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

Chamber Ref: FTS/HPC/PR/21/1781

Re: Property at 8 Easter Road, Kinloss, IV36 3XZ ("the Property")

Parties:

Janis Donaldson, 50B Clifton Road, Lossiemouth, IV31 6DP ("the Applicant")

Julie Hill, 8 Easter Road, Kinloss, IV36 3XZ ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

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

Background

1. This is an application by the Applicant for an order for payment where the landlord has not complied with the obligations regarding payment of a deposit into an approved scheme 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 Procedure Rules"). The tenancy in question was a Private Residential Tenancy of the Property by the Respondent to the Applicant commencing on 1 July 2019. The Tenancy came to an end around 31 May 2021 (when the Applicant says she returned the keys) or 1 June 2021 (the expiry date on a Notice to Leave issued by the Respondent).

2. The application was dated 20 July 2021 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £450 was due in terms of the Tenancy, paid to the Respondent around the commencement of the tenancy (the Applicant said it was paid on 3 July 2019), but not paid into an

approved scheme until on or about 12 March 2020 (as per an email from mydeposits Scotland lodged by the Applicant). The application did not specify the level of award sought other than to request "compensation based on monies not being lodged for over 8 months".

The Case Management Discussion

3. On 3 November 2021 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 both parties. The Applicant confirmed that she insisted on their application.

4. Both parties had lodged further papers and submissions, with the Respondent having provided a further page of submissions the day prior to the CMD. The Applicant confirmed that she did not require further time to consider the Respondent's most recent submissions and neither party sought time to lodge further submissions or documents. I took both parties through the background of the application and their respective positions.

5. The Applicant stated that she had assumed that her deposit was appropriately protected and had made no enquiries as to its whereabouts prior to receiving the email from mydeposits Scotland on 12 March 2020. She said that she was "quite surprised" when that email was received stating that her deposit had only just been lodged. She accepted that she had received protection of the deposit prior to her making any enquiries, and that at the end of the tenancy she had been afforded access to the adjudication service provided by the deposit scheme provider. (There had been a dispute between the parties regarding the condition of the Property.) The Applicant was satisfied that the Tribunal would make a decision on the level of compensation, though she stated that she thought it "should be on the higher end" as the deposit had been paid in good faith and she held that the Respondent should have been aware of her duties as a landlord if she was renting out property to a tenant. The Applicant made brief reference to having another application pending before the Tribunal in regard to other matters against the Respondent (and what those matters were). She understood that these matters were to be considered separately however and took issue with reference to these issues in the Respondent's recent submissions.

6. The Respondent's position was that this was the only time she had ever rented out a property. The Property was her own home but she had (at that time) moved in with her partner and had decided to rent it out. She had sought guidance from colleagues (as she worked in an office were advice on PRTs was provided, though her role did not deal in such matters). From the outset she had been aware of the need to lodge the deposit with a tenancy deposit scheme provider but she said that she had not been aware of the time-limit for doing so. At the commencement of the Tenancy, she described having recently suffered bereavement from a close family member and then, during the Tenancy, was concerned about the serious health of another family member. She described herself as "very naive in hindsight" but that she had other things on her mind at the time. She said that the need for lodging the deposit "went

out of my mind" but "kept coming into my head, and I appreciated I had to lodge it, so I did". She could not explain why she lodged the deposit in March 2020 (as opposed to earlier or later) as it was no prompted by anything in particular. As far as I understood from her submissions, March 2020 was simply an occasion when the need to lodge the deposit came back into her mind and she had the wherewithal to complete the task of lodging the funds.

7. The Respondent accepted that an award needed to be made in terms of the 2011 Regulations but argued that any award should be on the lower end as, though it was lodged late, it was lodged during the Tenancy and prior to any Notice to Leave being issued and so the Applicant had full benefit of the deposit protection scheme.

8. In reply, the Applicant stated that she "totally sympathised" with the Respondent's family bereavement and then family ill-health but that she believed the bereavement was some time before the commencement of the Tenancy and that the family member's condition was not known of until February 2020.

9. Both parties stated that they preferred a decision to be made at the CMD. No motion was made for expenses.

Findings in Fact

10. The Respondent, as landlord, let the Property to the Applicant under an undated Private Residential Tenancy commencing on 1 July 2019 ("the Tenancy").

11. The Tenancy Agreement at clause 10 required the Applicant to make payment of a deposit of £450 and narrated that the "scheme administrator" for holding the deposit under the 2011 Regulations was "My|deposits Scotland".

12. The Tenancy Agreement provided to the Respondent was accompanied with a copy of the "Easy Read Notes for the Scottish Government Model Private Residential Tenancy Agreement" which contained at section 10 the guidance: "The landlord has to pay the deposit to one of the schemes within 30 working days from the start of the tenancy".

13. The Applicant paid a deposit of £450 to the Respondent on or about 3 July 2019.

14. On or about 12 March 2021, a deposit of £450 was placed by the Respondent with mydeposits Scotland in regard to the Applicant's Tenancy of the Property.

15. The Tenancy was brought to an end on or about 31 May 2021.

16. The lodging of the deposit was around 7.5 months later than required in terms of the Respondent's obligations under the *Tenancy Deposit Schemes*

(Scotland) Regulations 2011/176 and the Respondent was in breach of the said Regulations.

17. The Respondent had never been a landlord, or handled tenant's deposits, prior to the Tenancy or receipt of the Applicant's deposit.

18. The Property was the Respondent's main residence prior to the Tenancy and after the conclusion of the Tenancy.

19. On receiving the Applicant's deposit, the Respondent was aware of the need to lodge the Applicant's deposit with a tenancy deposit scheme provider.

20. The Respondent arranged for the funds to be lodged with mydeposits Scotland unprompted by any enquiry or steps by the Applicant to raise the issue with him.

21. At the conclusion of the Tenancy, the Applicant has been afforded access to the adjudication scheme under Tenancy Deposit Scheme in terms of her tenancy deposit for the Property.

Reasons for Decision

22. 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 both parties, and their submissions on further procedure, 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 at the CMD.

23. The factual and core legal issues were generally undisputed between the parties. The Respondent had not placed the sum with an approved provider timeously but had done so long before the conclusion of the Tenancy (and thus before the Applicant required to rely upon the adjudication procedures). All of this was done without dispute as to her obligations, and all unsolicited by the Applicant. Beyond the technical breach of the 2011 Regulations, the sole criticism that I can see laid at the Respondent's feet is that she failed to focus on the specific terms of her obligations under the 2011 Regulations while nonetheless being in possession of documentation (which she issued to the Applicant) that made abundantly clear the timescales for compliance. There was no reason for the Respondent to be ignorant of her obligations or impediment to her fulfilling the obligations timeously. I was, however, willing to accept that the Respondent simply failed to understand the specific timescales for lodging and, due to this oversight, it is understandable how she came to lodge the deposit late. At the time of taking the deposit, this had been the only occasion when the Respondent had acted as a landlord and handle a tenant's deposit (and it may remain so). There was no systemic failure as the Respondent had no requirement for a system in place for handling deposits. The Applicant made brief comment on the Respondent having failed in other

unconnected regards as a landlord but I agree with the Applicant's general view that these are separate and not relevant to this application.

24. In coming to a decision, I reviewed recent 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)

25. 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:
    - the purpose of the 2011 Regulations;
    - the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    - whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
    - the reasons given for the failure to comply with the 2011 Regulations (in that case, also related to the landlord's representative);
    - whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
    - whether the failure was intentional or not; and
    - 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)

26. Applying the 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 any letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, both were achieved by the late lodging of the deposit in March 2020. The Respondent's acceptance that she had an obligation to lodge but did not appreciate the time-scale for doing so, and thereafter after lodging the deposit unprompted, lessen the Respondent's culpability in my view. Her reference to other family pressures and stresses certainly does not exacerbate her culpability but I think, in the circumstances, it is close to a neutral factor. In all, there was no intention by the Respondent to breach the 2011 Regulations. All steps by her have shown an intention to comply and she did, albeit late. It was not clear to me that she even appreciated she was lodging late until that point was made by the Respondent. At no time were the funds at risk, there were no other tenants affected (as there were no other tenants), and the sum involved were low. I am satisfied that this case does not disclose a serious breach.

27. 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.

28. The circumstances in *Wood* match well to the current case. The Respondent was an "amateur" and had no other properties, and does not remain a landlord at this time. Further, in the Respondent's favour, she did not have to repay the deposit at the end of the tenancy as she did better than that by ensuring belated lodging of the deposit long before the end of the tenancy. I see nothing in the reasoning in *Wood* that suggests that a low sanction could not be applied in the current case, and nothing in *Rollett* or *Wood* to suggest that this case falls in the middle or severe categories.

29. In the circumstances, I regard a low sanction to be appropriate, reflecting the low culpability of the Respondent. Though it is tempting to absolve the Respondent near completely, she is the party solely liable under the 2011 Regulations and, as she issued documents which clearly set out the timescale for her to lodge the deposit, she should be aware of the contents of documents that she has issued. I am awarding £45 under regulation 10 of the 2011 Regulations, being one-tenth of the deposit and hold this as an appropriate award in consideration of the law and all the facts. 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

30. I am satisfied to grant an order against the Respondent for payment of the sum of £45 to the Applicant with interest at 8% per annum running from today's date.

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.

Joel Conn
Legal Member/Chair

3 November 2021
Date