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/23/4017

Re: Property at 76/ 10 Mortonhall Park Crescent, Edinburgh, EH17 8SX ("the Property")

Parties:

Rebecca Wesner, Ruizhe (Ben) Yang, 32 Southhouse Place, Edinburgh, EH17 8FD ("the Applicants")

Nicholas Twist, 14 Lumsden Loan, Edinburgh, EH17 8ZF ("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 Applicants for an order for payment where a 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 application was conjoined with an application for return of £120, being the balance of the deposit funds retained by the Respondent. Reference is made to the decision in that application (CV/23/4015) the outcome of which is considered, in part, in coming to this decision.

3. The tenancy in question was a Private Residential Tenancy ("PRT") of the Property by the Respondent to the Applicants dated 23 July 2023 and

commencing on that date. It was agreed between the parties that the Tenancy terminated on 23 October 2023.

4. The application was dated 6 November 2023 and lodged with the Tribunal shortly thereafter. The application relied upon evidence that a deposit of £850 was due in terms of the Tenancy, paid to the Respondent, but never paid into an approved scheme. Further, after the Tenancy concluded on 23 October 2023, the Respondent returned only £730 to the Applicant having retained £120 in regard to having the locks to the Property changed. The application sought an order of £2,550, being the maximum allowable order.

The Case Management Discussion

5. On 8 February 2024 at 10:00, 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 the Applicants and the Respondent.

6. The Applicants confirmed that they insisted on the application and still sought a maximum order under the 2011 Regulations. The Respondent conceded that the 2011 Regulations applied to the deposit, that he had failed to make payment into an approved tenancy deposit scheme, and that an order fell to be made in the application. He had no submissions on the appropriate level of the order.

7. In response to questions, the Respondent gave the following further information and submissions relevant to the application:
   a. He rented out the Property (which he has owned since 2015) and one other property.
   b. He resided at the Property for a number of years, but had rented it out once before the Applicants' Tenancy. This previous tenant was in for around a year and was arranged through a family member. He had not sought a deposit from the previous tenant.
   c. The other property he rented out was currently unoccupied but had previously been tenanted for around a decade to a long-term tenant whose rent had been supported by benefit payments. No deposit had been sought from that tenant.
   d. The Applicants were thus his first tenants to pay a deposit.
   e. He had kept the deposit money from the Applicants in his usual current account.
   f. He had been vaguely aware of the 2011 Regulations before the commencement of the Tenancy. He made his own enquiries (by viewing websites) as to whether he required to place the Applicants' deposit with an approved tenancy deposit scheme provider and had concluded that it was optional.
   g. He had not had a chance to inspect the Property on 23 October 2023. He let himself in, using a set of keys he held, early on the morning of 24 October 2024 (around 06:30) to inspect. He had found the Property clean and in good condition, but with only one of the two sets of keys left. He then went to work and during the day contacted a locksmith (RT Joinery) to attend and change the locks. He was charged £120 for this.

h. He sent a WhatsApp message to the second Applicant at 17:53 on the evening of 24 October 2024 to update the Applicants that he was pleased with the condition of the Property but had required to change the locks for reasons of security and that he was deducting £120 from the deposit, but that he was returning the £730 balance at that time (which he did).
i. He has re-let the Property and, now being fully aware of the requirements of the 2011 Regulations, has placed the deposit with an approved tenancy deposit scheme provider.

8. In response to questions, the Applicants gave the following further information and submissions relevant to this application:
   a. They did receive back the £730 on 24 October 2023.
   b. They were concerned to hear that their deposit had not been kept separate from the Respondent's other money.
   c. When they left the Property, it was because they were moving into a property that they had purchased. They had not thus required return of their deposit urgently, and would have preferred to have had the benefit of a tenancy deposit scheme adjudication process, even if that had taken time (rather than receive back £730 the next day but not have access to such an adjudication process in regard to the retained balance of £120).

9. No motion was made for expenses or interest.

Findings in Fact

10. The Respondent, as landlord, let the Property to the Applicants under a Private Residential Tenancy dated 23 July 2023 and commencing on that date ("the Tenancy").

11. The Tenancy was brought to an end by mutual agreement on 23 October 2023.

12. In terms of clause 6 of the Tenancy, the Applicants were obligated to pay a deposit of £850 at the commencement of the Tenancy.

13. The Applicants paid a deposit of £850 to the Respondent at the commencement of the Tenancy.

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

15. The Respondent provided no note of the prescribed information on the tenancy deposit to the Applicants.

16. 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.

17. The Respondent is the landlord of two rental properties. He has been a landlord to private residential tenants for around a decade.

18. The Applicants were the Respondent's first tenants to pay him a deposit in connection with a tenancy agreement.

19. The day after the termination of the Tenancy, the Respondent inspected the Property and corresponded with the Applicants to confirm that he was returning £730 of the deposit and retaining £120 in regard to costs relating to a locksmith.

20. The Respondent paid the £730 to the Applicants by bank transfer on or about 24 October 2024.

21. The Applicants have not been afforded access to the adjudication scheme under Tenancy Deposit Scheme.

Reasons for Decision

22. I sought submissions from both parties on further procedure and both sought a decision made at the CMD. 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 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 sought further final submissions and information from the parties before making my decision.

23. There was little dispute between the parties on the material points, though there were a number of issues relating to the Respondent's circumstances (such as the number of properties he owned, the history of their letting, and his investigations into deposits) that the Applicants understandably neither disputed nor conceded.

24. I was satisfied that the evidence provided by the Applicants was credible and reliable on the material issues of this application.

25. I was not satisfied that the Respondent's answers to questions were entirely credible and reliable. At best, he was difficult to follow at times. In some instances that was on procedural or incidental matters (such as he asked for a continuation but then immediately followed that with a request that a decision be issued at the CMD). Other instances were when providing material submissions, where his explanations were potentially self-serving. For instance, when asked what investigations he had made into 2011 Regulations at the start of the Tenancy, as I understood his response he first said that he had not been aware of the Regulations but had since consulted various websites. He then concluded his response by saying he had consulted a number of websites at the time of first taking the deposit. I was left unclear as to whether his recollections were poor, whether he simply had an imprecise manner of expressing himself, or whether he seeking to hone his submissions to paint himself in the best light. Ultimately, however, where facts were not within the knowledge of the Applicants (and thus not conceded) I was satisfied to accept the Respondent's evidence on the

matters within the findings in fact relevant to the application, such as regarding his history as a landlord.

26. It was a matter of concession that the Respondent held a deposit shortly after the commencement of the Tenancy, did not lodge it, did not provide any prescribed information, retained the deposit himself, and returned it unprompted the day after termination of the Tenancy (albeit less a £120 deduction). There has been a clear breach of both the lodging and information requirements of the 2011 Regulations. The Applicants were thus unable to avail themselves of the adjudication service in regard to the £120 retained and have required to come to the Tribunal for a decision on this (in the conjoined application CV/23/4015).

27. In coming to a decision, I reviewed decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, *2019 Hous LR 75*, 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)

28. 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:
    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 affected 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)

29. 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.

30. The approach in these two cases is accepted in other UT cases: by Sheriff Fleming in *Hinrichs v Tcheir, [2023] UT 13, 2023 Hous LR 54* (which considered *Rollett*), and by Sheriff Cruickshank in *Ahmed v Russell, 2023 UT 7, 2023 SLT (Tr) 33* (considering both *Rollett* and *Wood*). In the latter case, Sheriff Cruikshank made the additional observation (at paragraphs 32 to 33) that there is no difference in law between how the "amateur" and "professional" landlord is to be treated but:

> *It will be a matter of fact in each case what the letting experience, or level of involvement, of a landlord is and it might, or might not, be a factor which aggravates or mitigates a sanction to be imposed under the 2011 Regulations. Indeed, by way of a general observation, with the increasing passage of time since the 2011 Regulations became operative, the letting experience of a landlord, and his working knowledge of the regulatory requirements, may hold less weight in mitigating a penalty than it previously did.* (paragraph 33)

31. Applying Sheriff Ross's reasoning in *Rollett* 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, the former was hypothetical as payment of the £730 was made the day after termination without the Applicants requiring to prompt payment but the latter issue was significant, as a deduction was made unilaterally by the Respondent. There was a clear failure to lodge the funds despite the Respondent having been a landlord in the Scottish private rental market for over a decade. I accepted that there was not, however, any intentional breach and that the Respondent does now comply with the 2011 Regulations with his current tenant. In considering Sheriff Bickett's reasoning in *Wood*, the Respondent's prompt attention to the deposit on 24 October 2023 can be seen as a mitigation but I find the guidance in *Rollett* to be more applicable to the circumstances of this application.

32. The Respondent sought to persuade me that his position was mitigated due to him claiming to have made investigations at the outset of the Tenancy into whether he was to lodge the deposit and those investigations leading him to believe that he did not. If anything this is an aggravation, as it is difficult to see how a reasonably informed landlord or tenant in 2023 could have come to the faulty conclusion that the 2011 Regulations were optional upon the landlord under a standard PRT. The private rental section is increasing regulated and by operating as a landlord of two properties the Respondent should ensure he is aware of the regulations upon him, whether in regard to deposits or any other matter. There was thus a reckless failure by the Respondent to become informed of his obligations and act upon them.

33. Mitigating against this, the Respondent acted promptly to consider and return the bulk of the deposit unprompted and (as I have found in the decision to CV/23/4015) did not make any unjustified deductions. His actions ensured there is no actual loss or legal detriment to the Applicants. I accepted the Respondent's evidence that the Applicants' deposit was the first he ever sought, and that he has placed the current tenant's deposit with an appropriate provider. I am thus satisfied that this falls in the mid-range of breaches and I am awarding £1,275 under regulation 10 of the 2011 Regulations, being 1.5 times the deposit. I hold this as an appropriate award in consideration of the law and all the facts.

Decision

34. I am satisfied to grant an order against the Respondent for payment of the sum of £1,275 to the Applicants.

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.

8 February 2024

Legal Member/Chair **Date**