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 Schemes (Scotland) Regulations 2011/176 and under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/21/2469

Re: Property at 1 Holylee Farm Cottages, Walkerburn, EH43 6BD ("the Property")

Parties:

Mr Mark McLeod, 2/2 Hart Street, Edinburgh, EH1 3RN as executor of the late Hugh Collins, formerly residing at 1 Holylee Farm Cottages, Walkerburn, EH43 6BD ("the Applicant")

Sir David Thomson, Holylee House, Walkerburn, EH43 6BD ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

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

Background

1. This is an application by the Applicant for an order for payment where landlord has not complied with the obligations regarding payment of a deposit into an approved scheme or provision of prescribed information under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* in terms of rule 103 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Procedure Rules"). The tenancy in question was an Assured Tenancy of the Property by the Respondent to the late Hugh Collins along with Caroline McNairn commencing on 1 May 2005. The Tenancy, which latterly was of Mr Collins alone, came to an end with the passing of Mr Collins on 5 August 2021. The Applicant is the sole executor of the late Mr Collins.

2. The application was dated 11 October 2021 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £800 was due in terms of the Tenancy, paid to the Respondent by the late Mr Collins, but not paid into an approved scheme until on or about 28 September 2021 (ie after the death of Mr Collins and the end of the Tenancy). The application further relied on a continued lack of provision of the prescribed information by the Respondent to the Applicant. The application sought the maximum payment of three times the deposit, which would be £2,400.

The Case Management Discussion

3. On 19 November 2021 at 11:30, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Applicant and the Respondent both personally.

4. The Applicant confirmed that he insisted on his application. There had been significant further documentation lodged by the Respondent since the lodging of the application, and the Applicant had lodged some submissions in response. Between the application, further documentation, and further submissions at the CMD, I was provided with fulsome submissions and both parties confirmed during the course of the CMD that they sought a decision made at the CMD rather than a continuation to a Hearing. I was satisfied to consider matters in this way.

5. The Applicant's position was that, subsequent to Mr Collin's passing, he had corresponded with the Respondent for two months regarding the whereabouts of the deposit, and eventually had a solicitor write. It was only the solicitor on behalf of the estate wrote to the Respondent was the deposit lodged with Safe Deposit Scotland, but the prescribed information was never provided.

6. The Respondent's position on the lodging of the deposit was that he did so because "I thought it better be done" and it was not necessarily prompted by the letter from the solicitor. This begged the question as to why it was not lodged in 2012 when it should have been. On this, the Respondent had provided a single letter by him to his solicitors dated 20 August 2012 where he appeared to respond to a letter from them about the commencement of the 2011 Regulations. In the letter he said to his solicitors that he had "decided to stop taking deposits but to ask prospective tenant to pay 3 months rent in advance with the extra rent used to meet the rent obligations at the end of the lease". The Respondent did not claim to have received any legal advice in response to this proposal, and did not provide any evidence of having sought legal advice on the specific issue with this Tenancy (of seeking to alter a pre-existing deposit provision to be one of advance rent). He accepted that he had not sought to agree any variation of the deposit provision with Mr Collins in 2012, so any plan to convert the deposit into "rent in advance" was unilateral. Further, the Respondent claimed that – contrary to what was said in the 20 August 2012 letter – that he has in fact lodged with a tenancy deposit scheme provider all new deposits received since the 2011 Regulations commenced. He accepted that he had a number of other residential tenancies (but did not give a number). He conceded that, once the 2011 Regulations came in, there must have been other ongoing tenancies with

deposits but the issue had not arisen when each of them had concluded. He did not go as far as conceding that he had committed further breaches and stated that he had not received any claim under the 2011 Regulations previously. Finally, he accepted that, at the end of the Tenancy, he had not at that time told the Applicant that there was an £800 credit against the final two months' rent (which would have followed if he had adopted the plan he set out in his 20 August 2012 letter). Instead, he had, after two months had passed, treated the money as a deposit and lodged it with Safe Deposit Scotland after all.

7. I asked the Respondent for any submissions on the legal issues of unilaterally changing the 2005 lease's deposit provision; or whether holding £800 as "rent in advance" was in fact a "tenancy deposit" by another name under the definition applying to the 2011 Regulations (which is in section 120(1) of the *Housing (Scotland) Act 2006* and 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 (b) the discharge of any of the occupant's liabilities which so arise"). He did not have any submissions though maintained throughout that he had made an "innocent" decision to treat the funds as not a deposit. I made the disposal that I would be treating the funds as an £800 deposit received and that its nature did not alter after receipt.

8. The Respondent further lodged papers regarding alleged damage to the Property which he believed was recoverable from the estate of the late Mr Collins under the Tenancy. The Applicant objected to such matters being considered and I agreed they were separate. The Applicant said that there had been brief correspondence in October 2021 between the parties' solicitors on such a damages claim but it had not been settled and had not been responded to on his behalf. The decision in this action does not alter the parties' respective position on such a dispute.

9. I asked each of the parties if they had any submissions on the level of award that was appropriate. The Applicant still sought £2,400. The Respondent had no material submissions. No motion was made for expenses.

Findings in Fact

10. The Respondent, as landlord, let the Property to Hugh Collins and Caroline Elizabeth McNairn under an Assured Tenancy dated 23 March, 16 April and 19 April 2005, commencing on 1 May 2005 ("the Tenancy").

11. During the course of the Tenancy, Mr Collins became sole tenant.

12. The Tenancy was brought to a de facto end on 5 August 2021 by the death of Mr Collins.

13. In terms of clause 4 of the Tenancy, Mr Collins and Ms McNairn were obligated to pay a deposit of £800 at the commencement of the Tenancy.

14. Mr Collins paid a deposit of £800 to the Respondent after commencement of the Tenancy.

15. The deposit had not been applied to any outstanding liability of the tenants prior to the commencement of the 2011 Regulations.

16. The Applicant is the sole Executor-Nominate of the late Mr Collins in terms of a Will dated 10 December 2012.

17. Subsequent to the death of Mr Collins, the Applicant corresponded with the Respondent on the Tenancy including whether the deposit was held with an approved tenancy deposit scheme provided. He received no response.

18. In or around September 2021, solicitors appointed to act for the executry of the late Mr Collins corresponded with the Respondent on the Tenancy including whether the deposit was held with an approved tenancy deposit scheme provided.

19. On or about 28 September 2021, a deposit of £800 was placed by the Respondent with Safe Deposits Scotland in regard to the Tenancy for the Property.

20. The Respondent has provided no note of the prescribed information on the tenancy deposit to the Applicant.

21. The lodging of the deposit was around eight years later than required in terms of the Respondent's obligations under the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* and the Respondent was in breach of the said Regulations in regard to the lodging and the provision of prescribed information.

22. The Respondent is the landlord of multiple rental properties.

23. The Respondent received advice from his solicitors in August 2012 about the commencement of the 2011 Regulations and the need to place tenants' deposits with an approved tenancy deposit scheme provider.

24. The Respondent chose not to place Mr Collins' deposit with an approved provider on the basis of the Respondent's own interpretation of the applicability of the 2011 Regulations.

25. The Respondent was not provided with any legal advice advising him that he could handle Mr Collins' deposit in any alternative fashion other than under the 2011 Regulations.

26. The Respondent did not agree with Mr Collins that his deposit could be handled in any alternative fashion other than under the 2011 Regulations.

27. The Respondent currently utilises approved tenancy deposit scheme providers for new deposits obtained from tenants.

28. The Respondent has not previously received intimation of a claim under the 2011 Regulations from any other tenant regarding an alleged breach of the said Regulations, other than this application.

29. Two months after the conclusion of the Tenancy, the Applicant has been afforded access to the adjudication scheme under Tenancy Deposit Scheme in terms of the late Mr Collins' tenancy deposit for the Property.

Reasons for Decision

30. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by both parties, and their submissions on further procedure, I was satisfied both that the necessary level of evidence had been provided through the application, further papers, and orally at the CMD, and that it was appropriate to make a decision under regulation 10 of the 2011 Regulations at the CMD.

31. The key facts were undisputed between the parties. The Respondent held a deposit prior to the commencement of the 2011 Regulations and had not placed the sum with an approved provider timeously, only doing so after the conclusion of the Tenancy. I am told that the Respondent now seeks to comply with the 2011 Regulations on new tenancies but this is at odds with his apparent decision in August 2012 that he would not do so (and his unilateral decision to treat the existing deposit of Mr Collins in the same way). It was not clear to me when the Respondent adopted a process of complying with his obligations, but it was clear that he had at an earlier stage thought he could see a way round complying with such obligations and ventured to do so. That only this application has apparently arisen from that decision does not prove that he did not breach the 2011 Regulations in other cases. Further, in this case his lodging of the deposit, but failure to send the prescribed information, suggests that the Respondent still lacks processes for full compliance with the 2011 Regulations.

32. In coming to a decision, I reviewed recent decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that "[e]ach 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." (paragraph 9)

33. In regard to that "factual matrix", Sheriff Ross reviews with approval the reasoning of the Tribunal at first instance in that case (at paragraph 10). Generalised for my purposes, the Tribunal made consideration of:
    - the purpose of the 2011 Regulations;
    - the fact that the tenant had been deprived of the protection of the 2011 Regulations;

- whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
- the reasons given for the failure to comply with the 2011 Regulations (in that case, also related to the landlord's representative);
- whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
- whether the failure was intentional or not; and
- whether the breach was serious.

Applying that reasoning, the Tribunal held – and the Upper Tribunal upheld – an award of two times the deposit. In analysing the "factual matrix" in that case, Sheriff Ross noted:

> *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* [of the letting agent in *Rollett*] *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.*
>
> *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.* (paragraphs 13 and 14)

34. The Upper Tribunal considered a case where the Tribunal regarded a low level of culpability in *Wood v Johnston, [2019] UT 39*. The Tribunal at first instance had awarded £50 (though it is not possible from the UT's opinion to determine what this was as a multiplier of the original deposit). Sheriff Bickett noted that parties to the appeal were agreed that "the award is a penalty for breach of Regulations, not compensation for a damage inflicted" (paragraph 6) and, like Sheriff Ross in *Rollett*, analysed the nature of the breach, though in briefer terms. In *Wood*, it was noted that the Tribunal at first instance had made the award in consideration that "the respondent owned the property rented, and had no other property, and was an amateur landlord, unaware of the Regulations. The deposit had been repaid in full on the date of the end of the tenancy." Sheriff Bickett refused permission to appeal and thus left the Tribunal's decision standing.

35. Applying Sheriff Ross's reasoning to the current case, the purposes of the 2011 Regulations are to ensure that a tenant's deposit is insulated from the risk of insolvency of the landlord or letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, these issues were cured by the late lodging of the deposit but only after the Applicant had engaged a solicitor. The purpose of the provision of the prescribed information is to ensure

the tenant is fully informed of their position. That has not been addressed. Further, there was an intentional failure to lodge the funds on time.

36. I cannot say for certain whether there were multiple breaches by the Respondent across his property portfolio but it seems unlikely that this was the only case, given the Respondent's attitude to the 2011 Regulations when they came in. To consider the aggravating factors that Sheriff Ross lists, there was a deliberate and reckless failure to observe responsibilities and, I felt from the Respondent's approach to matters at the Tribunal, a denial of fault. The Respondent wanted me to see this as an "innocent" matter but he is a landlord of a number of properties, has been for many years, and has solicitors to advise him. He chose not to lodge Mr Collins' deposit, knowing that a law was coming in to seek that such deposits were to be lodged. I do not see any fraudulent intention but the Respondent's attitude seems to be that he knew best and could ignore legal guidance. I see that as a further aggravating factor. The circumstances in *Wood* do not match well to the current case. The Respondent is not an "amateur" and has a number of other properties. Further, though he did place the deposit with Safe Deposit Scotland, he did so at the end of the tenancy and only when chased

37. I am satisfied that this case does disclose a serious breach. Had the Applicant not taken a diligent approach to his position as executor, and chased the deposit, there is nothing to suggest the Respondent would have taken steps to rectify the breach (and only then, he still did not rectify the breach regarding provision of information). That the deposit was lodged is a mitigating factor, but it was only lodged after the Applicant required to involve the executry's solicitor. I am awarding £2,000 under regulation 10 of the 2011 Regulations, being 2.5 times the deposit and hold this as an appropriate award in consideration of the law and all the facts. I shall apply interest on the sum under Procedure Rule 41A at 8% per annum from the date of Decision as an appropriate rate.

Decision

38. I am satisfied to grant an order against the Respondent for payment of the sum of £2,000 to the Applicant with interest at 8% per annum running from today's date.

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.

19 November 2021

Legal Member/Chair **Date**