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

Chamber Ref: FTS/HPC/PR/18/2372

Re: Property at 9 Wingate Place, Tillydrone, Aberdeen, AB24 2TD ("the Property")

Parties:

Miss Holly Bentley, Mr Dan Bentley, Mr Robert McAllister, 31 Belmont Gardens, Ashgrove Road, Aberdeen, AB25 3GA; Riverside Cottage, Eddleston, EH45 8QP; 31 Belmont Gardens, Ashgrove Road, Aberdeen, AB25 3GA ("the Applicant")

Mr Brian Davies, Ms Loretta Davies, 8 Meadow Place, Aberdeen, AB24 2SL ("the Respondent")

Tribunal Members:

Ewan Miller (Legal Member)

Decision

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

(a) The "Rent Rebate" referred to in the Lease of the Property fell within the definition of a "tenancy deposit" as such term is defined within s120 of the Housing (Scotland) Act 2006 and, therefore, the terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 applied.

(b) The Respondent is ordered to pay the sum of £100 to the Applicant in terms of Regulation 10 of the Regulations.

(c) The Tribunal wished to exercise its powers under Regulation 10(b)(i) of the Regulations and requires the Respondent to place the "Rent Rebate" in one of the approved tenancy deposit schemes in terms of the Regulations within 14 days of the date of service of this notice.

Background

1) The Respondent is the owner of the Property. The Respondent let the Property to the Applicant.

2) Following the end of the tenancy a dispute arose over monies that were classified in the lease by the Respondent as a "Rent Rebate". The Applicant viewed this as a deposit. The Applicant sought an order against the Respondent in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011, the Respondent having failed to lodge the "Rent Rebate"/deposit with an approved scheme as defined in the Regulations and to have returned the said "Rent Rebate"/deposit upon the termination of the tenancy between the parties.

3) On 27 December 2018, a legal member of the Tribunal, acting under delegated powers of the Chamber President determined that the matter should go before the Tribunal for a determination. Confirmation of this was sent to all parties on 14 January 2019 and a date set of 31 January 2019 for a Case Management Discussion ("CMD").

4) The Applicant subsequently indicated that they were busy with academic studies and wished to defer the date of the CMD to a later point. The Tribunal had before it full written submissions from both parties. On the basis that the letter of 14 January 2019 indicated that matters would only be deferred in exceptional circumstances and that the Tribunal had before it a full set of written submissions that addressed the pertinent issues, the Tribunal was satisfied that it was appropriate to continue with the CMD notwithstanding that the Applicant could not be present.

Case Management Discussion

5) A CMD by the Tribunal was held in Aberdeen on 31 January 2019. The Applicant was not present for the reasons set out above. Mr Davies of the Respondent was present and represented himself.

6) A large part of both parties written submissions focussed on deductions for cleaning and damage that the Respondent proposed to deduct from the Rent Rebate and the timings of the tenancy coming to an end. This was outwith the remit and jurisdiction of the Tribunal in relation to this particular application. The application before it sought a determination as to whether there had been a failure by the Respondent to lodge the Rent Rebate with one of the prescribed schemes as defined in the Regulations. Further, the Tribunal required to determine, if there was a failure, what the penalty to be imposed was. The Tribunal restricted itself to these two issues

Findings in Fact

7) The Tribunal found the following facts to be established:-

- The Respondent was the owner of the Property;
- The Respondent had granted a lease of the Property to the Applicant on 1 August 2017 at a rent of £1275 per calendar month;
- The lease specified that at the end of the lease, provided certain conditions were met there would be a Rent Rebate of £900;
- The lease came to an end on 31 July 2018, although the Applicant did not physically remove until late on 1 August 2018;
- The "Rent Rebate" as defined in the lease of the Property was a tenancy deposit within the meaning of s120 of the Housing (Scotland) Act 2006;
- The Respondent had not complied with the obligations contained within Regulation 3 of the Regulations (the requirement to place a tenancy deposit in a prescribed scheme)

Reasons for Decision

8) The Regulations were introduced to give protection to tenants against those landlords who took a deposit from a tenant and, at the end of the tenancy, either refused or delayed to hand the deposit back or otherwise made unlawful or unjustified deductions against the deposit. Because of the unequal power of the parties involved in a residential leasing transaction, the Regulations require landlords to place any deposit received in one of the independent schemes approved under the Regulations. At the end of the tenancy, in the event of there being a dispute as to the amount of deposit to be returned, then the approved schemes offer an independent adjudication process to determine any issues in dispute. Generally, these issues relate to either unpaid rental or deductions being made against the deposit for cleaning or to replace items that have become damaged during a tenancy.

9) The Regulations apply to any "tenancy deposit". Section 2 of the Regulations states that the term "tenancy deposit" has the meaning ascribed to it in s120(1) of the Housing (Scotland) Act 2006.

10) Section 120(1) states:-

"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 occupancy arrangement, or
(b) The discharge of any of the occupant's liabilities which so arise"

11) As stated above, if a tenancy deposit meeting the above definition exists then it requires to be placed in one of the approved schemes within 30 days of receipt by a landlord.

12) In this particular matter there was no dispute between the parties that no sums had been paid by the Respondent to one of the approved schemes.

13)The Respondents primary submission was that there was no deposit taken by him. Rather, in his submission, there existed a "Rent Rebate" that would be

repaid to tenants if (a) there were no rent arrears at the end of the tenancy and (b) the property was returned in a clean and tidy condition and there were no items broken or requiring repair outwith general fair wear and tear. The Applicant's submission was that the Rent Rebate was a deposit, and that they had always understood it to be such.

14) Attached to the lease given to the Applicant was an appendix referred to in the lease as "The Letter". The Letter was a relatively detailed document that set out:-

- the Respondents general expectations as to the condition the Property would be returned in;
- a list of cleaning and other tasks that tenants would require to undertake before termination of a tenancy and;
- A list of charges and fees that the Respondent would deduct from the Rent Rebate as well as an hourly rate for the Respondent for his time in addressing these issues.

15) The Lease stated that:-

"**Security deposit:** No security deposit is payable. Provided tenants are fully up to date with their rent and provided that the house is returned as described in "The Letter" at the end of this lease, then the landlord shall give a rent rebate to the tenants of £900. Should the house not be returned in the condition as described in The Letter, then the landlord shall still give the rebate but less any charges as set out in The Letter."

16) The Respondent's underlying submission was that the lease stated there was no deposit. It stated there was a Rent Rebate rather than a deposit. The Respondent was, therefore, not caught by the Regulations. The Respondent viewed the Rent Rebate as an incentive to encourage tenants to keep the property in good condition. It was, in his view, a retrospective discount of the rental charged.

17) The Tribunal was not of the view that simply calling a sum of money by a name other than ""deposit" was sufficient to exempt a party from the terms of the Regulations. A person might choose to call a cat a dog. However, if it still says "miaow" and prefers to sit by the fire than go for a walk then it is a cat!

18) The Tribunal was of the view that notwithstanding what the Respondent had called the £900 and irrespective of how he personally viewed it, the Tribunal required to assess the "Rent Rebate" against the definition set out in s120 of the 2006 Act. Was it a sum held as security for performance of the tenants obligations?

19) Since the introduction of the Regulations, landlords have introduced a myriad of clauses and wording to deal with sums that would previously have been deposits in order to try and remove themselves from the ambit of the Regulations. Despite this there is a paucity of case law on the definition contained in s120. Some of these new clauses are a blatant attempt to

subvert the Regulations whilst still, in practice, keeping control of deposit monies. Others will be a genuine attempt to remove a landlord from the ambit of the Regulations to avoid the time and perceived inconvenience of lodging deposits with an approved scheme.

20) The Tribunal considered the case of Cordiner –v- Al-Shaibany [B687/15 2015SCDUND51], being the only reported Scottish case the Tribunal was aware of. In this case Mr Al-Shaibany had taken payment of the first and the last months rent at the commencement of the tenant. Ms Cordiner, the tenant, had then complained at the end of the tenancy that the last months rental had, effectively, been a tenancy deposit and ought to have been lodged in a scheme. No deposit was defined in the lease.

21) Sheriff Drummond found in favour of Mr Al-Shaibany, finding that payment of the last months rent in advance was not, as required by s120, in security for the performance of any of Ms Cordiner's obligations. The payment was, as soon as made at the start of the lease, allocated to that final months obligation to pay rent. It was not available to be offset against other unpaid rental or used to cover other costs or losses incurred by Mr Al-Shaibany such as cleaning or repair costs (which did arise at the end of the lease). It was stated to be for a specific rental period.

22) In light of this decision, the Tribunal was of the view that in order for it to be satisfied that the Rent Rebate was a tenancy deposit as defined in s120 it would need to be satisfied that the sum was held for the general purpose of securing the performance of the tenants obligations and was not allocated to a specific eventuality such as a rent payment date.

23) The Tribunal came to the decision that it was held for the purpose of securing the performance of the tenants obligations and therefore met the definition set out in s120.

24) The Tribunal took account a number of factors in reaching this decision. Firstly, and in the Respondent's favour, there was no additional or separate payment of the £900 Rent Rebate that one might expect to see in a typical deposit arrangement. The rental was simply £1275 per calendar month. This then raised a question of how the Rent Rebate was created. Did it form the bulk of the first months rent? Was it paid in 12 equal monthly instalments as part of the rental? If a tenant defaulted on rental payments early on in the term was the Rent Rebate ever created? This chimed with the Respondent's submission that the Rent Rebate was simply an incentive to encourage tenants to keep his properties in good order and was paid retrospectively from sums he had received.

25) However, two primary factors persuaded the Tribunal that the Rent Rebate was a deposit. The first of these was an exchange between the parties on 15 September 2017. This related to the previous years lease of the Property which had been between the Respondent and two of the current Applicants. The Applicant had emailed the Respondent to clarify matters on the rental payments. The Respondent had previously stated the rental was £1300 a

month and the Applicant replied to say that it was in actual fact £1200 plus £75 deposit. The Respondent had replied to say "The rent, including what you call deposit is £1275, £75 per month of that is the deposit"

26) The Respondent submitted at the hearing that his use of the words "what you call deposit" showed he did not truly view it as a deposit, he was merely replicating the terminology of the Applicant to avoid any confusion. The Respondent had used the words "Rent Rebate" later on in the email, which the Respondent viewed as confirmation that it was not truly a deposit. However, even accepting that the Respondent may have viewed it genuinely as something else other than a deposit, the exchange showed that there was a genuine belief on the part of the Applicant that there was a deposit. It also showed, on the balance of probabilities, that the Rent Rebate was being created in equal monthly instalments and formed a part of the rent. Even though there was no breakdown of the monthly rental in the lease itself, the correspondence indicated that in practice the rental element was comprised of more than one part. The Tribunal took the view, on a very narrow and fine balance, that the Respondent had "priced" in to the rental an amount that would build up and comprise the Rent Rebate

27)The second primary factor was the position the Respondent found himself in at the end of the lease. Rightly or wrongly (and it was not within the jurisdiction of the Tribunal to determine this) the Respondent viewed that the Applicant was in breach of their obligations in terms of the lease and "The Letter". The Property had not been cleaned and repairs required to be carried out. He therefore took the view that he was entitled to utilise the Rent Rebate The Rent Rebate was held to secure the performance of those obligations which had been breached. This was the fundamental test that required to be satisfied for the Rent Rebate to be deemed to be a tenancy deposit and fall under the ambit of the Regulations.

28)The Tribunal also noted that the parties now appeared to be in the very position that the Regulations were created to put an end to. The Respondent confirmed that the Applicants had made all payments of rent. They were, therefore, entitled to receive the Rent Rebate unless they had breached other obligations. At the hearing the Respondent confirmed that he was planning on deducting £500 from the Rent Rebate. £300 for cleaning and £200 for general repairs. From the written submissions from the parties it was clear that this was disputed. The whole point of having the deposit scheme was so that landlords were not placed in a position of power by holding the deposit personally. The deposit was meant to be placed in an independent scheme where any disputes could be resolved by an independent adjudicator. The Applicant, by virtue of trying to utilise a different mechanism to hold funds at the end of the tenancy was able to determine himself the level of funds he wished to deduct and for what purpose. An aggrieved tenant would require to go to the Tribunal to recover funds rather than have the benefit of automatically having the dispute resolved through the deposit scheme independently. The Respondent also acknowledged that he still retained the full deposit despite accepting that £400 of the Rent Rebate was due to be returned. His explanation was that he had asked the Respondent to confirm

which parts of The Letter they felt that they had complied with but they had not responded to him as yet so he had retained the full funds.

29) Whilst the Tribunal found the Applicant to be sincere and credible, nonetheless by creating the Rent Rebate he had given himself the power to control the discussion about the return of the Rebate. Whilst the Tribunal was not suggesting nor did it believe there was any intent on the part of the Applicant to try and avoid paying back monies that were properly due, the legislation had been brought in specifically to prohibit this situation arising. This was a point the Tribunal could not ignore, particularly taking in to account the overriding objective requirement to provide for fairness that the Tribunal was under.

30) In summary, whilst the Respondent took the view that his Rent Rebate scheme was, in his words, to incentivise the performance of his tenants obligations under the lease, the Tribunal's view was that its practical effect and intent was to secure the performance of his tenants obligations. On that basis, the Rent Rebate fell under the definition of a tenancy deposit as defined in s120 and ought properly to have been placed in a prescribed scheme under Rule 3 of the Regulations.

31) Having determined that the Respondent was in breach of his obligation, the Tribunal required to determine what penalty should be imposed. In terms of Regulation 10(a) the Tribunal can order the Respondent to pay the Applicant an amount up to 3 times the amount of the tenancy deposit.

32) The Tribunal took note of the obiter comments of Sheriff Drummond in the Al-Shaibany case. Sheriff Drummond noted that had she found there to be a breach by Mr Al-Shaibany she would have sought to arrive at a penalty that was fair, proportionate and just in all the circumstances. She would not have viewed Mr Al-Shaibany's position as a case of him trying to deliberately frustrate a tenant or circumvent the law. Rather she would have viewed him as having formed a reasonable view of what was a narrow question of law for which there was no Scottish reported case offering clarification. On that basis she would have viewed his conduct at the very lowest end of the scale as a formal mark of non-compliance only. She indicated she would have imposed a penalty of £100.

33) The Tribunal found her remarks helpful and in accordance with the situation it found itself in. The Tribunal found Respondent to be sincere and credible. Whilst the Tribunal had found the Respondent to be in breach of the Regulations the Tribunal did not believe the Respondent had acted in a deliberately underhand fashion or that he was wilfully abusing the regulations. Rather he genuinely believed he had moved far enough away from a standard deposit situation to be outwith the scope of the regulations. There were no reported cases on a situation similar to the Respondent's procedure in his lease. On that basis, the Tribunal concurred with Sheriff Drummond's view and determined to impose a penalty of £100 as a formal mark of non-compliance only.

34) The Tribunal also turned its attention to the Rent Rebate/deposit of £900 that the Respondent had confirmed he still held. In terms of Rule 10(b)(i) of the Regulations the Tribunal may, as it considers appropriate in the circumstances of the application, order a landlord to pay the tenancy deposit to an approved scheme. The Tribunal did note that the tenancy had now ended. However, Rule 10 did not appear to preclude it exercising its discretion even at this late stage. On the basis that (a) the Tribunal had found that the Rent Rebate was a tenancy deposit and (b) there was clearly a dispute about what deductions were to be made then it was appropriate for the Tribunal to order the Applicant to pay the tenancy deposit to an approved scheme. This would put the parties back on an equal footing in relation to the dispute over the deductions sought by the Applicant. One or other of the parties could apply for the deposit to be released and any disputes over this could be resolved by the independent adjudicator of that scheme.

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

6/2/19

Legal Member/Chair **Date**