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/23/0537

Re: Property at 29 Campbell Drive, Larbert, FK5 4PP ("the Property")

Parties:

Lewis Croll, 6 Alexander Mcleod Place, Fallin, Stirling, FK7 7HP ("the Applicant")

Sandra Fletcher, 10 Fulmar Crescent, Larbert, FK5 4FW ("the Respondent")

Tribunal Members:

Joel Conn (Legal Member)

Decision

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

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 Rules").

2. The tenancy in question was an Assured Tenancy (said to be a Short Assured Tenancy) of the Property by the Respondent to the Applicant dated 6 November 2015 and commencing on that date.

3. The application was dated 16 February 2023 and lodged with the Tribunal on 6 March 2023. The application relied upon evidence that a deposit of £475 was due in terms of the Tenancy, paid to the Respondent, but never paid into an approved scheme. Further the Tenancy concluded on 29 January 2023 and the Respondent returned the deposit only on 28 February 2023 after correspondence between them on: the Respondent's intention to withhold the

deposit due to alleged damage and cleaning requirements; and an email of 22 February 2023 by the Applicant to the Respondent stating expressly that he held the Respondent to have breached the 2011 Regulations and that he was "taking this further via the Housing and Property Chamber".

4. Prior to the case management discussion, both parties lodged further written submissions and documents, such as a copy of the 22 February 2023 email and various text exchanges and photographs.

5. The application did not express the specific order sought, but relied on the failure to protect the deposit.

The Case Management Discussion

6. On 17 May 2023 at 14:00, 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 both parties personally.

7. The Applicant confirmed that he insisted on the application and sought a payment under the 2011 Regulations at the highest level. His reasoning was that:
   a. He only received the deposit back when he told the Respondent that he had applied to the Tribunal.
   b. Even up to a few days prior to the return of the deposit, he had received correspondence from the Respondent that the deposit was being set off against alleged damage. He described the Respondent as having "u-turned".
   c. The Tenancy Agreement had referred to the deposit being placed in an approved Tenancy Deposit Scheme, so he had assumed the money was protected. After the end of the Tenancy, he spent time emailing each provider to see where his money was held.
   d. The issue had created anxiety and stress at the time of his moving home.
   e. The 2011 Regulations were in place to avoid all these issues, and he believed that it was important for appropriate orders to be issued to landlords who had not followed the Regulations.

8. I confirmed that the parties were in agreement as to the material issues and it was agreed between them that:
   a. A deposit of £475 was paid at the outset of the Tenancy.
   b. It had not been paid into an approved Tenancy Deposit Scheme provider.
   c. The Tenancy ended by mutual agreement on 29 January 2023.
   d. The Respondent had returned the full deposit to the Applicant on 28 February 2023.

   All of this amounted to a concession by the Respondent that she had breached the 2011 Regulations in regard to the lodging of deposit funds. (She was further clearly in breach of the Regulations in regard to provision of information, but I noted no material submissions made by either side on this.)

9. The Respondent, having thus conceded that she had breached the 2011 Regulations, focused in her submissions (written and at the CMD) on points

regarding her conduct as a landlord, which she saw as mitigating. These included:

a. Not increasing the rent for a number of years, and then increasing it to less than she believed was the market rent for the area.
b. Holding off from seeking vacant possession for a number of years, even though the issues that were giving rise to the need to sell were present and growing.
c. Giving the Applicant significant notice (instead of just two months) of when she wanted vacant possession, and making clear that she did not require equivalent notice from him once he had decided upon an end date.

10. In regard to the issues of the breach of the 2011 Regulations, the Respondent stated:
    a. She purchased the Property some years earlier, intending that it would be an investment to assist her and her husband help their daughter onto the property ladder.
    b. She had rented it to her husband's parents at one point.
    c. She had rented it to others prior to the Applicant.
    d. To her recollection, no tenant prior to the Applicant had a deposit that qualified for lodging under the 2011 Regulations. She had never lodged a deposit with any approved Tenancy Deposit Scheme provider.
    e. She thinks she was aware at the start of the Tenancy with the Applicant that the deposit required to be lodged but she then forgot to do so. Having forgotten to do so, it never occurred to her again until she received the email of 22 February 2023 from the Applicant.
    f. She believed her claims against the Applicant for damage and cleaning issues after he left were valid, and were not simply wear and tear (such as damage to knobs on a cooker, and warping to cabinets due to where the Applicant had placed his kettle). (The Applicant disputed any of the Respondent's claims were other than normal wear and tear.) Nonetheless, as soon as it was pointed out to her in the email of 22 February 2023 that she should have placed the deposit with an appropriate scheme provider, she made arrangements within days to send the funds to the Applicant.
    g. She disputed that she did only sent out the money because the application was raised. She said that she had not understood from the terms of the email of 22 February 2023 that an application had been raised. (On this, it seemed to me that the Respondent likely failed to understand what the Applicant was meaning by his phrase: "taking this further via the Housing and Property Chamber".)
    h. As for why she never lodged the funds in 2015, she explained that at the time she and her husband were going through matrimonial issues, on which she preferred not to elaborate (as they remained together to this day). She said that at the time she thinks she was probably not focusing as well on the Tenancy or her work as well as she normally would. She described herself as usually "quite pedantic".
    i. The deposit funds had been placed in the same savings account into which the rent was paid. It had never fallen into overdraft.

11. On this, the Applicant did not dispute any of the Respondent's comments but – along with insisting that he did not believe there was any valid damages claim

against him – made a few additional points, regarding the Respondent's responsiveness as a landlord to repairs issues during the Tenancy. This led to the Respondent replying with her view. The parties clearly held differing views as to the Respondent's conduct as a landlord, though the Applicant's criticisms did not include any significant repairs issues on which he claimed the Respondent to have neglected the Property (more that he felt certain repairs could have been addressed differently or more swiftly). In regard to how the Respondent said she held the deposit, the Applicant did not have any information disputing where it was held, but referred to clause 3.2 of the Tenancy Agreement expressly saying that the funds would be placed with SafeDeposit Scotland, and commented that the Respondent may have benefited from interest on the sums by keeping it in her own account.

12. No motion was made for expenses.

Findings in Fact

13. The Respondent, as landlord, let the Property to the Applicant under an Assured Tenancy dated 6 November 2015, commencing on that date ("the Tenancy").

14. In terms of clause 3.1 of the Tenancy, the Applicant was obligated to pay a deposit of £475 at the commencement of the Tenancy.

15. The Applicant paid a deposit of £475 to the Respondent on 6 November 2015.

16. The Respondent placed the deposit funds into a savings account into which the rent of the Property was received.

17. The Tenancy Agreement contained reference at clause 3.2 to the *Tenancy Deposit Schemes (Scotland) Regulations 2011* and that any deposit would be retained by SafeDeposit Scotland under the said regulations for the duration of the Tenancy.

18. The Tenancy was brought to an end by mutual agreement on 29 January 2023.

19. The account in which the deposit funds were paid did not enter overdraft at any time during the Tenancy.

20. The Respondent failed to place the deposit into an approved Tenancy Deposit Scheme.

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

22. The failure to lodge the deposit or provide the prescribed information under the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* was in breach of the said Regulations in regard to the lodging and the provision of prescribed information.

23. The Respondent was the landlord of no other rental property other than the Property.

24. The Applicant was not the Respondent's first tenant at the Property.

25. After the Applicant corresponded with the Respondent on after the end of the Tenancy, the Respondent told the Applicant that she intended to retain the full deposit in regard alleged wants of repair at the Property.

26. On 22 February 2023, the Applicant emailed the Respondent stating (amongst other things):

> *I would like to make you aware that you have not fulfilled your legal obligations under the Tenancy Deposit Scheme Regulations 2011. By failing to lodge the deposit with SafeDeposits Scotland within 30 working days of the tenancy start date 6/11/15, as per the Short Assured Tenancy Agreement (which we both signed) you are therefore in breach of this obligation.*
> *I am currently taking this further via the Housing and Property Chamber.*
>
> *Quote from Scottish Govt website:*
> *Tenancy Deposit Schemes: "Landlords have a legal duty to pay any tenancy deposit they receive into an approved tenancy deposit scheme to protect deposits until they are due to be repaid"*
>
> *Before addressing the multiple points you have highlighted, I would like to highlight the 'Tenancy Deposits' page of the Scottish Government website where it clearly states:*
> *"The deposit cannot be used to replace items that are damaged, or worn, due to normal wear or tear"*

27. In consideration of the Applicant's said email, the Respondent returned the full deposit of £475 to the Applicant on 28 February 2023.

Reasons for Decision

28. The 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 the parties, 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. I canvassed the parties' opinion and both were satisfied that a decision be made at the CMD, without a Hearing being set or the matter considered by a full panel of the Tribunal.

29. As conceded by the Respondent, there has been a clear breach of the 2011 Regulations. This was despite the Respondent's own Tenancy Agreement making reference to the 2011 Regulations and the Respondent accepting that she would have been aware of the need to lodge the deposit at the time. The

Respondent was (understandably) circumspect as to the matters that pre-occupied her at the time of the Tenancy commencing, but I was willing to accept that she knew what she was to do, forgot to do it, and having forgotten she never remembered about the issue until the Applicant's email of 22 February 2023. The Applicant clearly sought to paint the Respondent's "u-turn" as an example of bad faith. I accepted the Respondent's position that she genuinely believes she has a claim against the Applicant in regard to the condition of the Property but, as soon as she was reminded of her obligations under the 2011 Regulations, she took steps to return the funds. (Nothing in this decision restricts the Respondent for raising a separate application, should she wish, in regard to any claim against the Applicant for breach of the Tenancy Agreement.)

30. In coming to a decision as to the level of award, I reviewed 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)

31. In regard to that "factual matrix", (then) 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:
    a. the purpose of the 2011 Regulations;
    b. the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    c. whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
    d. the reasons given for the failure to comply with the 2011 Regulations;
    e. whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
    f. whether the failure was intentional or not; and
    g. 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)

32. 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.

33. 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 all remained with the Applicant requiring to chase for repayment and being concerned about the deposit being retained (though ultimately it was returned without deduction). There was a clear failure to lodge the funds, despite a knowledge of the 2011 Regulations being in place. That said, I see none of the aggravating factors identified by Sheriff Ross (and see no other factors that I find to be aggravating).

34. In considering Sheriff Bickett's reasoning (and that of the Tribunal at first instance in that appeal), I also see few of the mitigating factors. Though the Respondent owned no other properties for rent, she was not a complete amateur either, having purchased the Property with a long term aim of investment and having rented it out for a number of years prior to the Applicant. The deposit was not immediately returned, the Applicant did have to chase for it, and he was threatened with it being retained until he stood his ground.

35. I thus hold that this is a case that falls in the middle of the range of possible disposals and I am awarding £715 under regulation 10 of the 2011 Regulations, being 1.5 times the deposit (rounded up). I 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

36. I am satisfied to grant an order against the Respondent for payment of the sum of £715 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.

[redacted]

17 May 2023

Legal Member/Chair **Date**