Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011/176 and under Section 16 of the Housing (Scotland) Act 2014, and under Section 71 of the Private Housing (Tenancies) (Scotland) 2016 Act

Chamber Ref: FTS/HPC/PR/22/4434

Re: Property at Flat 42, 72 Rosemount Viaduct, Aberdeen, AB25 1NU ("the Property")

Parties:

Dr Esther Idehen, 42 72 Rosemount Viaduct, Aberdeen, AB25 1NU ("the Applicant")

Christopher McInnes, whose present address is unknown ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision (in absence of the Respondent)

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

1. This is an application by the Applicant for an order for payment where landlord has not complied with the obligations regarding payment of a deposit into an approved scheme or provision of prescribed information under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* in terms of rule 103 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Rules"). During the course of the case management discussion, the Applicant further made clear that she also sought repayment of a £50 withheld balance of her deposit (which would be an order for payment under rule 111). As the potential for such an order under both rules was within the terms of the order sought in the application form, I was satisfied to treat the application as under both rules.

2. The tenancy in question was a Private Residential Tenancy ("PRT") of the Property by the Respondent to the Applicant dated 30 April and 1 May 2022 and

commencing on 30 April 2022. The Tenancy Agreement was, however, in a Short Assured Tenancy style and contained many inaccuracies, such as stating that there was a termination date of 29 October 2022.

3. The application was dated 16 December 2022 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £395 was due in terms of the Tenancy, paid to the Respondent, but never paid into an approved scheme. Further the Tenancy concluded on 3 October 2022 and the Respondent returned only £345 to the Applicant. The application did not express the specific order sought, but relied on both the failure to repay the deposit in full and the failure to protect the deposit.

The Case Management Discussion

4. On 17 May 2023 at 10:00, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Applicant.

5. There was no appearance for the Respondent. Service upon him by the Tribunal's Sheriff Officer was unsuccessful (and so the CMD had been rescheduled from an earlier date). Service by Advertisement had been carried out and I was satisfied that this had been completed properly. Having held back commencement of the CMD until 10:15, I was satisfied to proceed in the absence of the Respondent. In any case, he did not call in (nor did anyone on his behalf) by the conclusion of the CMD.

6. The Applicant confirmed that she insisted on the application and sought both a payment of £50, being the sum withheld from the deposit, and a payment under the 2011 Regulations at a high level. The application papers provided evidence of the payment of £790 at on 4 May 2022, which was said to be the deposit of £395 and the first month's rent of £395. Further the papers provided evidence that none of the three Tenancy Deposit Scheme providers had a trace of the deposit being lodged (which was consistent with the Applicant stating that the £345 was returned from the Respondent himself).

7. In response to questions, she gave the following further details:
   a. The Property was a one-bedroom attic flat.
   b. She lived alone at the Property during her Tenancy.
   c. All communication with the Respondent was by text or email. The Applicant preferred email communication when she wanted a record of important matters.
   d. The Applicant recalled emailing the Respondent by the end of September to say when she was leaving. An end date was agreed.
   e. On moving out, the Applicant cleaned the Property and left it in good condition. She took photographs and videos of this (though these were not lodged).
   f. After vacating, she contacted the Respondent for return of her deposit. She provided her bank details but payment was not made.
   g. She chased the Respondent and again provided her bank details. A payment for £345 was then paid and the Respondent emailed to say that

the Property had required to be cleaned after she left as his cleaner had said there had been a smell. The Respondent claimed that cleaning costs exceeded £50, but he was restricting the sum deducted to £50. No invoice or evidence of the cleaning costs was provided by the Respondent.

h. The Applicant contacted the Respondent to object to the deduction but then noticed that her text messages were not being marked as delivered. She concluded that the Respondent had blocked messages from her on his phone.

i. The Applicant contacted various sources of advice, including Aberdeen City Council, who said that the Respondent had not been registered as a landlord for the Property.

j. During the course of the Tenancy, the Applicant had not been satisfied with the Respondent's behaviour as twice he had sent contractors out to the Property, without giving her advance warning, and the contractors had simply let themselves in with keys that they had been provided by the Respondent.

8. In advance of the CMD, I had undertaken my own investigations on public databases, and had not been able to locate a current registration of the Respondent as a landlord for the Property. Further, I could see that the Property had been purchased by the Respondent in 2004, at the same time as he purchased another flat in the same block (both of which were still registered in his name in the Land Register). No other properties in the Land Register for Aberdeen appeared registered in the Respondent's name at present.

9. No motion was made for expenses.

Findings in Fact

10. The Respondent, as landlord, let the Property to the Applicant under a Private Residential Tenancy dated 30 April and 1 May 2022, commencing on 30 April 2022 ("the Tenancy").

11. The Tenancy Agreement was in an incorrect format, purporting to be a Short Assured Tenancy, and containing an erroneous statement that the Tenancy had an end date of 29 October 2022.

12. The Tenancy Agreement, despite being in an incorrect and out-of-date form, contained reference at clause 17 to the *Tenancy Deposit Schemes (Scotland) Regulations 2011* but implied that the Respondent (as landlord) would return any deposit to the Applicant "within the lesser of 1 day and any time period required by [the 2011 Regulations]… less any proper deductions".

13. The Tenancy was brought to an end by mutual agreement on 3 October 2022.

14. In terms of clause 13 of the Tenancy, the Applicant was obligated to pay a deposit of £395 at the commencement of the Tenancy.

15. The Applicant paid a deposit of £395 to the Respondent on 4 May 2022.

16. The Respondent failed to place the deposit into an approved Tenancy Deposit Scheme.

17. The Respondent provided no note of the prescribed information on the tenancy deposit to the Applicant.

18. The failure to lodge the deposit or provide the prescribed information under the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* was in breach of the said Regulations in regard to the lodging and the provision of prescribed information.

19. The Respondent is the landlord of at least two rental properties.

20. After the Applicant corresponded with the Respondent on two occasions, the Respondent returned £345 of the deposit, retaining £50 in regard to alleged cleaning costs.

21. The Respondent provided no evidence of cleaning costs or of any want of repair or issue with cleanliness at the Property.

22. The Applicant has not been afforded access to the adjudication scheme under Tenancy Deposit Scheme.

23. The Respondent is not registered as a landlord for the Property on the appropriate register.

Reasons for Decision

24. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by the Applicant, I was satisfied both that the necessary level of evidence had been provided through the application, further papers, and orally at the CMD, and that it was appropriate to make a decision under regulation 10 of the 2011 Regulations and under the 2016 Act at the CMD.

25. I received only *ex parte* evidence and vouching from the Applicant, but it was thus undisputed by the Respondent. I was satisfied by the Applicant's submissions that the Respondent held a deposit shortly after the commencement of the Tenancy, did not lodge it, did not provide any prescribed information, retained the deposit himself, and finally returned it (less a £50 deduction) only after prompting. There has been a clear breach of both the lodging and information requirements of the 2011 Regulations. The curious term of the Tenancy Agreement about the return of the deposit meant that the Respondent had in fact provided misleading information about the processes under the 2011 Regulations, by implying that he would be the party to return any deposit held.

26. In coming to a decision, I reviewed decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, Sheriff Ross notes that "the decision

under regulation 10 is highly fact-specific to each case" and that "[e]ach case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a 'serious' breach will vary from case to case – it is the factual matrix, not the description, which is relevant." (paragraph 9)

27. In regard to that "factual matrix", Sheriff Ross reviews with approval the reasoning of the Tribunal at first instance in that case (at paragraph 10). Generalised for my purposes, the Tribunal made consideration of:
    a. the purpose of the 2011 Regulations;
    b. the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    c. whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
    d. the reasons given for the failure to comply with the 2011 Regulations;
    e. whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
    f. whether the failure was intentional or not; and
    g. whether the breach was serious.

    Applying that reasoning, the Tribunal held – and the Upper Tribunal upheld – an award of two times the deposit. In analysing the "factual matrix" in that case, Sheriff Ross noted:

> *In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer* [of the letting agent in *Rollett*] *also tends to lessen culpability, as it affects intention. The finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.*
>
> *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, or other hypotheticals. None of these aggravating factors is present.* (paragraphs 13 and 14)

28. The Upper Tribunal considered a case where the Tribunal regarded a low level of culpability in *Wood v Johnston, [2019] UT 39*. The Tribunal at first instance had awarded £50 (though it is not possible from the UT's opinion to determine what this was as a multiplier of the original deposit). Sheriff Bickett noted that parties to the appeal were agreed that "the award is a penalty for breach of Regulations, not compensation for a damage inflicted" (paragraph 6) and, like Sheriff Ross in *Rollett*, analysed the nature of the breach, though in briefer terms. In *Wood*, it was noted that the Tribunal at first instance had made the award in consideration that "the respondent owned the property rented, and had no other

property, and was an amateur landlord, unaware of the Regulations. The deposit had been repaid in full on the date of the end of the tenancy." Sheriff Bickett refused permission to appeal and thus left the Tribunal's decision standing.

29. Applying Sheriff Ross's reasoning to the current case, the purposes of the 2011 Regulations are to ensure that a tenant's deposit is insulated from the risk of insolvency of the landlord or letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, these issues all remained with the Applicant requiring to chase for repayment and then a deduction was made with no vouching (and on the vague allegation of a "smell" remaining). Thereafter, the Respondent did not respond further to the Applicant. There was a clear failure to lodge the funds, despite (according to the inaccurate Tenancy Agreement) a knowledge of the 2011 Regulations being in place. The purpose of the provision of the prescribed information is to ensure the tenant is fully informed of their position, and the Respondent made an attempt to mislead and attempt to take advantage of the ignorance of the 2011 Regulations.

30. I have held that, as far as I have interpreted the publicly available information, the Respondent has been a landlord of at least two properties for some years. He does not appear to be an "amateur". If he was ignorant of the requirement to register as a landlord, lodge deposit funds, or comply with good property management, it was due to a reckless failure to become informed of his obligations. There were flagrant failures in this case to provide an accurate agreement, register as a landlord, attend to lodging of funds and provision of information, provide fair notice of access being taken by contractors, and engage properly on issues of deductions from deposit funds. To consider the aggravating factors that Sheriff Ross lists, there was a reckless failure (if not a deliberate failure) to observe responsibilities and an actual loss to the tenant. I cannot rule out any fraudulent intention. The significant number of criticisms that can be made against the Respondent's behaviour as a landlord leads me to hold that this is a serious breach. I am awarding £1,185 under regulation 10 of the 2011 Regulations, being the full 3 times the deposit and hold this as an appropriate award in consideration of the law and all the facts.

31. In regard to the claim for repayment of the £50 withheld, I also order payment of this amount. I make no finding whether or not there was a "smell" or need for further cleaning. The Respondent is free to raise his own claim for damages, but – having removed the Applicant's ability to make use of the Adjudication Scheme through the Tenancy Deposit Scheme providers – it is not appropriate that he retains any sums without evidence. I am satisfied to accept the Applicant's submissions that no evidence was provided, and so she is contractually entitled to repayment of the further £50.

32. The total award is £1,235 and I shall apply interest on the sum under Procedure Rule 41A at 8% per annum from the date of Decision as an appropriate rate.

Decision

33. I am satisfied to grant an order against the Respondent for payment of the sum of £1,235 to the Applicant with interest at 8% per annum running from today's date.

34. In light of the apparent failure of the Respondent to register as a landlord, I direct the Tribunal's clerks to pass a copy of this Decision and the order to Aberdeen City Council for them to proceed as appropriate.

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.

17 May 2023

_____ _____

Legal Member/Chair **Date**