Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under the Tenancy Deposit Schemes (Scotland) Regulations 2011, regulations 9 and 10

Chamber Ref: FTS/HPC/PR/18/3470

Re : Property at 48 Easthouses Way, Easthouses, Dalkeith, Midlothian EH22 4UA ("the Property")

The Parties:-

Daniel Botes, 15 Waterfall Walk, Dalkeith, Midlothian EH22 4UA ("the Applicant")
represented by Andrew Wilson, Community Health & Advice Initiative (CHAI), 502 Gorgie Road, Edinburgh EH11 3AF

Dalkeith Lettings (a partnership), 106 High Street, Dalkieth, Midlothian EH22 1HZ ("the Respondents")

Tribunal Member:

David Bartos (Legal Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") ordered the Respondents to pay to the Applicant the sum of One Thousand Six Hundred and Fifty Pounds (£ 1650.00) Sterling.

Summary of Case Management Discussion

1. **The case management discussion ("CMD") took place on Thursday 16 May 2019 at 14.00 hrs, at 126 George Street, Edinburgh. The Applicant was present. He was represented by Mr Andrew Wilson of Community Health & Advice Initiative (CHAI). There was no appearance by or on behalf of the Respondents.The Tribunal noted that the CMD had been postponed from an earlier date of 8 April 2019 on the request of the Respondents' Secretary Ms Mills owing to "them" being on annual leave on that date. That request had not been opposed by the Applicant.**

2. **Notice of the CMD at to-day's date had been given to the Respondents in a letter from the Tribunal dated 13 April 2019 which had been served on their partner Anthony Crolla by sheriff officers on 16 April 2019. The Respondents through Ms Mills applied again for a postponement of the CMD. This was on the grounds of holiday and lack of staff cover. The request for a further postponment was e-mailed by the Tribunal Office to**

the Tribunal Member on Monday 13 May 2019. The Tribunal Member refused the request. It was not in the interests of justice that there be further delay in holding the CMD. The discussion has been postponed once already to accommodate the Respondents. No reason has been given for the postponement other than their convenience. The Respondents had had ample time to lodge written representations and to prepare for the CMD. No written representations opposing the application had been received by the Tribunal from the Respondent. It was still open for the Respondents to instruct a representative on their behalf. The overriding objective of the Tribunal included the avoidance of delay so far as consistent with a proper consideration of the issues. There was nothing to suggest that the Tribunal could not deal with the issues even if the Respondents were unrepresented at the CMD.

3. At the opening for business on Wednesday 15 May the Tribunal Office had been informed of the refusal. It was notified to the parties in the afternoon of that day. On the morning of the CMD the Respondents sent an e-mail to the Tribunal in reply stating that "there is no one available to attend today". They made no other communication to the Tribunal in connection with their non-attendance at the CMD.

4. At the CMD Mr Wilson opposed any further postponement or adjournment. He submitted that the Respondents were a business. They had had ample time to instruct a solicitor had they wished to be represented. This was the second postponement request that had been made. They had not submitted any written representations opposing the application. A further postponement would be "putting off the inevitable". The Tribunal decided to proceed with the CMD. It took the view that in all the circumstances it was not unfair to the Respondents to proceed with the CMD and that it would be unfair to the Applicant for there to be further delay.

5. The Tribunal had issued a direction to both parties dated 29 April 2019. Both parties had lodged documents in response to the direction.

Facts Not in Dispute Between the Parties

(a) On 20 March 2012 the Respondents entered into a written short assured tenancy of the Property to the Applicant ("the Lease"). The Lease was for 6 months from 10 April 2012.

(b) The Lease provided for the payment by the Applicant to the Respondent of a deposit of £ 525 on the entry date. The Applicant paid this deposit to the Respondents in two instalments namely :
(i) on 1 March 2012 with £ 270;
(ii) on 20 March 2012 with £ 255.

(c) The Respondents then sought payment of another £ 25 towards the

deposit. This was paid by the Applicant to them on 5 November 2012. This brought the total of the deposit paid by the Applicant up to £ 550.

(d) The parties entered into further short assured tenancy agreements dated 29 October 2012, 10 April 2013, 5 May 2014, 28 October 2014, 21 April 2015 10 October 2015, 10 April 2016, 10 October 2016, 10 April 2017, and 10 October 2017.

(e) The last of these agreements provided for a deposit of £ 550 which it deemed to have been paid on the entry date. It also provided that the tenancy start date was 10 April 2012 which was the date of entry under the first agreement.

(f) The expiry date of the last Lease was 10 February 2018. It was then continued under clause 1 for another two periods of tacit relocation of 6 months each.

(g) On or about 7 November 2018 the Respondents gave the Applicant notice to quit the Property on 10 February 2019.

(h) In early December 2018 the Applicant had a discussion with the Respondents' Ms Mills. It was agreed that despite the expiry date of the Lease the Applicant would leave the Property on 10 December 2018. The Applicant asked Ms Mills about who was holding the deposit. He was not told who was holding the deposit.

(j) By letter dated 4 December 2018 the Respondents confirmed that if the Applicant did not pay the rent due in December they would require to use the deposit to meet that debt. The Applicant agreed, orally, that the deposit could be used for that purpose.

(k) The Respondents did not supply the Applicant with any information about the deposit scheme administrator or the date of payment of the deposit to the administrator at any point during the period of let of the Property.

(l) The Applicant had contacted Mr Wilson at CHAI with regard to the validity of the notice to quit. Mr Wilson enquired about the location of the deposit. The Applicant was unable to provide this information. Mr Wilson checked with the three deposit scheme administrators whether they held the deposit.

(m) Both SafeDeposits Scotland and MyDeposits Scotland confirmed that they did not hold a deposit for the Property and the parties. A search on the Letting Protection Service Scotland's website for a tenancy with a post code EH22 4UA indicated that a deposit matching the search could not be found.

(n) The Applicant has not been contacted by any deposit scheme administrator with regard to the payment of the deposit to the Respondents or himself.

(o) After the application had been made, by letter to the Applicant dated 2 April 2019 the Respondents confirmed that the Applicant had "verbally told" their Ms Mills to keep the deposit to cover December's rent. In the letter they also sought payment of additional rent and expenses for an earlier tribunal case which the Applicant had withdrawn despite the Tribunal not awarding the Respondents expenses.

(p) The deposit had not been paid to Letting Protection Service Scotland at any time.

(q) On 19 December 2018 the Applicant had applied to the Tribunal for an order for payment.

Oral Evidence and Submissions

6. The Applicant told the Tribunal of the history of his dealings with the Respondents in respect of the deposit. He stated that the initial deposit had been £ 525 and that this had been paid before he had taken entry to the Property. Mr Wilson took the Tribunal through the supporting documentary evidence submitted by him. He submitted that under regulation 3(1)(a) of the 2011 Regulations the Respondents had a duty to pay the deposit to an approved tenancy deposit scheme within 30 working days of the commncement of the first tenancy back in 2012. They had not done so within that time frame. Equally they had failed under regulation 3(1)(b) to provide the Applicant with the information set out in regulation 42 of the 2011 Regulations. There had been no compliance at all by the Respondents. In their annual tenancy agreements they had adopted the deposit for the latest tenancy agreement. In the circumstances the Applicant was entitled to payment of an amount not exceeding three times the deposit of £ 550.

7. With regard to the quantum of payment Mr Wilson submitted that the Respondents were a commercial business involved in letting residential property. They were not an "amateur landlord". Since the commencement of the letting they had provided regular fresh tenancy agreements. Even if they had been unaware of the tenancy deposit regulations at the outset any one of those fresh tenancy agreements could have triggered the lodging of the deposit with the administrator. He pointed out that the Applicant had been told nothing about the location of the deposit also contrary to regulation 3(1) . He asked for three times the deposit, totalling £ 1650.

Reasons

8. The Tribunal considered the application, the written submissions which it had received, the oral submissions of the Applicant's representative and the documentary evidence submitted by him. It found that it was able to make sufficient finding has in fact and that to do so was not contrary to the interests of the parties. It was therefore able to decide the case at the CMD without a hearing. It could see no benefit to be gained from a further hearing which would cause delay.

9. The Tribunal was satisfied that the Applicant had given his evidence credibly and was reliable. No doubt was cast on that evidence. On the basis of that evidence and the supporting documentary evidence the Tribunal made the findings in fact set out above.

10. The Tribunal raised the point that while the search with the LPS administrator through its website had been made for the correct postcode for the Property, namely "EH22 4UA", the last letting agreement stated the postcode to be "EH22 4UE". Indeed the last letter of the postcode appeared to differ in a number of the agreements.

11. Mr Wilson submitted that if the LPS had received the deposit then the Applicant should have been informed of this. He had not been. In addition LPS would have been in contact with him prior to releasing the deposit to the Respondents and obtained confirmation of his agreement to release the deposit. They had not been. Finally the correspondence from the Respondents to the Applicant indicated that in effect they had kept the deposit and not paid it over to any administrator. The Tribunal also noted that there had been no reprsentations from the Respondents to the effect that they had lodged the deposit with any particular administrator. The Tribunal found, on a balance of probabilities that the Respondents had not paid the deposit over to any scheme administrator at any time during the lease of the Property.

12. The Tribunal accepted that there had been a breach by the Respondents of their duties under both regulation 3(1)(a) and (b) of the 2011 Regulations. It followed that a sum of up to three times the deposit fell to be paid.

13. This was a serious case where the Respondents had disregarded their duty to protect the Applicant's deposit and had put it at risk for almost the entire duration of the let of the Property. That was a period of over 6 years. They were a commercial landlord who had ample opportunity to make themselves aware of the regulations and to ensure that the deposit was secured. They could have done this at the supply of any new lease agreement to the Applicant. Further, they had failed to supply the information set out in regulation 42 of the regulations. In all the circumstances the Tribunal found that this was a case at the top end of the scale and awarded the Applicant a sum three times the deposit,

namely £ 1650.

Outcome

14. The First-tier Tribunal for Scotland (Housing and Property Chamber) orders the Respondents to pay to the Applicant the sum of One Thousand Six Hundred and Fifty Pounds (£ 1650.00) Sterling.

Right of Appeal

15. 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.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

D Bartos

Legal Member **16 May 2019**
Date