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

Chamber Ref: FTS/HPC/PR/19/1198

Re: Property at 2 Balkello Farm Cottage, Auchterhouse, Angus, DD3 0RA ("the Property")

Parties:

Ms Catriona Montgomerie, 38 North Burnside Street, Carnoustie, Angus, DD7 7BH ("the Applicant")

Mr James Clark, Mrs Amanda Clark, 1 Balkello Farm Cottage, Auchterhouse, Angus, DD3 0RA ("the Respondent")

Tribunal Members:

Alastair Houston (Legal Member) and Jane Heppenstall (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of £450.00 be made in favour of the Applicant.

1. Background

1.1 This is an application under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chambers Rules of Procedure 2017 ("the Rules") being an application for an order for payment where a landlord had not paid a deposit into an approved scheme. The application was accompanied by bank statements from the Applicant.

1.2 The Respondent's representatives had lodged written representations in advance of the Case Management Discussion, which had taken place on 9 August 2019. The Applicant's representative had also lodged further written representations in response to those lodged on behalf of the Respondent. The Applicant herself sent an email on 23 September 2019 which was included within the papers for the Hearing.

2. The Hearing

2.1 The Hearing took place on 24 September 2019. The Applicant was not personally present but was represented by Mr Rod Davidson. Mr James Clark attended as a Respondent with his representative, Mr Lawson, trainee solicitor of Muir Myles Laverty solicitors.

2.2 Mr Davidson advised the Tribunal that the Applicant was unable to attend due to suffering from anxiety. He advised that the Applicant felt intimidated by Mr Clark. The Tribunal highlighted the terms of the Case Management Discussion note which was clear in that it was anticipated that the Applicant given evidence given the factual matters in dispute. The Tribunal queried whether Mr Davidson was seeking an adjournment or postponement. He confirmed he was not and wished the hearing to proceed.

2.3 Following a short adjournment to allow the Respondents' representative to take instructions, it was confirmed that the Respondent also wished the hearing to proceed. The only party who was to give evidence was Mr Clark. All parties were content with Mr Lawson examining Mr Clark with Mr Davidson being allowed to cross-examine him followed by any questions from the Tribunal.

2.4 Mr Clark confirmed that he was a joint owner of the property with his wife, Mrs Amanda Clark. They were landlords. They had begun leasing the property to the Applicant on 1 September 2018. Prior to that date, the Applicant had resided at the property on and off with the previous sole tenant, Mr Grant, with whom she had previously been in a relationship. Mr Grant had regularly travelled to and from the USA and had advised the Respondents he was moving to Texas at the end of August 2018. It was agreed his tenancy agreement would end then. The Applicant approached the Respondents and requested she continue to reside at the property. Mr Clark felt sorry for her as she said she had nowhere else to go. It was agreed that the Applicant could continue to reside at the property for a few weeks, despite the Respondents having other potential tenants lined up. No written tenancy agreement was produced. The Respondents were helping out the Applicant following a less than amicable break up with her partner. The Applicant's occupation of the property lasted until March 2019, being a period of six months. The Applicant had advised the Respondents that she had suffered a serious illness and a family bereavement in December 2018. Mr Clark felt as if he should continue to let her stay at the property. The Applicant subsequently advised that she wished to move to Carnoustie. The parties agreed to end the tenancy at the end of March 2019. Mr Clark did not think a written tenancy agreement required to be provided, nor did the Applicant request one. The Applicant made a payment of £300 to the Respondents in January 2019. The Respondents had discussed with the Applicant in September 2019 that she required to contribute to the

cost of emptying the septic tank which served the property and the Respondents' home. The payment was also to cover the cost of repairing holes in the walls in the property and any other bills. Following the Applicant leaving the property, a share of the cost of emptying the septic tank and the cost of repairing damage to the walls was deducted from this payment of £300. The receipts lodged reflected that cost. A sum of £180 was returned to the Applicant. This payment was not a deposit otherwise it would have been taken at the start of the tenancy rather than in January 2019. The money was requested when it was known the Applicant would be leaving and the Respondents did not wish to be left with outstanding bills. The payment could also cover any other potential bills. Any money paid by Mr Grant related to his tenancy and no payments were carried over. Mr Grant had not paid a deposit, rather a month's rent in advance. The only sum remaining was that of £20 which Mr Grant requested was used to buy the Respondents' grandson a birthday present. There was no agreement with the Applicant to pay up a £600 deposit. Rent was received from the Applicant.

2.5 In cross examination by Mr Davidson, Mr Clark advised he was a registered landlord, a point disputed by Mr Davidson. Mr Clark further advised he was trying to help the Applicant by permitting her to reside at the tenancy and thought this would be doing the right thing. He was not aware if the Applicant had registered with the local authority as homeless. He thought of her as a good friend and socialised with her as a neighbour. The Applicant had been upset and emotional when requesting to continue living at the property. In respect of the costs deducted from the payment of £300, Mr Clark had attempted to keep the cost of repairing the walls of the property low. He made payment to a tradesman in cash. No demand for payment had ever been made, rather a friendly discussion had been had with the Applicant. Mr Clark again denied the money taken was a deposit. It had been requested to avoid falling out with neighbours. Payment of rent had been made, in part to the Respondents, with the remainder being paid to the Respondent's daughter who had just had her first child and to whom they wished to give a helping hand. If the whole sum had been paid to the Respondents, they would have made the same payment to their daughter.

2.6 Mr Davidson then gave the impression of cutting his cross examination short as he did not believe that Mr Clark was answering his questions. The Tribunal proceeded to ask questions of Mr Clark who confirmed that the rent paid by the Applicant was £600 per month. The Respondents and the Applicant were not related. No money had been carried forward from Mr Grant's tenancy. No cash payment had been made by the Applicant to the Respondent in September 2018. No written tenancy agreement was ever produced in respect of the Applicant's occupation of the property. The obligation upon the Applicant to pay towards the cost of emptying the septic tank had been agreed in September 2018. The costs of emptying the septic tank and repairing the damage to the walls was not known at the time the payment of £300.00 was taken.

2.7 Mr Davidson and Mr Lawson then made submissions on behalf of the parties. Mr Davidson adopted those already lodged as written representations. Mr Lawson highlighted that there was no evidence before the Tribunal regarding the registration of the Respondents as landlords. He highlighted the Applicant's absence which meant her position could not be tested. No efforts to seek alternative arrangements for her to give evidence had been made nor any evidence produced that the Applicant was intimidated by Mr Clark. Mr Lawson submitted that Mr Clark's evidence was reliable and credible. He had answered questions clearly and concisely apart from a rigorous cross examination when voices had been raised. Mr Lawson accepted that a written tenancy agreement had not been provided but that a tenancy existed between the parties. He did not accept that they tenancy was on the same terms as that afforded to Mr Grant previously however, the Applicant would have been aware no money was being carried forward. The payment of £300 was made to cover expenses associated with staying in a countryside property. The Applicant had agreed to make the payment. Mr Lawson submitted that Mr Clark's evidence, together with the representations lodged by the Applicant, demonstrated that £180 had been returned to the Applicant. The payment was not a tenancy deposit. If the Tribunal was not with him on this point, then account should be taken of the money returned to the Applicant. The sum of £120 should be the limit of any order for payment made. Finally, the arrangements for payment of the rent were not relevant.

3. Findings In Fact

3.1 The parties entered into a Private Residential Tenancy agreement which commenced on 1 September 2018 and ended on 31 March 2019.

3.2 Rent of £600.00 per month was payable under the tenancy agreement.

3.3 The Applicant was obliged to make payment of a share of the cost of emptying the septic tank under the tenancy agreement.

3.4 The Applicant made payment of a tenancy deposit required by the Respondents on or around 7 January 2019.

3.5 The Respondents were under a duty to lodge this deposit with an approved scheme and provide the information prescribed by the 2011 Regulations.

3.6 The Respondents failed to comply with their duties under the 2011 Regulations.

3.7 Following the end of the tenancy agreement, the sum of £180.00 was returned to the Applicant from the deposit.

4. Reasons For Decision

4.1 Turning firstly to the format of the Hearing, the Tribunal proceeded in the absence of the Applicant, as both parties were content to do. In terms of Rule 29 of the Rules, the Tribunal proceeded on the basis of the evidence of Mr Clark, the representations made on behalf of the parties and all documents before the Tribunal.

4.2 The duties arising in respect of tenancy deposits are contained within Regulation 3 of the 2011 Regulations, which state as follows:-

3.—(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.
(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.
(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—
(a)in respect of which the landlord is a relevant person; and
(b)by virtue of which a house is occupied by an unconnected person,
unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.
(4) In this regulation, the expressions "relevant person" and "unconnected person" have the meanings conferred by section 83(8) of the 2004 Act.

The definitions of a relevant person and unconnected person are:-

(8)In this Part—
"relevant person" means a person who is not—
(a) a local authority;
(b) a registered social landlord; or
(c) Scottish Homes; and
"unconnected person", in relation to a relevant person, means a person who is not a member of the family of the relevant person.

Regulation 2 of the 2011 Regulations confirms that a tenancy deposit is defined by Section 120(1) of the Housing (Scotland) Act 2006 ("the 2006 Act") as follows:-

(1)A tenancy deposit is a sum of money held as security for—
(a)the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b)the discharge of any of the occupant's liabilities which so arise.

4.3 From the facts that were not in dispute between the parties, the Tribunal considers the Respondents to be relevant persons as defined in statute. Furthermore, the Applicant is an unconnected person and the property was not being put to a use which excluded the agreement from being a relevant tenancy. Accordingly, the duties contained within the 2011 Regulations could arise in the event a tenancy deposit was taken.

4.4 The key question for the Tribunal is, therefore, was a tenancy deposit taken? The position of the Applicant as per the written representations is that a total of £900.00 was paid to the Respondents in the form of a tenancy deposit. The Respondents' position is that payment of £300.00 was only ever made in addition to the monthly rental payments and this was not a tenancy deposit. The Tribunal considers that, in the absence of any evidence on the part of the Applicant, either given orally or in documentary form, there is no reason not to find Mr Clark's evidence believable and credible in that the only additional payment taken was that of £300.00 in January 2019.

4.5 Indeed, the Tribunal is prepared to accept all of Mr Clark's evidence however, based on his evidence the Tribunal concludes that the payment of £300.00 was a tenancy deposit within the meaning of Section 120(1) of the 2006 Act. Mr Clark was clear in that the obligation regarding the share of the cost of emptying the septic tank was agreed with the Applicant at the start of the tenancy agreement. Furthermore, the cost of this, and the repairs to the walls of the property, were not known in January 2019. Mr Clark also gave evidence that the payment was to cover any other bills which arose following the end of the tenancy agreement. It appears to the Tribunal that the payment of £300.00 was taken entirely for the purpose defined by the statute; to secure performance of the Applicant's obligation to make payment of her share of the cost of emptying the septic tank and to discharge any further liabilities that arose at the end of the agreement.

4.6 Mr Clark's evidence was that the timing of the payment meant that it was not considered to be a tenancy deposit. There is no requirement for a payment to be taken in advance of the tenancy commencing within Section 120(1) of the 2006 Act. There is, however, mention of any deposit requiring to be paid to a scheme within 30 working days of commencement of a tenancy within Regulation 3(1) of the 2011 Regulations. The Regulations do not specify any time limit for lodging a deposit which is taken by a landlord at a later date. The Tribunal does not consider that, in the absence of such provision, no such duty arises. If that were the case, a landlord could simply circumvent the 2011 Regulations by taking a deposit from a tenant at a later date. Rather, the Tribunal is prepared to infer that the time limit of 30 working days would apply from the date on which a deposit is paid, should this be after the commencement of the tenancy. In these circumstances, the Respondents are in breach of their duties.

4.7 Regulations 9 and 10 of the 2011 Regulations allow the Applicant to apply to the Tribunal who can make an order for payment of up to three times the deposit taken. In the present application, the Applicant requests that an order for repayment of the deposit is made. Rule 103 of the Rules does not allow for such an order, rather, the Applicant would require to make a separate application. The Tribunal can only consider what, if any, amount, the Respondents must pay to the Applicant as a consequence of their breach of the 2011 Regulations.

4.8 The Tribunal considers the sum of £450.00 to be appropriate in the circumstances. The Tribunal has taken into account the fact that a deposit was paid, was not lodged and then a portion was subsequently retained by the Respondents resulting in a dispute. The Applicant was deprived of the right to adjudication by a deposit scheme. The Tribunal has also taken account of the evidence of Mr Clark. In the Tribunal's opinion, the Respondents were of an honest belief that the payment they were taking was not a deposit however, such a naivety does not absolve the Respondents of their statutory duties. The Tribunal is also prepared to accept Mr Clark's evidence that the sum of £180.00 was returned to the Applicant. In the opinion of the Tribunal, these factors somewhat mitigate the breach of duty to the extent that a order for the maximum amount would not be 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.

A Houston

3 October 2019

Legal Member/Chair **Date**