the Respondent dated 15 May 2019;
    - An email from the Applicant to the Respondent dated 3 June 2019;
    - A collection of copy/original documents all bearing the signature of the Applicant including her passport, driving licence, a bank card, a Costco card, a new lease of a new property and the Lease of the Property;
    - Submissions from the Respondent dated 18 September 2019.

The Hearings

4. A Case Management Discussion had taken place ty on 24 September 2019. The Case Management Discussion had identified that there were fundamental issues in dispute in relation to whether the deposit had been returned or not and had set the matter down for a hearing. A hearing was held on 31 October 2019 before Mr Ewan Miller, Chairman and Legal Member and Mr Michael Scott, Ordinary Member of the Tribunal. The Applicant was present. She was accompanied her son, Martin Jopp, as her representative and by her husband as a supporter. The Respondent was present and had two witnesses, his wife, Mrs Joan Mackie and his sister, Mrs Seona Kemp.

5. The hearing focussed primarily on the Deposit Return form and whether the signature of the Applicant on it was genuine or not. At the hearing on 31 October 2019 the Tribunal felt it may be of benefit to explore whether an expert report on handwriting could be obtained on the veracity of the signature. Accordingly the Tribunal adjourned the matter to a later date to

allow it to consider this point. The Tribunal subsequently determined that it was not appropriate for it to obtain handwriting report of its own accord. The Tribunal then gave both parties an opportunity to produce a handwriting experts report or other evidence to prove or disprove the veracity of the Deposit Return. Neither party availed themselves of this opportunity. In the interim period the Covid pandemic occurred and accordingly it was not until 21 July 2020 that a second hearing date was set. This was carried out by teleconference, again before Ewan Miller and Michael Scott. The Applicant was present on the call along with her son, Martin Jopp. The Respondent was on the call also.

Findings in Fact and Law

6. The Tribunal found the following facts to be established:-

    - The Respondent was the owner of the Property;

    - The Respondent had let the Property to the Applicant at a monthly rental of £700 per calendar month by way of a Lease dated 11 August 2017, with the tenancy commencing on 28 August 2017;

    - The Applicant had paid a deposit to the Respondent of £700 on 22 August 2017;

    - The Lease had come to an end some time around June 2019;

    - The deposit had not been returned to the Application notwithstanding the terms of the Deposit Return dated 16 September 2017;

    - The Deposit Return had not been signed by the Applicant but by a person unknown;

    - The deposit had not been placed into an approved scheme within 30 days of receipt by the Respondent as required by the Regulations.

Reasons for Decision

7. The decision in this matter turned entirely on the validity of a letter dated 16 September 2017 ("the Deposit Return") and whether the signature of the Applicant on this was hers or had been forged. The Respondent, in response to the Tenant's application to the Tribunal, had produced the Deposit Return which purported to be a letter signed by the Applicant acknowledging the return of the deposit to her shortly after the commencement of the tenancy.

8. The Applicant strongly disputed that the signature on the Deposit Return was hers and denied that the Deposit had been returned to her. She alleged that the Respondent on one of his family had put her signature on the document in an effort to avoid their failure to deal with the deposit as required by the Regulations.

9. The parties were in agreement on certain matters. There was no dispute between the parties that the Respondent had leased the Property to the Applicant at £700 per month. The Applicant had produced an excerpt of her bank statement showing a transfer of £700 had taken place on 22 August 2017 to the Respondent. The Respondent did not dispute that this was payment of a deposit by the Applicant as required by the lease.

10. The submission of the Respondent and his wife was that shortly after the deposit had been paid and the tenancy commenced, that the Applicant sought the return of the deposit to her.

    They submitted that the Applicant needed money in relation to her car and also to purchase school clothes following upon the start of the new school term.

    The Tribunal highlighted that it would be an unusual action for a landlord to return a deposit to a tenant. The Respondent and his wife advised that the Applicant chased them several times for this and as they knew her eventually they decided to return the deposit.

    The Tribunal enquired whether the Respondent could produce any evidence showing the return of the deposit to the Applicant beyond the acknowledgment contained in the Deposit Return. The deposit had not been returned by bank transfer, they submitted, but had been given the Applicant in cash. The Tribunal enquired whether they could show a withdrawal from their bank account just prior to the signing of the Deposit Return that would substantiate that they had withdrawn funds to repay the Applicant. The Respondent and his wife advised that they were unable to do so. They submitted to the Tribunal that Mrs Mackie had worked for a payday lender and was used to having cash to hand. They were travelling to Australia shortly for an extended period and had sold various items of theirs and therefore had had the cash to hand.

11. The Respondents submitted that the Applicant had arranged to come round to their house on 16 September 2017 to collect the deposit in cash. The Respondent's wife, Mrs Mackie, spoke to being present when the Applicant arrived. The Respondent's sister, Mrs Seona Kemp. also stated that she had arrived during the course of the meeting and had seen the money being handed over by the Respondent to the Applicant. The meeting was alleged to have taken place on the morning on 16 September 2017.

12. The Applicant vehemently denied that this meeting had taken place. Having checked the date, she had noted that this fell on a day when Aberdeen Football Club were playing at home. She and her family were avid Aberdeen fans and it would be very unusual for her to go anywhere else during the day as her family normally met up in the morning, socialised together and then went on to the football. The Tribunal checked and noted that Aberdeen FC were indeed playing at home on that day. Accordingly it would still have been

possible for her to attend at the Respondent's house and attend the football in the afternoon.

13. The Applicant's submission was that she had never requested the return of the deposit. Although she agreed she was not particularly well off, she submitted that her family supported her and her husband – she had not required the return of the deposit to allow her to meet other financial commitments. She denied the meeting had ever taken place. She was of the view that the Respondent was trying to give the impression that a number of people had seen the meeting take place but was using his wife and sister as witnesses, who were simply covering up for the fact that he had not put the deposit into an approved scheme. She submitted all 3 were lying about the alleged meeting on 16th September.

14. The Applicant made two primary submissions to support her position that the meeting had never taken place and that the Deposit Return was not genuine.

15. The Applicant had submitted a number of other documents which she claimed showed a distinctly different signature to that shown on the Deposit Return. The Applicant had submitted her passport and her driving licence along with a bank card and a copy of the signed page of her new lease. The Tribunal also had the original lease signed between the parties which had the Applicant's signature on it. The Respondent had also provided to the Tribunal at the first hearing a Costco Membership Card with the Applicant's signature on it. He had found this at the Property upon taking possession.

    The Tribunal does not, of course, have any expertise or particular knowledge of handwriting analysis. Nonetheless, it was apparent to the Tribunal that there was a material difference between the signature on the Deposit Return compared to the other documents produced by the Applicant. On all occasions the Applicant had signed "L Jopp". The "L" in all signatures appeared to be generally the same. However, the Tribunal noted and accepted that the signature "Jopp" was markedly different between the Deposit Return and all of the Applicant's other signatures. It appeared to the Tribunal that the Applicant signed her surname generally in large looped letters. All the individual letters making up "Jopp" were distinct and clear. By contrast, the signature on the Deposit Return was much more angular and "spikey". The two "P" within Jopp had almost merged in to one and were very different to her normal signature

    The Applicant highlighted at the second hearing that she had MS and she simply could not write in a small and spikey manner as was on the Deposit Return. She could only write in a larger looped fashion because of her disability.

16. The Tribunal was of the view of that there was a material difference between the signature on the Deposit Return and all of the other documentation. The difference was significant enough to raise a doubt in the mind of the Tribunal as to whether the signature on the Deposit Return was genuine. The Tribunal

noted that the Respondent himself had provided the Tribunal the Costco card which was consistent with the other signatures produced by the Applicant.

17. The other main thrust of the Applicant's position was in relation to messages she had sent to the Respondent. She highlighted a Facebook message from herself to the Respondent on 15 May 2019. The Applicant had said in that message:-

"You do have my £700 deposit, which reminds me I hope it is in the holding account that it is supposed to be paid into and I should have been given the account number for which is a safeguard for both you the Landlord and me the Tenant".

The Tribunal asked the Respondent what his reaction was when he received this message. At both hearings he stated that he was confused by this as, in his view the Applicant could not possibly have thought that there was a deposit as she knew full well that it had been returned to her. He did not know what she was thinking about and he could not understand it.

18. The Tribunal asked why he had not responded to that message. If it was blatantly apparent that there was no deposit, why had he simply not responded to ask what she was talking about and to highlight the Deposit Return? The Respondent stated that they had been in Australia at that point and they were so confused by what was being said by the Applicant that they simply decided not to respond.

19. The Applicant then highlighted an email of 2 June 2019 to the Respondent. This email stated:-

"We are still awaiting all the Certificates you are legally supposed to provide at the beginning of this tenancy as well as the information regarding the deposit scheme for our £700".

20. Again the Respondent did not question that he had received this email. He had advised that they had, in the intervening period, returned to the UK and had seen the Applicant at the Property a day or two before receipt of this email. The deposit had not been mentioned at that meeting and so, in the words of the Respondent, he assumed that the deposit had been sorted out.

The Tribunal again questioned him as to why he had not responded to this email. He again stated that he presumed that as it had not been mentioned at the meeting prior to this email that the deposit was sorted out. The Tribunal pointed out that in the mind of the Applicant it did not appear to be "sorted out" as she had raised the question of the deposit again. Why did he not question her and point out the Deposit Return? The Respondent again stated that he could not understand why the Applicant had raised this point as she was well aware that the deposit had been returned to her. He had elected not to respond to it as he was unsure on what possible basis the Applicant could be raising this.

21. The Tribunal considered all of the evidence before it. The Tribunal did not find any party before it to be consistently credible and was of the opinion that all would be willing to bend the truth to further their case if it so suited them. The Tribunal was also, as stated above, is not an expert in handwriting but, nonetheless, required to reach a determination on the submissions and evidence before it in order to dispose of the matter.

22. The Tribunal found, on the balance of probability and by the very narrowest margin, that they preferred the evidence of the Applicant over the Respondent. There were number of factors in this.

23. Firstly, the Tribunal was of the view that it would be unusual for a landlord to return a deposit to a Tenant. Whilst there may have been some connection between the parties, nonetheless it would still have been unusual and unlikely to occur. In the Tribunal's experience a conversation around a deposit and the requirement for it would be more likely to occur before the commencement of the tenancy rather than after the deposit had been paid. This was, however, a minor factor in the Tribunal's decision.

24. Secondly, it had also not helped the Respondent's case that he and his witnesses were unable to provide any ancillary evidence that the deposit had been returned beyond the Deposit Return and their own submission. It is, of course, perfectly legal to hold cash and to conduct a transaction in cash. However the majority of transactions now take place through electronic means. The Applicant had paid via electronic means and it did not help the Respondent that he was unable to show monies being taken back out of the account to refund to the Applicant. Again, though, this was a relatively minor factor in the Tribunal's decision.

25. Thirdly, whilst the Respondent and his two witnesses both stated that the Applicant had signed the Deposit Return, they were of course connected parties and the weight therefore that can be given to their evidence needed to be considered. There was a material difference between the signature of Mrs Jopp on the Deposit Return against every other item that she had provided. She appeared to have a very consistent signature and the Deposit Return Form simply did not match this. In the view of the Tribunal that had to place doubt on the validity of the Deposit Return notwithstanding the submission of the Respondent and his witnesses.

26. The biggest single factor weighing against the Respondent was in relation to the failure to respond to the Facebook message and the email sent to him by the Applicant. If the Respondent truly had held the Deposit Return Form and it had been validly signed by the Applicant then it was scarcely credible that neither message evoked a response from the Respondent to point out to the Applicant that he had already returned the deposit. The justifications and reasons by the Respondent in this regard were unclear and lacked credibility. His answers at both hearing in this regard were unconvincing.

27. For the Applicant to have brought the application to the Tribunal in bad faith required a significant degree of both duplicitousness and foresight on her part.

At the point of receiving the cash she would have had to deliberately have put a signature on the Deposit Return Form that was materially different to her normal signature. At that point in time there was no dispute between the parties and matters appeared to be amicable between them. It appeared unlikely to the Tribunal that she would have had the foresight to start the conception of a fraudulent deposit claim against the Landlord at that point. The two messages to the Respondent regarding the deposit appeared valid and were made within the wider context of the messages. If she knew that she had genuinely signed the Deposit Return Form and the Landlord held this then it seemed to the Tribunal that there would have been little point in her sending such messages. The failure of the Respondent to reply to the references to the deposit was more suggestive that there was a deposit than the fact that there was not.

Ultimately, the Tribunal found it unlikely that the average landlord would not have responded to those messages to point out that the deposit had been repaid. On balance the Tribunal was of the view that the deposit had been paid to the Respondent but had never been returned. The overall circumstances and sequence of events was, in the view of the Tribunal, more consistent with Applicant's submission.

28. Having determined the key point as to the validity of the Deposit Return, the Tribunal then needed to consider the sanction to be imposed. Paragraph 10(a) of the Regulations allows the Tribunal to impose a maximum sanction of three times the deposit. The Tribunal had indicated to the parties at both hearings that they were of the view that the penalty to be imposed would either have to be nil or the maximum amount. If the Tribunal had found for the Respondent and that he had returned the deposit on 16 September 2017 then he had returned it within the 30 days leeway he had to place the deposit into one of the approved schemes. There would, therefore, have been no breach as the deposit was returned. On the other hand, if the Tribunal found in favour of the Applicant then effectively, on the balance of probability, the Tribunal was finding that the Respondent or someone connected to him had forged a document and he and his witnesses had lied to the Tribunal. In such circumstances the Tribunal could not conceive of any other penalty than imposing the maximum sanction of three times the monthly rental. Both parties had accepted at both hearings that this was a logical conclusion.

    Accordingly, as the Tribunal found that the Deposit Return was not genuine, albeit on a very narrow margin, the Tribunal had effectively declared it to be fraudulently signed by the Respondent or a party unknown. It followed that the Respondent had, in light of that finding, tried to mislead the Tribunal and to deny the Applicant the benefit of her deposit. Accordingly, the Tribunal was satisfied that it was appropriate, as had been indicated to the parties at the time, to impose the maximum penalty of £2,100.

29. The Tribunal also noted the terms of Paragraph 10(b)(i) of the relevant regulation which gives the Tribunal the power to order the deposit to be put into an approved scheme as per the terms of the Regulations. Given the finding of the Tribunal, the Tribunal was of the view that the deposit had not

been repaid in 2017 and not been returned since then. The Respondent had therefore had the benefit of the deposit which may or may not be returnable to the Applicant. The Respondent had alleged in his submissions that there was a large amount of damage to the Property caused by the Applicant. That may or may not be true and was not the concern of the Tribunal in this matter. Nonetheless the Applicant should be entitled to make her case as to whether or not the deposit should be returned and the Respondent can likewise submit that he has suffered loss as a result of the actings of the Applicant and that he is entitled to the return of the deposit. The 3 approved tenancy deposit schemes run a dispute resolution service and this could determine the matter between the parties. Accordingly the Tribunal was of the view that that a sum of £700 representing the deposit should be placed on an approved tenancy deposit scheme by the Respondent within 30 days. The Respondent can then apply to the scheme to receive the monies back and the Applicant will then have the opportunity to dispute the matter should she so desire.

Decision

30. The Tribunal determined that the Applicant had made a deposit of £700 to the Respondent, it had not been returned to her and had not been placed on an approved scheme as required by Paragraph 9 of the Regulations. The Tribunal imposed a penalty under Paragraph 10 to the sum of £2,100 to be paid to the Applicant and further ordered the Respondent to place £700, representing the deposit still held, into an approved tenancy deposit scheme within 30 days of receipt of this decision.

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.

Ewan Miller	6 August 2020
Legal Member/Chair	**Date**