



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/24/0496

Re: Property at Hamewith, Cluny, Sauchen, Inverurie, AB51 7RR (“the Property”)

Parties:

Mr Malcolm Johnstone, Ms Jackie Forsyth, Vale View Forbes, Alford, Aberdeenshire, AB33 8QL (“the Applicant”)

Mr Cosmo Linzee Gordon, Cluny Castle Estate Office, Cluny Castle, Sauchen, Inverurie, AB51 7RT (“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 Eight hundred pounds (£800) Sterling

Background

- 1 By application to the Tribunal the Applicants sought an order under rule 103 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 (“the Rules”) against the RAC Linzee Gordon Grandchildren’s Trust and the Respondent. In summary the Applicants sought a payment order against the Respondents as a result of their failure to lodge the Applicant’s tenancy deposit with an approved tenancy deposit scheme.
- 2 A legal member of the Tribunal with delegated powers from the Chamber President determined that there were no grounds upon which to reject the application. The application was therefore referred to a Case Management Discussion (“CMD”). Notification of the CMD was given to the parties.

- 3 On 3 July 2024 the Tribunal received written representations from the Respondent. The Respondent explained that the property had originally been let to the Applicants by the RAC Linzee Gordon Grandchildren's Trust. The Trust had employed an agent to act on their behalf. The Trust had since been disbanded and the trustees were no longer available. The Respondent confirmed that there were no bank accounts remaining under the name of the Trust and his efforts to date in procuring the return of the funds had been unsuccessful.

The Case Management Discussions

- 4 The first CMD took place on 19 July 2024 by teleconference. The Applicants were both in attendance. The Respondent, Mr Cosmo Gordon, was also present.
- 5 The tribunal explained the purpose of the Case Management Discussion and the legal test applicable to the application. It noted the terms of the Respondent's written representations, namely that the Trust had let the property to the Respondents in 2005. The Trust had since been dissolved. The Respondent did not know whether there were any funds left and did not have access to the accounts in any event.
- 6 The tribunal clarified with the Respondent that ownership of the property, with the tenancy in place, was transferred to him around 2013 when he was aged 18. He did not know whether the Applicants had been advised of the change in ownership. Mr Johnstone confirmed that they had not been formally advised. There was a question as to the ownership of the property which had come to light following the termination of the tenancy. The Respondent confirmed that he was the current owner and landlord of the property. He did not deny that. The only query was the disparity between the Trust and the associated bank accounts. The signatories and bank accounts were disconnected from his position as landlord. There was a certain element of connection in terms of legal responsibility however there were other beneficiaries of the trust. The bank accounts were kept separate from him.
- 7 The Respondent advised that he had not sought legal advice on the question of liability. He would not however like to think that the duties under the 2011 Regulations could be applied retrospectively. The responsibility lay with the Trust and it was the Respondent's view that he had no liability under the 2011 Regulations. The Respondent queried whether a landlord could be liable if they had taken on the tenancy. The tribunal advised that it could not provide the Respondent with advice, however it would adjourn the CMD to a further date to give the Respondent the opportunity to take advice and make further submissions on the question of liability.
- 8 The tribunal determined to adjourn the CMD to 10 September 2024. Parties were advised of the adjourned date. The Respondent was directed to take independent legal advice and make further written representations on the question of liability. The Applicants were directed to provide the Respondent

with their bank details to enable the refund of advanced rent to be made and full details of the account held by the Trust that they paid rent to be provided to the Respondent.

- 9 No written representations were received from the Respondent following the CMD.
- 10 The second CMD took place on 10 September 2024. The Applicants were both in attendance. The tribunal attempted to telephone the Respondent however an employee of his advised that he was out of the office and unable to join the call. The tribunal therefore determined to adjourn the CMD to provide the Respondent with a further opportunity to put forward his defence to the application. The tribunal advised that if the Respondent did not attend the next CMD it would be likely that the application would be determined in his absence. A direction was issued requiring the Respondent to submit a written note of his defence no later than 14 days prior to the CMD. Notification of the CMD was given to the parties.
- 11 On 11 November 2024 the Respondent emailed the tribunal requesting a postponement of the CMD on the basis that he would be on paternity leave. The Applicants objected to the postponement on the basis of the financial hardship and inconvenience caused by the Respondent's conduct that had resulted in previous adjournments. They wished matters to be brought to a prompt conclusion.
- 12 On 26 November 2024 the tribunal wrote to parties refusing the postponement request. The tribunal noted that there had been two previous CMDs and the Applicants were entitled to proceed with the application. The Respondent was advised that he could arrange for a representative to attend the CMD on his behalf if he was unable to do so.
- 13 On 26 November 2024 the Respondent emailed the tribunal noting the decision refusing the postponement request. He advised that he would be taking legal advice. He explained that there was no legally binding, nor active financial or inheritable connection between the Trust and his current business. He suggested that the tribunal could make contact with the Trust's previous representative.
- 14 The third CMD took place on 10 December 2024. The Applicants were both in attendance. The Respondent was not present, nor represented. The tribunal noted the terms of his written representations and therefore determined to proceed in his absence. The tribunal heard submissions from the Applicants on the question of liability and various issues they had experienced during the tenancy regarding disrepair at the property. They confirmed that they had yet to receive their deposit back from the Respondent. The Applicants also sought an award of expenses against the Respondent, citing costs that they had incurred in attending the tribunal proceedings on three separate occasions.

Findings in Fact

- 15 The Applicants entered into a tenancy agreement regarding the property with the RAC Linzee Gordons Grandchildrens Trust which commenced on 22 July 2005.
- 16 The Applicants paid a tenancy deposit to the Trust in the sum of £800. The Trust issued an invoice for said payment on 22 July 2005.
- 17 The deposit was not lodged with a tenancy deposit scheme following the introduction of the 2011 Regulations.
- 18 The ownership of the property transferred to the Respondent on 6 November 2013 when the Respondent was aged 18.
- 19 The Trust has now been dissolved.
- 20 The Respondent is the current landlord of the property under the terms of the aforementioned tenancy agreement.
- 21 The tenancy between the parties terminated on 14 November 2023.
- 22 The Respondent did not return the deposit to the Applicants. The Respondent has been unable to locate the deposit.
- 23 The terms of the said tenancy agreement require the Respondent to return the deposit to the Applicants following termination of the tenancy.

Relevant Legislation

- 24 The relevant legislation is contained with the Tenancy Deposit Scheme (Scotland) Regulations 2011:-

“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 sheriff 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.”

Reasons for Decision

- 25 The tribunal was satisfied that it could reach a decision on the application following the case management discussions based on the application paperwork and the representations from the parties. The Respondent had been given several opportunities to fully set out his defence to the application but had not done so. In accordance with the tribunal’s overriding objective to avoid delay insofar as compatible with the proper consideration of the issues the tribunal determined that it should proceed to a decision on the matter.
- 26 The tribunal was satisfied that the Respondent was latterly the Applicant’s landlord under the terms of the tenancy agreement signed by the Applicants and the Trust in 2005. That matter was not in dispute. The tribunal had to consider therefore whether the duties under the 2011 Regulations applied to the Respondent, having regard to the fact that the deposit had been paid to the Trust at the commencement of the tenancy. The tribunal noted that the Trust had been dissolved back in 2013.
- 27 The tribunal considered the main objectives of the 2011 Regulations to reduce the number of unfairly withheld deposits, ensure that deposits are safeguarded throughout the duration of the tenancy, and to ensure that deposits are returned quickly and fairly, particularly where there is a dispute. Regulation 3 requires a landlord “*who has received a tenancy deposit in connection with a relevant tenancy*” to pay the deposit to an approved tenancy deposit scheme. In

this case, that duty came into effect three months after the first approved scheme became operational in July 2012.

- 28 It is accepted that the tenancy deposit was paid to the Trust, and not the Respondent. Accordingly the primary question for the tribunal to consider was whether the Respondent had in fact “received” the deposit.
- 29 The Respondent’s position was that he took ownership of the property at the age of 18. He was not aware of the details of the Trust’s financial accounts at the time, and he did not know where the deposit was held. He did not seek to dispute that a deposit had been paid by the Applicants, but he did not believe he was responsible for compliance with the 2011 Regulations.
- 30 The tribunal considered that the meaning of “received” had to be viewed in the wider context of the 2011 Regulations, and taking into account the objectives of the legislation. There was no dispute that a deposit had been paid by the Applicants. Furthermore the Respondent had an obligation under the terms of the tenancy agreement to return a deposit at the end of the tenancy. Accordingly that obligation now fell upon him as the previous landlord’s successor in title. One of the benefits of the tenancy deposit scheme is the opportunity to resolve any disputes regarding the deposit through the independent dispute resolution mechanism. In the absence of the deposit having been placed in a scheme, this would not have been available to the Applicants, with the Respondent being able to unilaterally make decisions about any deductions required.
- 31 The tribunal therefore concluded that, based on the evidence before it, it could accept that the deposit had been received by the Respondent when he took ownership of the property in 2013, having previously been paid to the Trust. This was confirmed by the invoice that the Applicants had submitted with the application. Ideally a level of diligence would have been undertaken at that point on the Respondent’s part when taking on the responsibility of landlord but due to his young age at the time of transfer that does not appear to have been done. The tribunal considered that this interpretation was in line with the purpose of the 2011 Regulations, protecting tenant’s deposits by ensuring they have a remedy at the end of the tenancy against the landlord if required. The Respondent was now standing in the shoes of the Trust, with the same duties and responsibilities.
- 32 Accordingly having concluded that a deposit had been received by the Respondent and not paid into a tenancy deposit scheme, the tribunal found that regulation 3 had been breached. The tribunal therefore considered what level of sanction would be appropriate in the particular circumstances of this case which required the tribunal to apply weight to the relevant aggravating and mitigating factors. In terms of regulation 10 the tribunal must order the landlord to pay an amount not exceeding three times the amount of the tenancy deposit.
- 33 The tribunal took into account the fact that the deposit had remained unprotected for the entirety of the tenancy term. The Applicants had been put to

the inconvenience of having to submit an application to the tribunal to secure its return, in addition to the present application. It was of some concern to the tribunal that the deposit could not be located. Again, the 2011 Regulations were aimed at preventing situations such as these. The tribunal also considered the submissions the Applicants had made regarding previous issues with disrepair at the property.

- 34 However the tribunal did consider there was a significant mitigating factor in this case as put forward by the Respondent. He was only 18 when he took ownership of the property. The tribunal therefore accepted that he may not have been in a position to fully accept his responsibilities as a landlord, and was likely unaware of the duties in relation to tenancy deposits. However, he had now been the landlord of the property for approximately ten years. He had discussed potential deductions from the deposit in an email to the Applicants at the termination of the tenancy. It appeared he may still be unclear about his responsibilities regarding tenancy deposits which was a cause for concern.
- 35 Having weighed the aggravating and mitigating factors in this case the tribunal did not believe given the unusual circumstances of this tenancy that an award at the higher end of the scale was merited. The tribunal considered a fair and proportionate sanction having regard to the above factors to be £800.
- 36 The Applicants had sought expenses given the inconvenience and cost in attending the three CMDs. The test for awarding expenses is a high bar to meet. The tribunal must be satisfied that a party has acted in a way that caused unnecessary or unreasonable expenses to the other party through their conduct during the case. It should be noted that the tribunal process has generally been designed to be “cost free” and the power to make an award of expenses is one which is designed to be used in exceptional cases rather than as the norm.
- 37 The tribunal was not persuaded that the test for an award of expenses had been met in this case. Whilst it was true that the CMD had been adjourned on two occasions, this was not wholly down to any conduct on the Respondent’s part. The tribunal accepted that he had failed to attend the CMD in September without any reasonable explanation as to why but did not think that merited an exception being made in this case. The tribunal therefore refused to make an award of expenses under Rule 40.

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

24 January 2025

Legal Member/Chair

Date