Upper Tribunal for Scotland

2023UT07
Ref: UTS/AP/22/0021

DECISION OF

Sheriff Ian Hay Cruickshank

ON AN APPLICATION TO APPEAL
IN THE CASE OF

Mrs Iqra Ahmed, Mr Shahnawaz Ahmed, Glenwood Den Of Cults, Aberdeen, AB15 9SJ

Appellants

- and –

Mrs Amy Russell, 8 Whitehill Farm Road. Stepps, G336BT

Respondent

FtT Case Reference: FTS/HPC/PR/22/0031

21 February 2023

Decision

Refuses the first ground of appeal; Sustains the second ground of appeal and quashes the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 24 August 2022; thereafter re-makes the decision in terms of section 47(2)(a) of the Tribunals (Scotland) Act 2014 and grants an order for payment by the appellants to the respondent in the sum £1,500.00.

Introduction

[1] This is an appeal against a decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the FtT") dated 24 August 2022. The FtT ordered the appellants to pay the sum of £2,500 to the respondent by way of sanction under Regulation 10 (1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). This was for failure to comply with the duty created by Regulation 3, namely to pay the tenancy deposit to an approved scheme within 30 days from the beginning of the tenancy.

[2] On 29 September 2022 the FtT granted permission to appeal having concluded an arguable point of law had been stated. The point of law as framed by the FtT was as follows: "The error of law which has been averred is that the Tribunal did not differentiate between a landlord who has numerous properties and run a business of letting properties and a landlord who has one property which they let out."

[3] Having received this application I sought to clarify the ground, or grounds of appeal, which the appellants relied upon. Whereas permission to appeal had been allowed by the FtT on the above basis, I considered that the application for permission to appeal was more broadly framed. Accordingly, to clarify the nature and extent of the ground, or grounds, of appeal I assigned a Case Management Discussion on 24 January 2022. An appeal hearing was assigned for 14 February 2022.

<u>Grounds of Appeal</u>

[4] At the Case Management Discussion I heard submissions from both the appellants and the respondent. It was determined that the grounds of appeal to be advanced would more properly be stated as follows:

1. In determining a fair and proportionate sanction the FtT erred in law by failing to differentiate between the appellant's status as a landlord having only one property for let from a landlord with numerous properties and operating a letting business.
2. The FtT erred in law when exercising its discretion by imposing a sanction which was excessive and unreasonable given the particular facts and circumstances surrounding the appellant's failure to comply with Regulation 3 of the Tenancy Deposit (Scotland) Regulations 2011.

Facts and submissions before the FtT

[5] The factual background was not disputed before the FtT. The parties entered into a Private Residential Tenancy in terms of the Private Housing (Tenancies) (Scotland) Act 2016. The tenancy commenced on 1 July 2020. Prior to commencement a tenancy deposit of £1,250 was paid to the landlords who retained the deposit throughout the tenancy. The tenant vacated the property on 10 December 2021. A dispute arose between the parties in relation to proposed deductions from the deposit. The landlords paid the deposit into an approved tenancy deposit scheme on 13 December 2021.

[6] Amongst the items of evidence lodged with the application the FtT had before it a screenshot of a communication from Safe Deposits Scotland. This was in the following terms:

"On 20 December 2021 we sent the tenant a copy of your Proposal for Deposit Repayment relating to this tenancy.
We advised the tenant that they had until 7 February 2022 to respond to your Proposal for Deposit Repayment, if they wished to either:
Specifically agree to your Proposal for Deposit Repayment; or

Dispute your Proposal for Deposit Repayment, in which case they needed to specify the amount of the deposit which they considered should be repaid to them, if different to the amount claimed by you.
The tenant has advised us that they wish the dispute to be dealt with by the First-tier Tribunal. Where a tenant tells Safe Deposits that they wish to go to court instead of using adjudication, the deposit will be released as per the Proposal for Deposit Repayment made by the landlord. The deposit will be released by 14 February 2022. Safe Deposits has no further to role to play and it will be for the First-tier Tribunal to decide how the deposit should be allocated."

[7] The case before the FtT was in terms of Rule 103 of the First-tier Tribunal for Scotland and Property Chamber (Procedure) Regulations 2017. This related to an application for an order for payment where the landlord had failed to carry out duties in relation to tenancy deposits under the 2011 Regulations. The applicant did not bring proceedings before the FtT to determine how the deposit should be divided between the parties given the dispute between them.

[8] The applicant submitted to the FtT that issues arose after vacating the subjects when the landlords wanted to make deductions which were considered unjustified. The landlords had retained control of the deposit for eighteen months. It was not the responsibility of the tenant to advise the landlord to lodge the deposit in an approved scheme. Before the FtT the applicant considered the maximum penalty would be appropriate.

[9] The appellants admitted the breach. They had been unaware of the 2011 Regulations. They were not professional landlords and leased only one property. They had thought a deposit only required to be lodged if a dispute arose. When a dispute was apparent the deposit had been lodged in a tenancy deposit scheme albeit this was after the end of the tenancy. The appellants

acknowledged the specific requirement to lodge the deposit was contained within the tenancy agreement but they had failed to properly read the lease. The appellants submitted they had made a genuine mistake. They had not made any deductions prior to lodging the deposit. The property had since been leased to new tenants and the deposit had been lodged timeously with a tenancy deposit scheme.

Reasoning of the FtT

[10] The FtT considered the parties submissions. It gave consideration to the cases of *Kirk* v *Singh* 2015 SLT (Sh Ct) 111 and *Cooper* v *Marriot* 2016 SLT (Sh Ct) 99 and commented on the facts in each case and the respective penalties imposed. The FtT acknowledged that the 2011 Regulations were intended to put landlord and tenant on an equal footing with regard to any tenancy deposit and to provide a mechanism for resolving any dispute between them. It further acknowledged that in assessing the level of sanction there was a duty to impose a fair, proportionate and just sanction in the circumstances of the each case always having regard to the purpose of the 2011 Regulations and the gravity of the breach.

[11] The FtT's written decision provides the following reasoning for the sanction imposed:

"5.6 The Regulations do not distinguish between a professional and non-professional landlord. The obligation is absolute on the landlord to pay the deposit into an Approved Scheme.
5.7 The Tribunal acknowledged that the Respondents advised that they were unaware of the regulations at the time the Private Residential Tenancy was signed. They had not properly read the lease. However, ignorance of the law is no excuse.
5.8 The Tribunal were concerned that the deposit had been unprotected for the duration of the tenancy and that the deposit was only paid into the scheme after the termination date.

5.9 Despite the Tribunal being satisfied that the Respondents had failed to comply with their duties under Regulations 3 (1) of the 2011 Regulations, the purpose of the 2011 Regulations had not been defeated. The deposit was paid into the approved scheme at the termination of the tenancy when the parties were unable to reach agreement on the deductions to be made from the deposit. The Applicant chose not to use the Rent Deposit adjudication scheme with the result that the Scheme returned the deposit to the Respondents."

[12] The conclusion of the FtT written decision suggests that the whole deposit was returned to the appellants by the approved scheme. This is not factually correct. On appeal, both parties agreed that the sum of £718.75 had been returned by Safe Deposits Scotland to the landlords and the remainder of £531.25 to the tenant.

Submissions before the Upper Tribunal

[13] When seeking leave to appeal before the FtT the appellants relied upon the case of *Wood* v *Johnston* [2019] UT 39. In the hearing before me the appellants submitted this case was authority for the proposition that it was necessary in law for the FtT to differentiate between a landlord with numerous properties running a letting business as opposed to a landlord who leased only one property. In other words, it was necessary in law to differentiate between an "amateur" and "professional" landlord. The FtT had stated that the 2011 Regulations did not distinguish between such landlords. In failing to differentiate between the two the FtT had erred in law and the sanction it had imposed was neither fair nor proportionate.

[14] The appellants further submitted that given all of the facts and circumstances before the FtT the sanction imposed was excessive and unreasonable. Reference was made to certain first instance decisions before the FtT which in the appellants' submission demonstrated that in

similar fact based cases penalties of less than twice the deposit had been imposed. Furthermore, the written decision of the FtT lacked sufficient reasoning. It did not make clear what level of seriousness the FTT had attached to the breach.

[15] The respondent submitted that the appeal should fail on the basis that, in law, "professional" and "amateur" landlords should not be distinguished. Each case was fact specific and the status of the landlord was but one factor which had to be considered. In this case the fact that the appellants leased only one property was irrelevant. The property had been leased for £995 per month and the appellants had received a considerable rent over the period of the lease. The respondent also submitted that the breach of the 2011 Regulations had left her in a vulnerable position and considered that the parties could have come to a resolution sooner had the deposit been protected from the start. The respondent still considered that it would have been appropriate for the FtT to award the maximum sanction. As the approved scheme had not been set up or used correctly the respondent elected not to use the adjudication system which resulted in the appellants receiving £718.75 from the deposit.

[16] On the matter of reasonableness the respondent referred to the case of *Rollet* v *Mackie* UTS/AP/19/0020. The respondent examined the factors referred to in that case as examples of what might mitigate or lessen culpability and also examples of factors which would be found in cases at the most serious end of the scale. The respondent submitted that in this case there had been fraudulent intention on the part of the appellants.

[17] Neither party was legally represented at the appeal hearing. Both the appellants and the respondent presented full and reasoned submissions for my consideration. I am obliged to both parties for their efforts in this regard.

Discussion

[18] The Housing (Scotland) Act 2006 ("the 2006 Act") made provision in relation to tenancy deposits and the creation of a regulatory framework for the manner and circumstances in which tenancy deposits must be paid, held and repaid under an approved scheme (sections 120-123 of the 2006 Act). The regulatory framework was also to include the imposition of sanctions for failure to participate in, or to comply with, an approved scheme. The resultant regulations are to be found in the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

[19] The main purpose of the legislation was to move the holding of deposits from landlords to independent approved third parties. Further, policy objectives behind the Regulations were three fold. First, to reduce the number of unfairly withheld tenancy deposits. Secondly, to ensure that deposits were safeguarded throughout the duration of the tenancy. Thirdly, to ensure that deposits were returned quickly and fairly, particularly where there was a dispute over the return of the deposit, or portion of it, to tenant or landlord. In order for sanctions to be effective and to actively encourage landlords to comply with the legislation, it was intended that they should apply even if the failure to comply was rectified by the time an application for a sanction had been made (see the executive note accompanying the 2011 Regulations).

[20] Regulation 3 of the 2011 Regulations, so far as relevant to the present case, is in the following terms:

"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…."

[21] Regulation 10 of the 2011 Regulations, so far as relevant to the present case, is in the following terms:

"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…."

[22] For the purposes of the Regulations a landlord is defined as any person who lets a house under a tenancy, and includes the landlord's successors in title (Regulation 2 of the 2011 Regulations and section 194 of the 2006 Act).

[23] First instance jurisdiction now lies with the FtT. First instance jurisdiction originally lay with the Sheriff Court. Given that permission to appeal has been granted in this case by the FtT it is appropriate to reflect upon Sheriff Court, Upper Tribunal and Court of Session judgements to appreciate the development of judicial interpretation and application of the 2011 Regulations.

[24] In the case of *Tenzin* v *Russell* [2015] CSIH 8A the Court of Session considered an appeal that setting the sanction at three times the deposit was excessive. The court could find no fault with the Sheriff's reasoning in applying the maximum sanction and stressed that an appellate court would only interfere if the court at first instance had not exercised its discretion at all, taken into account irrelevant considerations or failed to take into account relevant considerations. It

was not sufficient merely that the appellate court might have come to a different decision on the facts. The nature of discretionary decisions meant that two different minds might reach different decisions without it being the case that either decision could be categorised as wrong (at paragraph 11).

[25] In *Jenson* v *Fappiano* 2015 SCEDIN 6, an application for a sanction under the 2011 Regulations was made where a deposit of £1000 had not been lodged in an approved scheme for the period of more than a year. When a dispute arose the full deposit was paid into an approved scheme and became subject to an independent adjudication which found in favour of the tenant who received the deposit in full. The breach of the 2011 Regulations was admitted. In a careful consideration of the law Sheriff Welsh concluded that Regulation 10(a) set an upper limit but did not lead to the automatic triplication of the deposit as a sanction. Such an approach would negate meaningful judicial assessment. Judicial discretion had to be applied as constrained by settled equitable principles (see generally paragraphs 11-12). In exercising his discretion by taking account of the relevant factors within the particular circumstances of the case the learned Sheriff imposed a sanction equivalent to one third of the deposit. On the matter of "amateur" landlords the Sheriff warned that the Regulations do not recognise that status and such landlords were not exempt from compliance through inexperience or naivety (paragraph 18).

[26] In *Cooper* v *Marriot* 2016 SLT (Sh Ct) 99, being a further decision of Sheriff Welsh, it was again noted that the 2011 Regulations did not recognise the status of amateur landlord but were applicable to all landlords regardless of the scale in which they operated. Where the deposit had been held unprotected for two years and resulted in depriving the tenant of his right to invoke

the dispute resolution service which would have been provided by an approved scheme the sheriff found no mitigation. He considered the breach to show flagrant and willful disregard of the terms and purposes of the Regulations and ordered payment equivalent to twice the deposit. It was observed that the purpose of regulatory sanction was to punish the landlord for non-compliance and not to compensate the tenant for harm done albeit the net result may seem as if the latter had occurred.

[27] In *Kirk* v *Singh* 2015 SLT (Sh Ct) 111, where the deposit was £380, the sanction imposed by Sheriff Jamieson was £500 which he considered fair and proportionate having regard to the seriousness of the non-compliance and having regard to the maximum sanction available in that case. The Sheriff acknowledged that different shrieval approaches had developed on how to calculate the appropriate sanction but favoured the approach taken in the case of *Jenson*.

[28] *Wood* v *Johnston*, the case relied upon by the appellants, is a decision of the Upper Tribunal. The appeal was at the instance of the tenant who was aggrieved that a penalty of only £50 was imposed in circumstances where the whole deposit had been repaid on the date the tenancy ended. The reasoning of the FtT included that the landlord leased only one property, was an amateur landlord and unaware of the 2011 Regulations. In refusing leave to appeal Sheriff Bicket stated the following:

"It does not appear to me to be an error in law to differentiate between landlords who have numerous properties and run a business of letting properties as such, and a landlord who has one property which they own and let out. It would be inappropriate in my view to impose similar penalties on two such landlords. Further, a number of factors appear to have been taken account of, and the First-tier Tribunal appeared to me to have taken account of valid matters in

assessing the penalty imposed, and although they have not specified what weight they have given to each of the factors mentioned, they are not required to do so."(at paragraph 7)

[29] Similar consideration to the level of sanction was given by the Upper Tribunal in *Rollett* v *Mackie* UTS/AP/19.0020. An aggrieved tenant sought permission to appeal a decision of the FtT where he had been awarded a sanction of £2150, twice the deposit, arguing that the maximum sanction should have been imposed. In refusing permission to appeal Sheriff Ross concluded that the FtT had not made a fundamental error when exercising its discretion based on the facts of the case. The learned Sheriff provided the following helpful summary:

"Each case must be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to "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." (at paragraph 9)

[30] 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 factors which could lessen or increase the level of culpability.

Conclusion

[31] This is an appeal in terms of section 46 of the Tribunals (Scotland) Act 2014. As such, an appeal is to be made on a point of law only. The FtT granted permission to appeal for the reasons stated in their written decision of 29 September 2022. Two grounds of appeal are to be considered in this case. It is for the appellants to satisfy me that there are arguable grounds for appeal which point to an error of law.

[32] The first ground of appeal falls to be dismissed. The FtT correctly identified that the 2011 Regulations do not distinguish between a professional and non-professional landlord. In my opinion the case of *Wood* v *Johnson* is not authority for the proposition that, in law, an "amateur" landlord must be treated differently from a "professional" landlord. My reading of the case is that the error of law sought to be argued was that the FtT had misdirected itself as to the factors to be considered in assessing the level of sanction. The relevant factors included the "amateur" status of the landlord. Sheriff Bicket correctly acknowledged that the 2011 Regulations do not stipulate what sum should be paid as a penalty other than to provide a method of calculation as to the absolute maximum which can be imposed. The FtT was given a discretion as to the level of sanction and, in that case, the status of the landlord was but one of a number of relevant factors which had been considered in the proper exercise of that discretion.

[33] If I am wrong in my reading of the case of *Wood*, I would respectfully disagree that, in law, the 2011 Regulations require that an "amateur" and "professional" landlord should be treated differently for the purposes of sanction. The law does not differentiate between these descriptors. For my part, I disapprove of distinguishing between a so-called "amateur" and "professional" landlord. 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.

[34] It should also be acknowledged that a landlord does not, in law, require to seek a deposit. Should a landlord elect to do so then it is essential that he is aware of, and abides by, the duties imposed upon him by the 2011 Regulations. Again, there can be no general rule. The weight to be given to the letting experience of the landlord will depend on the particular circumstances of each case.

[35] I now turn to the second ground of appeal. This is whether, when exercising its discretion, the FtT imposed a sanction which was excessive and unreasonable. The test to overturn a discretionary decision is a high one.

[36] Rather than prescribing a maximum sanction which can be imposed uniformly in each and every case the maximum sanction allowed by Regulation 10 is determined by the level of the deposit. The higher the deposit the higher the maximum sanction becomes. In the present case, the maximum sanction which could have been imposed was £3,750.

[37] Furthermore, the wording of Regulation 10 perhaps lends itself very easily for the Tribunal of first instance to assess the appropriate sanction in multiples of the deposit. In my view that should be discouraged. It does not mean that the only choice available to the FtT is to impose a sanction which accords with one, two or three times the amount of the deposit. In the event that a breach is admitted or proved the 2011 Regulations state that a sanction must be imposed. The mandatory requirement to impose a sanction left it open to the FtT in this case to impose any figure it deemed fair and proportionate in the exercise of its reasonable discretion from £1 to £3,750.

[38] Previous cases have referenced various mitigating or aggravating factors which may be considered relevant. It would be impossible to ascribe an exhaustive list. Cases are fact specific and must be determined on such relevant factors as may be present. The appellate court will only interfere if the court at first instance has not exercised its discretion at all, taken into account irrelevant considerations or failed to take into account relevant considerations.

[39] In the present case the appellants admitted they had been in breach of the 2011 Regulations. Per the proposal put by the landlords to the approved scheme, the sum of £718.15 was returned to them and the balance of £531.25 returned to the tenants. The approved scheme did so because the tenant decided not to use the adjudication scheme having advised she wished to resolve matters via the FtT. In reality, the tenant did not pursue a claim in relation to the portion of the deposit retained by the landlord. That is of no particular consequence in assessing the sanction to be imposed under the 2011 Regulations. The sanction which is imposed is to mark the gravity of the breach which has occurred. The purpose of the sanction is not to compensate the tenant. The level of sanction should reflect the level of overall culpability in each case measured against the nature and extent of the breach of the 2011 Regulations.

[40] In this case, the FtT correctly acknowledged that the 2011 Regulations were intended to put landlord and tenant on an equal footing and provide a mechanism for resolving any dispute between the parties. It correctly acknowledged that the appellant's failure to properly read the lease was no excuse. Concern was rightly expressed that the deposit had been unprotected for the duration of the tenancy and only paid into a scheme after the termination date. However, in its reasoning the FtT specifically concluded that whereas the respondents had failed to comply

with their duties under Regulation 3 (1) of the 2011 Regulations, the purpose of the 2011 Regulations had not been defeated. The deposit had been paid into the approved scheme at the termination of the tenancy when the parties were unable to reach agreement although the applicant chose not to use the Rent Deposit adjudication scheme.

[41] Having outlined the above, without stating what weight was placed on each relevant factor identified, and without further clarification as to the level of seriousness the FtT considered the breach merited, it proceeded to state that a fair and proportionate sanction would be twice the deposit, namely £2,500. The sanction was therefore two thirds of the maximum which could be imposed.

[42] I have concluded that, based on the facts and circumstances of the admitted breach before the FtT I do not consider that the sanction imposed was reasonable. It is excessive and does not reconcile with the FtT's conclusion that the purposes of the 2011 Regulations had not been defeated. I am unable to conclude that it was a fair and proportionate sanction based on the facts as recorded, and the reasoning contained in, the written decision. Although I agree with observations in *Wood* v *Johnston* that the FtT does not strictly require to indicate the weight it has placed on each relevant factor it would be of assistance to the appellate court to give some indication of the overall assessment of the factors in order to provide justification for the sanction imposed.

[43] The fact that the deposit remained unprotected for a period of 18 months was clearly an aggravating factor. Similarly, the appellants' ignorance of the requirements of the 2011 Regulations, or failure to properly read the provisions of the lease, provides no mitigation. These

factors would lead to more than a token sanction being imposed. Thereafter, the FtT acknowledged that the deposit was paid into an approved scheme after termination of the tenancy but does not in its reasoning say anything about the fact that the deposit, without deduction, was paid into an approved scheme within one week of termination of the lease when it became clear a dispute had arisen between the parties. Similarly whether any weight was placed on the fact that it was the tenant who chose not to use the rent deposit adjudication scheme is not clear. These factors, however, must have had meaningful mitigating weight particularly given the FtT's ultimate conclusion that the purposes of the 2011 Regulations had not been defeated. Therefore I have concluded that the FtT has made a fundamental error. Without further detailed written reasoning to justify the sanction it imposed, I consider the same to be excessive and unreasonable.

[44] As I have acknowledged, it will be in only exceptional cases that a discretionary decision is interfered with by an appellate court. Balancing the aggravating and mitigating factors here I consider that the level of culpability was moderately serious but a sanction of less than twice the deposit is merited. In these circumstances I will uphold the appeal, quash the sanction imposed and find the appellants liable to pay the sum of £1,500 which, in my opinion, given the maximum sanction which could be imposed, represents a fair and proportionate sanction when all relevant factors have been appropriately balanced.

Upper Tribunal for Scotland

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within ***30 days*** *of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff Ian Hay Cruickshank

Member