Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the 2011 Regulations) and Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 (the 2017 Rules)

Chamber Ref: FTS/HPC/PR/24/5276

Re: Property at Flat 2, 112 St Andrews Drive, Glasgow, G41 4RB (the Property)

Parties:

Ms Kristen and Mr Andrew Bennie, Flat 2, 256 Darnley Stret, Glasgow, G41 2JA (the Applicants)

Mr David Wagner, Flat 1, 112 St Andrews Drive, Glasgow and Mr Christopher Wagner, Esk House, Bishops Park, Thorntonhall, Glasgow (the Respondents)

Mr Christopher Wagner, Esk House, Bishops Park, Thorntonhall, Glasgow (the First Respondent's Representative)

Tribunal Member:

Ms. Susanne L. M. Tanner K.C., Legal Member and Chair

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (the tribunal): (i) determined that the Respondents did not comply with the duty in Regulation 3 of the 2011 Regulations to pay the Applicants' deposit into an approved scheme and to provide the tenant with the information required under Regulation 42; (ii) it must order the Respondents to pay the Applicants an amount not exceeding three times the amount of the tenancy deposit in terms of Regulation 10 of the 2011 Regulations; and (iii) made an order requiring the Respondents to pay to the Applicants the sum of ONE THOUSAND EIGHT HUNDRED POUNDS (£1800.00) Sterling

Procedural background

1. On 15 November 2024, the Applicants made an Application to the tribunal against the First Respondent in terms of Rule 103 of the 2017 Rules and Regulation 9 of the 2011 Regulations, namely an application for an order for payment where the landlord has failed to carry out duties in relation to a tenancy deposit (the Application).

2. The Applicants attached to the Application:
   2.1. Paper apart
   2.2. Copy tenancy agreement; and
   2.3. Copy Notice to Quit.

3. On 19 November 2024, the Application was considered by a legal member acting under the delegated powers of the President and further information was requested from the Applicants.

4. On 21 November 2024, the Applicants lodged an amended Form G and additional information.

5. On 22 November 2024, the Application (as amended) was accepted for determination by the tribunal.

6. A Case Management Discussion (CMD) teleconference was fixed for 9 May 2025 at 1000h by teleconference and parties were notified of the date, time and details of the CMD, which both parties were required to attend. Parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the application. Parties were advised that if they did not attend the CMD, this would not stop a decision or order from being made by the tribunal if the tribunal considered that it has sufficient information before it to do so and the procedure has been fair. The First Respondent was invited to submit any written representations he wished by 22 March 2025. The Application paperwork and notification of the hearing was served on the Respondent by Sheriff Officers.

7. On 18 February 2025, the First Respondent lodged written submissions and evidence.

8. On 3 April 2025, the First Respondent lodged redacted bank statements, with consent from the account holder.

9. On 14 April 2025, the Applicants lodged written submissions and evidence.

Case Management Discussion (CMD) – 9 May 2025, 1000h – by teleconference

10. Both Applicants attended the teleconference.

11. The First Respondent attended the teleconference. He was represented by his father, Mr Christopher Wagner.

12. The tribunal chair explained the nature and purpose of the CMD and both parties indicated that they understood.

Applicants' motion to amend to add a second Respondent

13. The Applicants moved to amend the Application to add a second Respondent, Mr Christopher Wagner. They said that they had raised the action against Mr David Wagner because he had been the registered proprietor of the Property since 3 April 2022 (although they said that they were never formally notified about the change in ownership and did not find out until the Notice to Quit was served in 2024). They said that they had proceeded on the basis that there was an assignation of the tenancy and Mr David Wagner was the ultimate recipient of the deposit following that assignation. However, they dealt with his father Mr Christopher Wagner, as landlord, throughout their tenancy from 17 June 2011 until it ended on 31 August 2024. They said that Mr Chrstopher Wagner has been involved in all the correspondence, including after the Notice to Quit was served.

14. Mr Christopher Wagner (in his capacity as representative of his son, David Wagner, the First Respondent) said that there is no opposition to the Application being amended to add him as a second Respondent, as he was the landlord; and he agreed for the CMD to continue today. He did not request an adjournment, or further time.

15. The chair allowed the amendment of the Application to add the Second Respondent. The Second Respondent has seen all the case papers since the Application paperwork was served and he has been involved in preparing written submissions and evidence which have been submitted via the First Respondent. He is acting as the Representative of the Second Respondent and had prepared to appear as representative of the First Respondent at the CMD. He did not say that any further time would be required as a result of being added as a Respondent as well as a Representative. The chair decided that in all the circumstances it was in line with the overriding objective of the tribunal for the CMD to proceed today against both Respondents, without the need to adjourn.

The Applicant's submissions

16. The Applicants stated that the tenancy start date was 17 June 2011 and the end date was 31 August 2024. They said that the rent was originally £925 per month and that it increased to £1050 per month, which was notified on 24 January 2022 by email from the Second Respondent, Mr Christopher Wagner.

17. The tenancy deposit of £1200 was paid by the Applicants to the Second Respondent around the time of the start of the tenancy in June 2011.

18. The tenancy deposit was not protected until 16 August 2024 when it was paid into a tenancy deposit protection scheme.

19. The full deposit was returned to the Applicants on 13 February 2025, following an adjudication process in the tenancy deposit scheme.

20. The Applicants stated that their deposit was not protected for over 12 years, from the date the 2011 Regulations came into force on 2 July 2012 until 16 August 2024.

21. The Applicants now understand, as a result of the evidence lodged by the Respondents, that the deposit was not transferred into the name of Mr Christopher Wagner. It was transferred into an account with the Second Respondent's wife, Mrs Pamela Jane Wagner, with whom they had no contractual relationship.

22. In the Application the Applicants sought a payment order for three times the tenancy deposit of £1,200.00, namely £3,600.00. They confirmed at the CMD that they maintained that position following return of their deposit in full. The Applicants submitted that if there had been any dispute (prior to protection) it would not have been protected. The Applicants referred to the purpose of the legislation, which they said is to impose a penalty on the landlord and promote compliance with the legislation. They submitted that there are two aggravating factors that they would like the tribunal to consider, namely the length of time for which the deposit was unprotected and the fact that it was held in the bank account of a third party.

Respondents' submissions

23. Mr Christopher Wagner, the Second Respondent and representative of the First Respondent said that it was not disputed that the deposit was not kept in a tenancy deposit protection scheme from 2 July 2012 (the date that the Regulations came into force) until 31 August 2024 (the end of the tenancy).

24. Mr Christopher Wagner said that this was their first rental property at the time that the tenancy began in 2011. They built the flats St Andrews Drive as a development.

There were five flats. They were completed and they were not able to sell two of them. The Second Respondent ended up having to buy the two flats in order to clear lending on them. That was the only reason that the Second Respondent rented two flats at St Andrews Drive. The Bennies rented one and the other was rented to someone else. The Second Respondent then sold the other flat and in April 2022 they sold the Property that the Bennies were in to their son David (the First Respondent).

25. The Second Respondent self-managed the Property (and the other rental property) from the start of the tenancy until the end of the tenancy, including the period after the sale to the First Respondent in April 2022.

26. The Second Respondent was not aware of the 2011 Regulations coming into force on 2 July 2012.

27. The Second Respondent said that he knew that they had a duty to protect the Bennies' deposit. They set up an individual account (in the name of Mrs Pamela Wagner, the Second Respondent's wife and First Respondent's mother). He said that it was a non-trading account and that the Bennies money was isolated. He said that they appreciate that it was not done in the strictest sense of the law. He submitted that their deposit was never at threat. He accepts that their deposit was not lodged in a statutory scheme. He said that they are completely at fault for that.

28. The Second Respondent said that they did notify the Bennies in writing of the change of ownership on 24 January 2022. Two days later Kirsten (the First Applicant) replied acknowledging that change of ownership. He said that he remained as landlord and understood that any obligations would fall on him as the landlord. He thinks he has been responsible and fair throughout the Bennies' tenancy.

29. The Second Respondent said that on 16 August 2024 they moved the deposit into a safe deposit scheme. That occurred as a result of the Bennies making them aware that the deposit was to come back to them and highlighting to the Second Respondent that the funds should have been in a safe deposit scheme.

30. The Second Respondent apologised for not doing so. He said that he appreciates that they had a responsibility to protect the Bennies' deposit.

31. The Second Respondent submitted the following in mitigation, with reference to his written submissions and evidence.

    31.1. The Bennies paid a deposit before deposit protection became mandatory but that said they should have known about that coming into force.

31.2. He said that the Applicants got their deposit back in full after the adjudication process in the statutory scheme.

31.3. They (the Respondents) are very responsible business people and understand their responsibilities to protect monies. They like to think they have been extremely fair. They thought they were dealing with a couple of professionals. The only issue they had was replacement of a washing machine and tumble drier.

31.4. They were completely naïve. The Respondents did not carry out regular inspections or an inventory and pictures when they moved in. They are not 'professional' landlords.

31.5. The Bennies moved into a property that was in a show flat condition. When they left the Property it was filthy and in a state of disrepair and the Respondents did many thousands of pounds of work.

31.6. When it went to arbitration, they lost the £1200.00 deposit. As a result the Respondents feel desperately aggrieved, considering that they have had their deposit back in full. He finds it incredible that they are requesting more money from the Respondents. He understands that they had a responsibility as landlords but they feel that they are the ones wronged.

31.7. They took legal and accountancy and advice when the Property was transferred to the First Respondent, in terms of CGT and such like. There was no discussion about the deposit being held. That was never a thought for them.

31.8. They felt that in their opinion that the Bennies' deposit was protected in a completely separate and non-trading account.

32. In closing his submissions, the First Respondent said that he has not looked at cases as to whether this should be at the lower, middle or upper end of the scale. He said that he expects the tribunal to be fair in deciding what amount to award. He said that if the tribunal wants to award the full three times punishment on them, then maybe the Bennies will do the decent thing and allow Respondents to pay it to charity rather than them.

Other discussion and adjournment for deliberation

33. In relation to the final point made about the payment order, the Chair told both parties that the tribunal's jurisdiction in terms of the 2011 Regulations only allows the tribunal to make a payment order by the Respondents in favour of the Applicants. It is a matter for the Applicants what they do with the funds once received.

34. The tribunal adjourned to consider its decision.

Findings in Fact

35. The First Respondent built the Property as part of a development.

36. The First Respondent was unable to sell the Property and another in the development and required to purchase them to release lending.

37. The First Respondent decided to let the Property and one other.

38. The First Respondent self-managed the letting and management of the Property.

39. The Applicants entered into a tenancy for the Property with the First Respondent which started on 17 June 2011.

40. The Applicants paid the Second Respondent a tenancy deposit of £1200.00.

41. The Second Respondent lodged the Applicants' tenancy deposit in an account in the name of his wife, which was set up only for the purpose of holding the deposit.

42. The Property was sold by the Second Respondent to the First Respondent on or about 3 April 2022.

43. The First Respondent gave the Second Respondent authority to continue as the landlord of the Property.

44. The tenancy deposit funds remained in the Second Respondent's wife's / First Respondent's mother's account until 16 August 2024, when they were paid into an approved tenancy deposit protection scheme.

45. The Applicants' tenancy deposit was unprotected for a period of around 12 years from 2 July 2012 until 16 August 2024.

46. Following the conclusion of the tenancy, the Respondents made a claim against the tenancy deposit through the deposit protection scheme.

47. The Applicants opposed the proposed deduction and the dispute went to adjudication within the deposit protection scheme.

48. The Applicants' full deposit was returned to them in February 2025.

49. The Respondents have acknowledged the failure to lodge the deposit in a tenancy deposit protection scheme and apologise.

50. The failure to lodge the deposit in an approved scheme between 2 July 2012 and 16 August 2024 was not intentional on the part of the Second Respondent.

Findings in fact and Law

51. The 2011 Regulations came into force on 2 July 2012, after the tenancy deposit had been paid by the Applicants to the Second Respondent.

52. The Applicants' tenancy deposit should have been lodged with a deposit protection scheme within 30 working days of the Regulations coming into force on 2 July 2012.

53. The application to the tribunal was made on 15 November 2024, within three months of the end of the tenancy, as required by the 2011 Regulations.

Discussion

54. The material facts were not in dispute and the Respondents admitted the failure to comply with Regulation 3 of the 2011 Regulations. The remaining submissions at the CMD related to factors which the Applicants submitted should be considered as aggravating factors and the Respondents submitted should be considered as mitigating factors in relation to the tribunal's discretionary decision about the amount of the order to be made in terms of Regulation 10 of the 2011 Regulations.

55. The tribunal took account of the parties' written and oral submissions and the evidence lodged by both parties. The tribunal had regard to Upper Tribunal authorities in similar cases, in particular *Rollett v Mackie [2019] UT 45* and *Ahmed v Russell [2023] UT 7*.

56. In *Rollett*, above, Sheriff Ross said [at para 9] that:

'Each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a "serious" breach will vary from case to case – it is the factual matrix, not the description, which is relevant. Comparison with other cases is therefore of minimal assistance in the present case. The general principles of the law apply and these include that for a discretionary decision to be overturned it must be one which no reasonable tribunal could make.'

57. And further [at para 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 fact and tends to lessen culpability'.

58. In *Ahmed*, above, Sheriff Cruickshank outlined the purpose and policy objectives of the Regulations [at para. 19] and referred to Sheriff Ross's *'helpful summary' Rollett*, above [at para. 29], stating:

'Furthermore, in Rollett, Sheriff Ross considered that in assessing the level of sanction the question was one of culpability. When it came to the level of sanction the question was one of degree and provided examples of the factors which could lessen or increase the level of culpability' [at para. 30].

59. In the present case, the tribunal took the approach of establishing the facts and then considering aggravating and mitigating factors to determine culpability of the Respondents and decide on the appropriate level of sanction.

60. In making its assessment, the tribunal took into account that the Second Respondent was the landlord throughout the relevant period from the coming into force of the 2011 Regulations to the end of the tenancy; and that the First Respondent was the proprietor of the Property from on or around 3 April 2022, giving authority to the Second Respondent to continue as landlord. The CMD was approached on the basis that the parties were jointly and severally liable for the breach, albeit that the First Respondent had no legal liability for the period that the deposit was unprotected before 3 April 2022.

61. The tribunal considers the following to be aggravating factors:

61.1. The Applicants' deposit was unprotected for a period of 12 years and one month, from the coming into force of the 2011 Regulations on 2 July 2012 until the end of the tenancy. That period spans the transfer of ownership to the First Respondent on or about 3 April 2022, after which time the Second Respondent continued as the self-managing landlord with the authority of the First Respondent;

61.2. The Applicants' deposit was held in the account of a third party with whom they had no contractual relationship.

62. The tribunal considers the following to be mitigating factors:

62.1. The tenancy deposit was paid into an approved tenancy deposit scheme on 16 August 2024, prior to the end of the tenancy. The dispute which followed thereafter was dealt with through that scheme, which is the one of the primary purposes of such schemes. Indeed, the Applicants received return of their full deposit in February 2025;

62.2. The breach was not intentional. The deposit was paid to the Second Respondent prior to the coming into force of the 2011 Regulations. He was a first time landlord at the time that the deposit was taken and at the time the 2011 Regulations came into force some months later. However, the tribunal considers that the passage of time reduces the effect of that mitigation as he could and should have become aware of the Regulations during his management of the Property over the following years, both during his ownership and after transfer of ownership to the First Respondent, when he continued to manage the tenancy. The First Respondent delegated responsibility for tenancy matters to the Second Respondent;

62.3. The deposit was held in a separate nominated bank account throughout the period, as evidenced by the production of bank statements of Mrs Wagner. However, the tribunal considers the fact that this was in an account in the name of a third party significantly lessens that mitigation as it would have complicated any dispute which may have arisen had the tenancy ended during that period, prior to the protection of the deposit.

63. For the reasons outlined, the tribunal considered that the breach was in the middle of the scale of seriousness and decided to make an order for payment by the Respondents jointly and severally to the Applicants of the sum of £1800.00, which is one and a half times the tenancy deposit which was paid. That sum was considered by the tribunal to be reasonable in all the circumstances.

64. The tribunal told parties' its decision and reasons orally at the CMD and explained that a written decision with statement of reasons would be produced. Both parties indicated that they understood the tribunal's decision.

Permission to Appeal

65. **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.**

9 May 2025

Ms. Susanne L M Tanner K.C.
Legal Member/Chair