



**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**

Chamber Ref: FTS/HPC/PR/23/1990

Re: 6 Blenheim Place, Edinburgh EH7 5JH (“the Property”)

Parties:

Jack Sykes, 12 Chapel Lane, Benson, Oxfordshire OX10 6LU (“First Applicant”)

**Henry Crone, 90 Drayton Gardens, Priory Mansions, Flat 6, London SW10 9RG
 (“Second Applicant”)**

**George Tompkins, Pallingham Lock Farm, Toat Lane, Pulborough, West Sussex
RH20 1BX (“Third Applicant”)**

**Arthur Wills, Weedon Hill Farm, Farthingstone Road, Weedon, Northants NN7
4RP (“Fourth Applicant”)**

**Hugo Andrew, 14 Henderson Road, Wandsworth, London SW18 3RR (“Fifth
Applicant”)**

**Charles Sykes, 12 Chapel Lane, Benson, Oxfordshire OX10 6LU (“Applicant’s
Representative”)**

Judith Kennard, 109 Church Way, Iffley, Oxfordshire OX4 4EG (“Respondent”)

**Bannatyne Kirkwood France & Co, 16 Royal Exchange Square, Glasgow G1
3AG (“Respondent’s Representative”)**

Tribunal Members:

Joan Devine (Legal Member)

Frances Wood (Ordinary Member)

Decision :

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the Respondent should pay to the Applicant the sum
of £5,175.**

Background

1. The Applicant made an application in Form G dated 11 June 2023 ("Application") under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("Rules") stating that the Respondent had failed to timeously lodge a tenancy deposit in an appropriate scheme in breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations").
2. A Case Management Discussion ("CMD") took place on 14 September and 14 December 2023. Reference is made to the notes of the CMDs. A Hearing was fixed to take place on 3 April 2024.

Documents

3. The documents produced to the Tribunal by the Applicant were:
 - A private residential tenancy agreement ("PRT") between the Respondent as Landlord and the Applicants as Tenant dated 11 March 2022 and which commenced on 10 July 2022.
 - Written submission as to whether the PRT was a "relevant tenancy".
 - Screenshots of text messages between the Parties dated 8 and 9 February 2023.
 - Document dated 2 May 2023 headed "The Deposit" which stated that the Property was to be occupied as a holiday let in terms of schedule 1 paragraph 6 of the Private Housing (Tenancies)(Scotland) Act 2016 ("2016 Act").
 - Mandates from Henry Crone, George Tompkins, Arthur Wills and Hugo Andrew authorising the Applicant's Representative to act on their behalf.
 - Email exchanges with Safe Deposits Scotland which stated that they did not hold a deposit on the basis of the information provided.
 - Email from the Applicant's Representative stating that the tenancy ended in May 2023 and stating that the maximum award of compensation was sought.
4. The documents produced to the Tribunal by or on behalf of the Respondent were :

- A written submission from the Respondent lodged on 28 August 2023.
- A deposit certificate from Safe Deposits Scotland for the Property dated 28 September 2021 in respect of a tenant Alice Sitwell.
- A deposit certificate from Safe Deposits Scotland for the Property dated 30 June 2023 in respect of a tenant Joshua Beck.
- A written submission from the Respondent lodged on 1 September 2023 with list of documents annexed numbered 1 to 32.
- A written submission lodged by the Respondent's Representative on 25 October 2023.
- A written submission lodged by the Respondent's Representative on 12 December 2023.
- An inventory of productions lodged by the Respondent's Representative on 27 March 2024 containing items 1 – 7. Item 1 being a witness statement for the Respondent.

Hearing

5. A Hearing took place on 3 April 2024 at 121 George Street, Edinburgh. The Applicant's Representative was in attendance. None of the Applicants were in attendance. The Respondent was in attendance and was represented by Alexandra Wooley of the Applicant's Representative.
6. The Tribunal noted that none of the Applicants were in attendance and explained to Mr Sykes that created an evidential difficulty for him. Mr Sykes said he understood but each of the Applicants were engaged in exam preparation. Ms Wooley moved the Tribunal to dismiss the application in terms of rule 27(2)(b) as the Tribunal could not deal with the proceedings justly and fairly in the absence of the Applicants. The Tribunal noted that many of the relevant facts were agreed and that it was possible for the Tribunal to deal with an application in the absence of a party in terms of rule 29. The Tribunal refused the motion.
7. The Tribunal noted that a number of matters had been agreed at the CMDs and checked with the Parties that those issues remained a matter of agreement. The following was agreed :
 - the Respondent was a landlord for the purposes of the 2011 Regulations

- the Property was not occupied by the Applicants for the purposes of a holiday
 - the Applicants paid rent to the Respondent in respect of the Property
 - a deposit of £3450 was paid to the Respondent by the Applicants
 - the deposit was not lodged in an approved scheme
 - the tenancy ended in May 2023.
8. Mr Sykes told the Tribunal that the Applicants signed the PRT in March 2022 with the expectation that they would move into the Property in July 2022. He said the deposit was paid in March 2022. He said that the Applicants all moved into the Property in September 2022 and left in May 2023. He said that no formal notices were served to terminate the tenancy and that the deposit was returned by two payments on 9 and 12 June 2023. Mr Sykes said that all 5 of the Applicants plus Oliver Brookes paid rent for the period July 2022 to May 2023. The Tribunal asked Mr Sykes about the holiday letting agreements entered into. He said he believed they were entered into as the Respondent did not have a HMO licence. He said he had hoped the PRT overrode the holiday let agreements. The Tribunal asked Mr Sykes if his son, the First Applicant, occupied the Property only for short times between September 2022 and May 2023. Mr Sykes said that his son came home for Christmas and Easter but otherwise was a student full time at Edinburgh University and occupied the Property. He said his son was not “back and forth” during term time. Mr Sykes said that all of the Applicants were full time students at Edinburgh University during the period September 2022 to May 2023. The Tribunal noted that the start date in the PRT was July 2022 but emails lodged indicated that was brought forward to June 2022. Mr Sykes said that the start date was brought forward as the landlord wanted to let the Property for 12 months.
9. The Tribunal referred Mr Sykes to item 7 in the inventory of productions lodged by the Respondent’s Representative on 27 March 2023 which was an email from Mr Sykes to the Respondent dated 8 June 2023. He said he sent the email as the deposit had not been repaid and he wanted it repaid in full. He said it was subsequently repaid in full. The Tribunal noted the reference in the email to an application under rule 103 and asked Mr Sykes if he knew what sort of applications that rule covered. He said he thought rule 103 was about getting the deposit back. He said he had taken advice from City of Edinburgh Council Private Rented Sector Enforcement Team, Shelter and the CAB.

10. Ms Wooley invited the Tribunal to accept the witness statement of the Respondent lodged on 27 March 2024 as the Respondent's evidence in chief which the Tribunal did.
11. In response to questions put by the Tribunal the Respondent told the Tribunal that the date of the commencement of the Applicants tenancy was confused as the Applicants and Oliver Brookes ("Crone Group") had moved their belongings into the Property before the previous tenant ("Sitwell Group") had moved out. The Respondent said that she found this to be the situation when she attended the Property on 27 May 2022 to carry out the final inspection of the Property for the tenancy by the Sitwell Group which ended on 31 May 2022. She said she would normally carry out the final inspection, discuss any breakages, agree deposit deductions and then return the balance of the deposit held but she could not do that with the Sitwell Group as there were Crone Group belongings in the Property. She said that nobody from the Sitwell Group attended the final inspection on 27 May 2022 so she let herself in with her set of keys, and she was not aware of them ever returning to the Property after 27 May 2022. She said the Sitwell Group made their last rental payment in May 2022.
12. In response to questions put by the Tribunal the Respondent told the Tribunal that the Crone Group paid rent from 1 June 2022 but she told them they could not take entry to the Property over the summer. She said they acquired keys for the Property from the Sitwell Group. The Tribunal referred the Respondent to an email from her to Henry Crone dated 19 May 2022 which formed part of Respondent document 10. The email referred to a lease being attached with a start date of 1 June 2022. The Respondent said the Crone Group agreed to bring the date of entry forward to 1 June 2022. She said the Crone Group did not sign the new lease with the start date of 1 June 2022 but they paid rent from that date. She said she spoke to the Sitwell Group and the Crone Group and concluded the situation was chaotic. She said she allowed the goods left in the Property to remain but put an "end date" on that of August 2022 as nobody could attend until then to clear the Property. She said the Crone Group cleared the Property of goods on 25 August 2022.
13. The Tribunal referred the Respondent to the Holiday Letting Agreements lodged which formed the Respondent's documents 13, 21, 23, 26 and 27. The Tribunal noted the first Holiday Letting Agreement (document 13) was between the Respondent and the Applicants plus Oliver Brookes and was for period 1 June 2022 to 1 September 2022. The Tribunal asked who prepared the document. The Respondent said that she did. She said that all goods (belonging to both the Sitwell Group and the Crone Group) were removed from

the Property on 24 and 25 August 2022. She said at that time she was in “two minds” about letting the Property to the Crone Group.

14. The Tribunal referred the Respondent to the second Holiday Letting Agreement (document 21) which was between the Respondent on the one part and Henry Crone and Oliver Brookes on the other and was for period 15 September 2022 to 15 October 2022. The rent was £3450. The Respondent said that Mrs Brookes provided this document. The Tribunal noted clause 9 which provided that the tenants would use the subjects as a private holiday residence for a maximum of 2 tenants and 4 guests. The Tribunal noted the rent was £3450 for the one month duration. The Tribunal asked why only two tenants were included in the agreement. The Respondent could not offer an explanation but said the rent was the rent and it did not matter to her how it was covered.
15. The Tribunal asked the Respondent for how long she had been letting the Property. She said she had let the Property since 2007. She said she normally let the Property for the period September to the following May but it was not unusual for the tenancy to be brought to an end early. The Tribunal asked how often that had happened. She said that once a tenancy was brought to an end in April. She said that although she had a mortgage on the property she was not concerned about repayments as she had sold other property.
16. The Tribunal referred the Respondent to the third Holiday Letting Agreement (document 23) which was between the Respondent on the one part and Arthur Wills and Hugo Andrew on the other and was for period 15 October 2022 to 15 November 2022. The rent was £3450. The Respondent said that she prepared the document. She said Henry Crone told her which member of the Crone Group should be noted as tenant. She said that was the case for all of the Holiday Letting Agreements.
17. The Tribunal asked the Respondent about rent received each month for the Property noting that the bank statements lodged by the Respondent (Respondent's document 28) showed 6 payments of £575 being received by her each month. She said that she received 6 rental payments each month from the Crone Group.
18. The Tribunal noted that the Holiday Letting Agreements covering the period September 2022 to May 2023 named two tenants each of whom were members of the Crone Group and allowed for four unnamed guests and asked the Respondent whether it concerned her that four unknown individuals could be occupying the Property at any one time. She said it did cause her concern. The Tribunal asked the Respondent if the six members of the Crone Group occupied

that Property in the period September 2022 to May 2023. She said she did not know. She said she did not know if the boys “came and went” during the period. The Tribunal expressed the view that it was surprising that each member of the Crone Group paid rent of £575 per month in the period September 2022 to May 2023 but did not occupy the Property. The Respondent said she did not believe they all occupied the Property during that period. She said that at the end of the tenancy in May 2023 there were six sets of keys left in the Property. She said she nevertheless changed the locks.

19. The Tribunal asked the Respondent if she was aware of the short term let regime that came into effect in October 2022. She said that she was not. The Tribunal asked the Respondent if the Property had been relet. She said it had been relet to students. The Tribunal asked if the tenancy agreement was a private residential tenancy. The Respondent said that it was.
20. Mr Sykes said that he had no questions for the Respondent.
21. Ms Wooley asked the Respondent what she believed to be the main purpose of letting the Property in June 2022. The Respondent said it was to store belongings.
22. Ms Wooley asked the Respondent if the members of the Crone Group lived in the Property full time in the period September 2022 to May 2023. The Respondent said they did not although they did stay in the Property when they were in Edinburgh. She said she did not believe they were there all the time. She said there were gaps at Christmas and when members of the group had internships. She said it was her strong impression that they were not there all the time.

Submissions

23. Mr Sykes said that securing a tenancy for the Applicants had been very stressful. He said that the PRT had been in place from March 2022 and the Applicants thought that was something they could fall back on. He said that the HMO for the Property expired in April 2021 and that should have “rung alarm bells” and he should have consulted the City of Edinburgh Council website. He said he would like to see justice done and he did not want this sham arrangement to happen to anyone else. The month to month holiday lets had been a device to make it seem that only two tenants were living in the property.
24. Ms Wooley summarised her position by firstly inviting the Tribunal to dismiss the Application as the 2011 Regulations did not apply. Secondly she sought dismissal as the Applicants were personally barred from making the

Application. Thirdly she submitted that if the Tribunal was not prepared to dismiss and determined there had been a breach of the Regulations then any payment order made should be minimal. She then expanded on each point.

25. Ms Wooley submitted that the leases were excluded from the 2011 Regulations as they were not a PRT but a series of short term lets. She referred to her submission lodged on 23 December 2023. Ms Wooley said that for a lease to be a PRT the property must be occupied by the tenant as their only or principal home. She referred to *Roxburgh District Council v Colins* 1991 SLT (Sh Ct) 49 which referred to a tenant requiring to have a real, tangible and substantial connection with the house to establish it as their principal home during the relevant period. She submitted that the Applicants had failed to demonstrate a real tangible connection with the Property.
26. Ms Wooley submitted that the Respondent was credible and reliable. She said the Respondent acknowledged receiving the deposit and having taken advice at the time. She submitted that the arrangement could never be a PRT as the Property was not the principal home of the Applicants. Ms Wooley submitted that calling the arrangement a holiday let did not mean the Property was let for a holiday. She referred to page 3 of her submission which contained her submission on short term lets.
27. Ms Wooley submitted that the Applicants were personally barred from making the Application. She referred to McBryde on Contract at paragraph 25-08. She referred to production 7 in the inventory lodged on 27 March 2024 which was the email from the Applicant's Representative dated 8 June 2023. She said that the email included a clear threat that if the deposit was not repaid in full further action would be taken. She said the Respondent repaid the deposit in full and by doing so lost the ability to retain any part of it in respect of any damage. She referred to paragraph 18 of the Respondent's witness statement.
28. Ms Wooley submitted that if the Tribunal determined that the 2011 Regulations did apply and that there had been a breach, then the circumstances did not require a high penalty. She said the Respondent had been open and honest. She may have been misguided but she had tried to do the right thing. There had been no prejudice to the Applicants. Ms Wooley referred to *Rollet v Mackie* UTS/AP/19/0020 at paragraphs 13 and 14 and submitted there were no aggravating factors in this case. She also referred to *Wood v Johnston* where the penalty was £50 and submitted that the Tribunal had a very wide discretion.
29. Ms Wooley again invited the Tribunal to dismiss the Application as the 2011 Regulations did not apply and as the Applicants were personally barred from

making the Application. She submitted that if a penalty was to be awarded it should be minimal. Finally she submitted that if the arrangement had been a PRT it ceased to be one in September 2022 when it became a short term let. Any application under the 2011 Regulations required to be made within 3 months of the end of the tenancy. As the PRT ended in September 2022, the Application was time barred.

Findings in Fact

The Tribunal made the following findings in fact:

1. On 9 March 2022 the Respondent sent to the Applicants a private residential tenancy agreement (“PRT”) in terms of which the Respondent was landlord and the Applicants were tenant of the Property and which commenced on 10 July 2022.
2. The Applicants signed the PRT on 11 March 2022.
3. On 19 May 2022 the Respondent sent to Henry Crone an amended PRT with a start date of 1 June 2022 and asked him to confirm all tenants will be happy for the previous signatures to be used.
4. The Applicants paid to the Respondent a deposit of £3450 on 29 March 2022.
5. The deposit was not paid to the administrator of an approved scheme in compliance with the 2011 Regulations.
6. The deposit was returned to the Applicants by two payments from the Respondent on 9 and 12 June 2023.
7. The Respondent and the Applicants plus Oliver Brookes entered into a Holiday Letting Agreement in respect of the Property for the period 1 June 2022 to 1 September 2022 at a rent of £3450 per month.
8. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Henry Crone and Oliver Brookes for the period 15 September 2022 to 15 October 2022 at a rent of £3450 per month. The Agreement provided that the property was to be used as a private holiday residence for a maximum of 2 tenants and 4 guests.

9. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Arthur Wills and Hugo Andrew for the period 15 October 2022 to 15 November 2022 at a rent of £3450 per month.
10. The Respondent entered into a Holiday Letting Agreement in respect of the Property with George Tomkinson and Jack Sykes for the period 15 November 2022 to 15 December 2022 at a rent of £3450 per month.
11. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Henry Crone and Oliver Brookes for the period 15 December 2022 to 15 January 2023 at a rent of £3450 per month.
12. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Hugo Andrew and Arthur Wills for the period the 15 January 2023 to 15 February 2023 at a rent of £3450 per month.
13. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Jack Sykes and George Tompkins for the period 15 February 2023 to 15 March 2023 at a rent of £3450 per month.
14. The Respondent entered into a Holiday Letting Agreement in respect of the Property with Henry Crone and Oliver Brookes for the period 15 March 2023 to 15 April 2023 at a rent of £3450 per month.
15. The Respondent and the Applicants plus Oliver Brookes entered into a Holiday Letting Agreement in respect of the Property for the period 15 April 2023 to 20 May 2023 at a rent of £3450 per month plus an additional 6 days bringing the total rent to £4083.29 for the period.
16. The Applicants each paid to the Respondent rent of £575 per month in the period June 2022 to May 2023.
17. The Applicants occupied the Property in the period 15 September 2022 to 20 May 2023.
18. The Applicants did not occupy the Property for the purposes of a holiday.
19. In the period 15 September 2022 to 20 May 2023 the Applicants occupied the Property as their principal home.

Findings in Fact and Law

1. The Respondent is a landlord for the purposes of the 2011 Regulations.

2. The Applicants were a tenant for the purposes of the 2011 Regulations for the period 15 September 2022 to 20 May 2023.
3. The contractual arrangement between the Applicants and the Respondent in terms of which the Applicants occupied the Property was a private residential tenancy in terms of the 2016 Act.
4. The tenancy in terms of which the Applicants occupied the Property is not excluded from the 2011 Regulations by the terms of section 83(6) of the 2004 Act.
5. The Respondent failed to comply with her obligations in terms of regulation 3 of the 2011 Regulations.
6. The Applicants are not personally barred from making the Application.

Relevant Legislation

30. Regulation 2 of the 2011 Regulations defines "landlord" as having the meaning conferred by the Housing (Scotland) Act 2006 which is "*any person who lets a house under a tenancy including their successors in title*"
31. Regulation 3 of the 2011 Regulations provides *inter alia* :

"*(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.....

(3) A "relevant tenancy" for the purposes of paragraphs (1) 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 Antisocial Behaviour etc (Scotland) Act 2004 ("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."

32. Section 83(6) (d) of the 2004 Act states :

"(d) the house is being used for holiday purposes"

33. Section 83(6) (n) of the 2004 Act states :

"(n) the house is being used for a short term let as defined in article 3 of the Civic Government (Scotland) Act 1982 (Licensing of short-term Lets) Order 2022 ("2022 Order").

34. The applicable parts of Article 3 of the 2022 Order states :

"short-term let" means the use of residential accommodation provided by a host in the course of business to a guest, where all of the following criteria are met –

(a) The guest does not use the accommodation as their only or principal home,

(b) The short-term let is entered into for commercial consideration,

(f) the short-term let does not constitute an excluded tenancy (see schedule 1)

35. Paragraph 2 of schedule 1 of the 2022 Order sets out the list of excluded tenancies which include a private residential tenancy (within the meaning of the 2016 Act).

36. Section 83(8) of the 2004 Act states :

"(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.*

"unconnected person", in relation to a relevant person, means a person who is not a member of the family or the relevant person.

37. Regulation 9 of the 2011 Regulations provides:

"(i) A Tenant who has paid a tenancy deposit may apply to the First Tier Tribunal for an order under Regulation 10 where the Landlord did not comply with any duty in Regulation 3 in respect of that tenancy deposit.

(ii) An Application under paragraph 1 must be made no later than three months after the tenancy has ended."

38. Regulation 10 of the 2011 Regulations provides *inter alia* :

"If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal –

- (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit"*

Reasons for the Decision

39. Having regard to the legislation set out above, it is clear that the Respondent is a landlord and the Applicants were a tenant for the purposes of the 2011 Regulations. The Respondent accepts that she received a deposit of £3450 on 29 March 2022 and that she did not at any time lodge it in an approved scheme. The question for the Tribunal is whether the contractual arrangement between the Parties is excluded from the 2011 Regulations by virtue of Section 83(6) (d) or (n) of the 2004 Act which excludes from the 2011 Regulations arrangements where the house is being used for holiday purposes or the house is being used

for a short term let. The Respondent accepted that the Applicants did not use the Property for holiday purposes. Section 83(6)(d) therefore does not need to be considered further.

40. The Respondent's Representative submitted that the arrangement between the Applicants and the Respondent were a series of short term lets and therefore excluded from the 2011 Regulations. The Respondent's evidence was that she was unaware of the short term lets regime that came into being in October 2022. In her witness statement the Respondent said that she set up the first Holiday Let Agreement for the period 1 June to 31 August 2022 to cover the Crone Group storing possessions in the Property. All of the Crone Group were listed as tenants. She then goes on to say that in July 2022 she discovered that the HMO licence for the Property had expired. She said she thought she could not rent the Property on a PRT unless it had an HMO licence. She said she agreed to let the Property to the Crone Group on a longer lease once the HMO licence was approved. She said that she submitted the application for the HMO licence on 4 November 2022 and it was granted on 13 June 2023.
41. The Respondent's evidence was that she had let the Property to students since 2007 and that she let the Property for the period September to the following May although on one occasion the tenancy was terminated in April. She told the Tribunal that the tenant who took up occupation after the Crone Group did so on a PRT. The Respondent had lodged a deposit certificate for Alice Sitwell dated 28 September 2021 and one for Joshua Beck dated 30 June 2023. The Respondent therefore accepted that the 2011 Regulations applied in respect of the lettings before and after the letting to the Crone Group.
42. The Respondent's Representative submitted that the arrangement between the Applicants and the Respondent was a short term let in terms of section 83(6)(n) of the 2004 Act. She submitted that the arrangement could not be a PRT as the Property was not occupied by the Applicants as their only or principal home. In support of this submission the Respondent told the Tribunal that she did not know if the six members of the Crone Group occupied the Property in the period September 2022 to May 2023. She said she did not know if the boys "came and went" during the period. The Respondent said she did not believe they all occupied the Property during that period. In her witness statement the Respondent said that Mr Crone and Mr Brookes asked her to set up a new short term let for the Property with them as named tenants and they indicated "*that other members of the Crone Group might occasionally stay in the Property but merely as guests.*" The subsequent Holiday Letting Agreements were between the Respondent and a variety of members of the Crone Group. The Applicants did not attend the Hearing and therefore could not tell the Tribunal for what

periods each of them resided in the Property. It is however worthy of note that in an email from Henry Crone to the Respondent dated 30 May 2022 (part of document 12 for the Respondent) he states *“As you said over the phone, just confirming that this short term tenancy agreement will not hinder or change our agreement to take the flat full time in September”* The Applicant’s Representative did tell the Tribunal that his son returned to the family home at Christmas and Easter. The Respondent had told the Tribunal that each member of the Crone Group paid rent of £575 per month in the months June 2022 to May 2023. The Tribunal considered the Respondent’s evidence that the Applicants each only occasionally stayed in the Property to lack credibility. The Tribunal did not find this aspect of the Respondent’s evidence to be plausible. It was inconsistent with the Applicants each paying rent to the Respondent of £575 per month for a period of 12 months. It was inconsistent with the email from Henry Crone dated 30 May 2022. It was inconsistent with the oral evidence given by the Respondent who said she did not know when the Tribunal asked if the six members of the Crone Group occupied the Property in the period September 2022 to May 2023. The Respondent changed her position when Ms Wooley asked her if the members of the Crone Group lived in the Property full time in the period September 2022 to May 2023. In reply to the question the Respondent said that they did not although she said they did stay in the Property when they were in Edinburgh. She went on to say that she did not believe they were there all the time and there were gaps at Christmas and when members of the group had internships. In response to questions from the Tribunal the Respondent said that she did not have the Property under surveillance and she did not visit the Property to ascertain who was living in the Property at any point. She concluded by saying however that it was her strong impression that the Applicants were not there all the time. The inconsistencies in the Respondent’s evidence indicates that it is not reliable. The Tribunal considered that the probability was that the Applicants occupied the Property during the period September 2022 to May 2023.

43. The Respondent’s evidence was that the letting before the letting to the Crone Group and the letting after the letting to the Crone Group were on a PRT and the deposit taken was lodged in an approved scheme in accordance with the 2011 Regulations. A PRT was sent to the Crone Group in March 2022 and signed by them. Why then were Holiday Letting Agreements with only two members of the Crone Group noted as tenant subsequently put in place ? The Respondent’s evidence was that the Holiday Letting Agreements were used for the Crone Group rather than a PRT because she was “in two minds” about letting to the Crone Group. In her witness statement the Respondent said that she never considered the PRT signed by the Crone Group to be operative partly

because the HMO had expired which she believed was required in order to lease for a longer period. She goes on to say that she was “blindsided” by the discovery of possessions of the Crone Group in the Property when she inspected on 27 May 2022 and considered she had to act quickly to regulate the use of the Property until the PRT was supposed to start. In Henry Crone’s email to the Respondent dated 30 May 2022 timed at 11.46 he refers to agreement that the members of the Crone Group would sign a short term lease and he states “*As you said over the phone, just confirming that this short term tenancy agreement will not hinder or change our agreement to take the flat full time in September*”. The timing of events is relevant here. The Respondent’s evidence was that she became aware that the HMO had expired in July 2022 which was after the Respondent sought to regulate matters with the first Holiday Letting Agreement which was signed on 30 and 31 May 2022 and in which the Applicants and Oliver Brookes were all named as tenants. In her witness statement the Respondent said that she did not wish to “turn her back” on the Crone Group and intended to let the Property to them on a longer lease once the HMO licence was approved which she believed would not take long. She goes on to say that she continued to grant one month holiday let agreements because she believed that the HMO licence would be granted shortly, the intention being that once the HMO licence was sorted, she could look at a full lease for the Property. Taking this evidence together it is apparent that the reason the Respondent put in place a series of one month Holiday Letting Agreements with only 2 members of the Crone Group was her concern about the lack of a HMO licence.

44. The Respondent’s Representative invited the Tribunal to find that the arrangements between the Applicants and the Respondent were a short term let. A short term let requires that the accommodation is not used as the tenants only or principal home. The Respondent’s Representative relied upon *Roxburgh District Council v Colins* 1991 SLT (Sh Ct) 49. In that case the Court required to consider whether the property in question had been the only or principal home of the Defender throughout the period of 12 months immediately preceding the tenant’s death for the purposes of section 52 of the Housing (Scotland) Act 1987. The court decided that the property had been the Defender’s principal home during the relevant period. The “relevant period” for the purposes of this case is the period 15 September 2022 to 20 May 2023. As noted above, the Tribunal does not accept the evidence of the Respondent that the various members of the Crone Group occupied the Property only occasionally. If that evidence is rejected, what is left in support of the submission is the written submission lodged by the Respondent’s Representative where it is stated that accommodation occupied by a student

only during term time can never be regarded as their only or principal home. The Tribunal disagrees with that proposition. The Tribunal considered that the contractual arrangement between the Applicants and the Respondent was not a short term let in terms of section 83(6)(n) of the 2004 Act.

45. Having concluded that the contractual arrangement between the Applicants and the Respondent was not a short term let, what then was it? The Tribunal considers that the tenancy was one under which the Property was let to the Applicants, who are individuals, as a separate dwelling and that the Applicants occupied the Property as their only or principal home during the period 15 September 2022 to 20 May 2023. The tenancy was not one that is excluded from being a private residential tenancy in terms of schedule 1 to the 2016 Act. In these circumstances the Tribunal determines that the contractual arrangement between the Applicants and the Respondent was a private residential tenancy in terms of the 2016 Act to which the 2011 Regulations applied.
46. The Respondent's Representative invited the Tribunal to determine that the Applicants were personally barred from making this application. The personal bar submission was based upon an email from Charlie Sykes to the Respondent dated 8 June 2023. The formulation of personal bar set out in *Gatty v MacLaine* 1921 SC (HL)1 is well known and is that personal bar arises where A by his words or conduct justified B in believing that a certain state of facts exists and B has acted upon such belief to his prejudice. The Respondent lodged a number of emails between herself and the Crone Group. Aside from 3 instances where the email exchange was with Arthur Wills all of the other exchanges were between the Respondent and Henry Crone. There was a lengthy exchange between the Respondent and Henry Crone regarding damaged items on 31 May 2023. Mr Crone proposed an amount that the Respondent should retain from the deposit. The Respondent sent a further email to Henry Crone on 6 June 2023. Mr Sykes then sends an email to the Respondent on 8 June 2023 in which he states he is acting for and on behalf of the Applicants and Oliver Brookes. Against a background of all communications being with Henry Crone it is surprising that the Respondent did not question the basis on which Mr Sykes was representing all 6 members of the Crone Group. In her statement the Respondent says that she was surprised by the email and that it contradicted her discussion with the Crone Group regarding the deposit. In the email of 8 June 2023 Mr Sykes asks for the deposit to be repaid in full and states that if that does not happen "*I will submit Form G to the Housing and Property Chamber First Tier Tribunal for Scotland indicating that you are in breach of rule 103 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.*" There are two difficulties with this statement. The

first is that as Mr Sykes was not a tenant of the Respondent he had no locus to make any application to the Tribunal against the Respondent. The second difficulty is that there is no rule 103 in the 2011 Regulations. Mr Sykes told the Tribunal that he was referring to an application to have the deposit returned in full. In her witness statement the Respondent does not specify what sort of application she understood was being referred to. Taking all of this evidence together the test for personal bar is not met. The email from Mr Sykes dated 8 June does not justify the Respondent in believing that, in exchange for payment of the deposit in full, the Applicants and Oliver Brookes gave up the right to make an application to the Tribunal under regulation 9 of the 2011 Regulations.

47. Having determined that the 2011 Regulations applied to the tenancy the Respondent was obliged to comply with the Regulations. It was a matter of admission that she did not do so. Regulation 10 of the 2011 Regulations states that if satisfied that the landlord did not comply with the duty in Regulation 3 to pay a deposit to the scheme administrator of an approved scheme within the required timescales, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.

48. The amount to be awarded is a matter for the discretion of the Tribunal having regard to the factual matrix of the case before it. The Tribunal considered the comments of Sheriff Ross in *Rollett v Mackie* UTS/AP/19/0020. At para 13 and 14 he considered the assessment of the level of penalty and said:

"[13] 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 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.

[14] 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."

49. The Tribunal noted that the Respondent was an experienced landlord. She had been letting the Property since 2007. She complied with the 2011 Regulations

regarding the letting before and the letting after the letting to the Crone Group. She was not ignorant of the 2011 Regulations. The explanation given for the failure to comply with the 2011 Regulations was that she understood that the 2011 Regulations did not apply to the tenancy. The paperwork used to document the tenancy was called a Holiday Letting Agreement which provided that the Property was to be used as a private holiday residence and yet the Respondent admitted that the Applicants did not occupy for the purposes of a holiday. The Respondent later suggested that the tenancy was a short term let, a regime which she knew nothing about. The denial of fault increases culpability. There was no suggestion of repeated breaches against other tenants or fraudulent intention. There was no actual loss caused to the Applicants as the deposit was returned in full within a relatively short time of the tenancy ending. Had the deposit not been returned voluntarily, the Applicants would have been deprived of the opportunity to approach the scheme administrator regarding the return of the deposit and the purpose of the 2011 Regulations would have been defeated. The amount of the deposit was however high which is an aggravating factor.

50. Having regard to the relevant factors the Tribunal determined that the sanction should be £5,175 (1.5 times the deposit) in the particular facts and circumstances of this case.

Decision

The Tribunal granted an Order for payment of £5,175 in terms of Regulation 10(a) of the 2011 Regulations.

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.

**Joan Devine
Legal Member**

Date: 22 April 2024