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 Scheme (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/24/2900

Re: Property at Bolthole, 130 High Street, Aberlour, AB38 9NY ("the Property")

Parties:

Mr Peter Cousins, 32 Allachy Terrace, Aberlour ("the Applicant")

Mrs Stella Taylor, 2 Allt A Bhainne Distillery Cottages, Glenrinnes, AB55 4DB ("the Respondent")

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to make an order in the sum of One thousand four hundred and fifty pounds (£1450) Sterling

Background

1 The Applicant applied to the Tribunal seeking an order for payment as a result of the Respondent's failure to lodge their deposit in an approved tenancy deposit scheme under Rule 103 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 ("the Rules") and Regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 ("the 2011 Regulations").

2 By Notice of Acceptance of Application dated 18th July 2024 a Legal Member of the Tribunal with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. The application was therefore referred to a Case Management Discussion ("CMD") to take place by teleconference on 26 November 2024 at 2pm. Both parties were written to

with the date of the CMD in accordance with Rule 17(2) of the Rules and were invited to make written representations.

3 On 21st October 2024 sheriff officers served the letter with notification of the CMD date and application paperwork upon the Respondent.

4 On 29 October 2024 the Tribunal received an email from the Respondent advising that the property was not a residential property and had been let for holiday purposes on various national and international platforms. It was registered as such on non domestic rates. The lease reflected that. The Tribunal responded to acknowledge the Respondent's submissions and to confirm that the CMD would proceed as scheduled. On 25 November 2024 the Tribunal received an email from the Respondent confirming that she would not be attending the CMD. The Tribunal responded by email that same day to request clarification as to whether the Respondent was seeking a postponement of the CMD. The Tribunal reminded the Respondent that if she did not attend the CMD the Tribunal could proceed to make a decision in her absence. The Respondent did not reply.

5 On 25 November 2024 the Tribunal received an email from the Applicant's representative, Anne Cousins, confirming that she would attend the CMD on the Applicant's behalf.

The CMD

6 The CMD was held on 27th March 2024 by teleconference. The Applicant was represented by Mrs Cousins. The Respondent was not in attendance. The Tribunal noted that she had been given notification of the CMD under Rule 17(2) of the Rules and had been given the opportunity to participate in the CMD, and make written representations. She was clearly aware of the CMD having regard to the terms of her email of 25 November 2024 and had been made aware that the Tribunal could proceed to make a decision if she did not attend. The Tribunal was therefore satisfied that it could proceed in the Respondent's absence.

7 The Tribunal explained the purpose of the CMD and asked for submissions from Mrs Cousins on the application before it.

8 Mrs Cousins explained that she and her husband, the Applicant, had moved to Morayshire from the Scottish Borders for her husband's work. They had found the property on Gumtree. They had gotten in touch with the Respondent and had agreed to a viewing. The property was suitable for their needs. At the time they still owned a house in Peebles which was up for sale, and they needed somewhere to rent pending the sale. It was agreed that they would rent the property from October and the situation would be reviewed in

February or March. Mrs Cousins denied that she and her husband had been told it was a holiday let. The only reference to a holiday let was on the lease agreement. Mrs Cousins advised that she and her husband had not rented property before and this was all new to them, therefore they didn't think to question it.

9 Mrs Cousins explained that she and her husband had paid a deposit of £750 to the Respondent. They had asked the Respondent on a few occasions to confirm where the deposit was being held. They had thought that the Respondent would pay the deposit into a deposit scheme. In March, the Respondent had emailed them advising that she needed the property back to let for holiday purposes, and gave them four weeks to vacate. At that point Mrs Cousins and her husband had queried the position regarding the deposit, asking the Respondent was they were due to receive back from her. Mrs Cousins pointed out that they had asked this question on a number of occasions and the Respondent had never made reference to the property being a holiday let. She could have done so at any point. Mrs Cousins explained that she had taken advice from the Citizens Advice Bureau who stated that the position was unclear regarding the nature of the tenancy.

10 Mrs Cousins confirmed that the invoices for the rent were still being sent to their home in Peebles. However that property was up for sale. It was no longer their principal home. They were not returning to that property and would be based in Morayshire on a permanent basis. They were therefore treating the property as their principal home during the period of their occupation. That was their full time residence. Mrs Cousins confirmed that they had left the property in April, after a period of six months. She referred to an email that had been submitted with the application which was from the Respondent. In the email the Respondent stated that she needed to resume operating the property as a holiday let in order to make more money as she had lost her job.

11 Mrs Cousins advised that the Respondent had never paid the deposit back and had ignored the Applicant's requests. The Respondent had initially said that she would repay the deposit upon receipt of the keys however that never happened. The Applicant had left money in the electricity as well, having paid upfront. The Respondent had then said that she would work out what was owed for the utility bills before repaying the remainder of the deposit. No payment had been received.

12 Mrs Cousins advised that she understood the Respondent had a portfolio of rental properties, with two properties at Bolthole. The other property had been rented in a similar manner to a local worker. He had rented it from August 2023 and the lease had been terminated in April 2024. Mrs Cousins understood that legal action had been taken against the Respondent in relation to that tenancy. The deposit had also been retained by the

Respondent in that case. Mrs Cousins understood from speaking with locals that this was a pattern of behaviour on the part of the Respondent, renting the properties on a long term basis then taking them back at short notice for holiday lets. The situation had caused the Applicant and Mrs Cousins significant stress and they were seeking a penalty to deter the Respondent from exhibiting similar behaviour in future.

Relevant Law

13 The relevant law is contained with the Housing (Scotland) Act 2006 and the Tenancy Deposit Scheme (Scotland) Regulations 2011. Section 120 of the 2006 Act provides as follows:-

"120 Tenancy deposits: preliminary

(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.

(2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

14 The 2011 Regulations provide 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."

"9.—(1) 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.

(2) An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended."

"10. 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; and

(b)may, as the First-tier Tribunal considers appropriate in the circumstances of the application, order the landlord to—

(i)pay the tenancy deposit to an approved scheme; or

(ii)provide the tenant with the information required under regulation 42."

15 The following provisions of the Antisocial Behaviour etc (Scotland) Act 2004 are also relevant to this application:-

83 Application for registration

"(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—

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

(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.

(7)The Scottish Ministers may by order modify subsection (6).

(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."

16 Article 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 ("the 2022 Order") provides as follows:-

***"3.** In this Order—*

"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,

(c) the guest is not — (i) an immediate family member of the host, (ii) sharing the accommodation with the host for the principal purpose of advancing the

guest's education as part of an arrangement made or approved by a school, college, or further or higher educational institution, or

(iii) an owner or part-owner of the accommodation,

(d) the accommodation is not provided for the principal purpose of facilitating the provision of work or services by the guest to the host or to another member of the host's household,

(e) the accommodation is not excluded accommodation (see schedule 1), and

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

"short-term let licence" means a licence granted for the activity designated in article 4."

Reasons for Decision

17 The Tribunal determined the application having regard to the application paperwork, the written representations from the parties and the verbal submissions at the CMD. The Tribunal considered it could make a decision on the application in the absence of the Respondent. She had been given the opportunity to participate in the proceedings but had failed to attend the CMD, despite having been advised that a decision could be made in her absence.

18 The Tribunal was satisfied that, whilst the lease had referred to a holiday let, the Applicant was not occupying the property for holiday purposes. It was clear from the terms of the correspondence between the parties that this was not the nature of the arrangement. It may be the case that the Respondent has further evidence to sustain an argument that the property is a short term let. However she had not submitted anything to the Tribunal in this regard other than a brief written representation, and she had not attended, nor arranged for representation, at the CMD. The Tribunal was therefore reliant upon the Applicant's evidence as presented by Mrs Cousins.

19 The Applicant's position is that the property was being treated as their principal home during the period of their occupation. Their property in Peebles was up for sale. They had no intention of returning there. The Applicant had obtained employment in the local area and had moved with the intention of residing permanently in Morayshire. The Tribunal therefore accepted, in the absence of any evidence to the contrary, that the property was their principal home at that particular point in time, and therefore the nature of the arrangement between the parties did not meet the definition of a short term let under Article 2 of the 2022 Order. On that basis the Tribunal was satisfied

that the tenancy was a relevant tenancy for the purpose of the 2011 Regulations.

20 The 2011 Regulations specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy and provide information to the tenant regarding the deposit. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy.

21 The Tribunal was satisfied that the Applicant had paid the sum of £725 to the Respondent as a tenancy deposit based on the application paperwork and the submissions from Mrs Cousins at the CMD. The Tribunal further accepted that the Respondent did not pay the £725 into an approved tenancy deposit scheme. The Applicant had provided confirmation from each of the three approved schemes that there was no deposit lodged in his name with any of them.

22 Regulation 10 states that in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondent had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case. The application of the sanction must seek to act as a penalty to landlords and ensure compliance with their statutory duties in relation to tenancy deposits.

23 The Tribunal had regard to the decision of Sheriff Cruickshank in *Ahmed v Russell (UTS/AP/22/0021)* which provides helpful guidance on the assessment of an appropriate sanction. In doing so the Tribunal must identify the relevant factors, both aggravating and mitigating, and apply weight to same in reaching its decision. The Tribunal is then entitled to assess a fair and proportionate sanction to be anywhere between £1 and three times the sum of the deposit, which in this case is £2175. As per Sheriff Cruickshank at paragraph 40 of his decision in *Ahmed:*

"*The sanction which is imposed is to mark the gravity of the breach which has occurred. The purpose of the sanction is not to compensate the tenant. The level of sanction should reflect the level of overall culpability in each case measured against the nature and extent of the breach of the 2011 Regulations."*

24 In this case, the deposit had remained unprotected for the entirety of the tenancy, and the Respondent had latterly failed to return the deposit to the Applicant, despite giving a commitment that she would do so. The Applicant

therefore had no option but to submit this application to the Tribunal. The Tribunal further noted that the Respondent had another rental property which appeared from Mrs Cousins' submissions to have been managed in a similar manner, with long term lets being terminated at short notice to maximise the Respondent's income. The Tribunal considered these both to be relevant aggravating factors to which significant weight could be applied.

25 In terms of mitigating factors, the Tribunal took into account the Respondent's written representations, noting her belief that this was a holiday let and therefore the 2011 Regulations did not apply. This provided an explanation as to why she had not lodged the deposit in a tenancy deposit scheme. However it was clear that this was not a let for holiday purposes. She had acknowledged that in her email to the Applicant terminating the tenancy.

26 Accordingly, having regard to the requirement to proceed in a manner that is fair, proportionate and just having regard to the seriousness of the breach, the Tribunal considered that the level of culpability was serious in this case, but that it did not quite merit an award at the highest end of the scale given the Respondent's apparent mistaken belief about the nature of the arrangement. Having weighed the aggravating and mitigating factors, the Tribunal therefore concluded that an award of £1450 would be reasonable in the particular circumstances of this case.

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.

Ruth O'Hare

3 December 2024

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Legal Member/Chair **Date**