Upper Tribunal for Scotland

2025UT24
Ref: UTS/AP/24/0050

DECISION OF

Sheriff Kelly

ON AN APPEAL
IN THE CASE OF

Mr Elekwachi Ukwu, Mrs Chinyelugo Ukwu

Appellant

- and -

Mr David Tait, Mrs Kelly Ann Tait

Respondent

FTS Case Reference: FTS/HPC/PR/23/2993

Glasgow, 17 April 2025

Decision

The appeal is refused. The decision of the First Tier Tribunal for Scotland, Housing and Property Chamber dated 8 March 2024 is upheld.

Introduction

[1] The appellants leased the property at 5 Crosshill Road, Bishopton, PA7 5QJ ("the property") from the respondents. At the outset of the lease a tenancy deposit of £1,695 was paid. This was lodged in an approved scheme in compliance with Regulation 3 of the Tenancy Deposit

Schemes (Scotland) Regulations 2011 ("the 2011 Regulations").

[2] Letting agents managed the property for the respondents. Those agents transferred the deposits in respect of properties managed by them to another approved scheme. At the time of transferring those funds from the first approved scheme, Letting Protection Service ("LPS"), to another scheme, Safe Deposit Scotland ("SDS"), the receiving scheme administrator was bound to intimate that transfer to the appellants, in terms of Regulation 23(3) of the 2011 Regulations.

Procedure before the FTS

[3] The appellants applied to the First Tier Tribunal for Scotland, Housing and Property Chamber ("FTS") for an order for payment. The application form, Form G, submitted to the FTS by the appellants asks at question 7 for details of the claim. The appellants said this:

> "THE LANDLORD FAILED TO CARRY OUT THE DUTIES SPECIFIED IN THE REGULATIONS IN RELATION TO THE TENANCY DEPOSIT. THE LANDLORDS FAILED TO ENSURE THAT THE TENANCY DEPOSIT PAID BY THE TENANTS WAS HELD BY AN APPROVED DEPOSIT SCHEME UNTIL THE DATE IT IS REPAID IN ACCORDANCE WITH THE REGULATIONS AT THE END OF THE TENANCY"

[4] The application was acknowledged by the FTS on 31 August 2023 and then requests for further information were made of the appellants. One such request was for "evidence that the deposit was not lodged with a deposit scheme" (email of 4 September 2023). The appellants responded repeating that part of Form G at question 7 outlining the basis of their claim (email of 4 September 2023). An amended Form G was submitted on 7 September 2023. The appellants' answer to question 7 was identical to that contained in the original Form G. A further Form G was submitted on 8 September 2023 and again question 7 was answered in identical terms.

[5] A request for information was sent to the appellants. The appellants resisted this request.

The appellants reiterated that the tenancy deposit was not in an approved scheme throughout the tenancy and thus "there was a gap in the period of protection". The email goes on to specify that there was a failure to provide prescribed information amounting to a breach of the regulations (email of 18 September 2023).

[6] A case management discussion took place on 18 December 2023. The hearing was adjourned for intimation upon the respondents' letting agents. In advance of the adjourned hearing on 8 March 2024, the appellant, Mr Ukwu, communicated dissatisfaction with the conduct of the initial case management discussion and these communications are narrated at paragraphs 17 – 22 of the FTS decision.

FTS Decision

[7] The FTS issued its decision after the case management discussion. It made eleven findings in fact, at paragraph 41 of its decision. This confirmed that the approved scheme which received the sums, SDS, including the appellants' tenancy deposit, intimated the receipt of funds to the appellants (finding in fact f.). The respondents did not (finding in fact g.).

[8] The FTS rejected the appellants' submission that there had been collusion between the letting agents and the two approved schemes in respect of the sums transferred. It rejected as unsupported on the evidence, the appellants' assertion that monies in respect of his tenancy deposit were not transferred. The FTS held that there was documentary evidence to the contrary – para.48.

[9] The FTS held that there had been a breach of regulation 43 of the 2011 Regulations. There was no provision for the imposition of a penalty. The FTS observed that a statutory notice had

been issued by the receiving approved scheme, SDS. The respondents would not have been aware of the transfer, it having been implemented or actioned by the letting agent. This was not a significant breach of the 2011 Regulations; and in the event of there being a power to award a penalty this would have been *de minimis*.

Appeal

[10] The appellants sought review of the FTS decision, and, separately, permission to appeal. By decision dated 27 June 2024 the FTS refused the appellants' permission to appeal.

[11] The appellants sought permission to appeal from the Upper Tribunal. By decision dated 22 October 2024, the Upper Tribunal granted permission to appeal, in part. The Upper Tribunal held that the ground of appeal identifying an error of law on the part of the FTS failing to make a finding in terms of regulation 42 of the 2011 regulations was arguable. The appellants' ground of appeal focusing upon the conduct of the hearing by the FTS was refused permission to appeal.

[12] Subsequent to the issuing of the Upper Tribunal decision, the appellants communicated extensively with the Tribunal secretariat making a number of criticisms of the permission to appeal decision.

Permission to Appeal

[13] Section 46(1) of the Tribunals (Scotland) Act 2014 provides that a decision of the FTS may be appealed to the Upper Tribunal. Such an appeal is to be made on a point of law only – section 46(2)(b). An appeal may only be taken with permission, either of the FTS or the Upper Tribunal – section 46(3). Regulation 37 of the First Tier Tribunal for Scotland, Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations") provides certain procedural requirements

in relation to such an application.

[14] Where such permission is refused by the FTS, an application may be made for permission to appeal from the Upper Tribunal. Regulation 3 of the Upper Tribunal for Scotland (Rules and Procedure) Regulations 2016 ("the 2016 Regulations") governs the procedure. Where the FTS has refused permission to appeal, the Upper Tribunal may refuse or give permission to appeal, or give permission to appeal on limited grounds or subject to conditions – regulation 3(6). Where the Upper Tribunal arrives at a decision refusing permission or limiting the grounds upon which permission is given without a hearing, this may be reconsidered at a hearing – regulation 3(7).

[15] In this case the Upper Tribunal after convening a hearing gave permission to the appellants to appeal on limited grounds. Therefore, no further appeal lies against that Upper Tribunal's decision on permission to appeal.

[16] Instead, the 2017 regulations provide that a respondent may lodge a written response to the notice of appeal – regulation 4 – and, in turn, the appellant may provide a written reply to that response – regulation 5. Thereafter, part 4 of the 2017 regulations gives the Upper Tribunal general case management powers in relation to the progress of the appeal. Part 5 deals with the procedure to be adopted in connection with hearings.

Hearing

[17] The appellants received intimation of the hearing of the appeal assigned for 19 February 2025. The respondents have never entered the Upper Tribunal process, nor the FTS process. The hearing was fixed to proceed on an in person basis at the Tribunal Centre in Glasgow. The appellants made application for that to take place on a remote basis via Webex. They had not

provided their address. Mr Ukwu communicated with the Upper Tribunal secretariat advising that he was

> "reluctant to specify where I current live due to safety and security concerns relating to protected disclosures I made regarding systematic corruption and fraud in the United Kingdom".

[18] Mr Ukwu subsequently advised that he was residing in the United Arab Emirates. That is not a jurisdiction which has given permission for hearings to be conducted and evidence to be taken remotely. The Foreign, Commonwealth & Development Office website states:

> "We have not been able to obtain the agreement of the government of the United Arab Emirates to a request to allow individuals in the United Arab Emirates to voluntarily give evidence from the United Arab Emirates by video link in UK civil, commercial or administrative tribunals (either as a witness or when appealing a case)."

[19] By email dated 10 February 2025, the applicant asked for the application for the appeal to be determined on the papers on the basis that he could not travel to the United Kingdom. He contended that he had inadequate time to prepare. The period of notice provided to the appellants in respect of the hearing assigned was in excess of the period provided for in the 2017 regulations – see regulation 26(2). No application was received to adjourn the proceedings.

[20] The hearing proceeded though neither party was present nor represented. Notwithstanding the appellants' failure to attend at the hearing, I considered that the matter could be decided in their absence.

[21] Rule 28 of the 2016 Regulations provides:

> "28. If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

[22] I consider that the appellants were aware of the hearing – that much is clear from their communications in advance of, and about, the hearing of 19 February 2025. I considered that it would be in the interests of justice to proceed. It did not seem likely that the appellants would be in a position to attend in light of their present location and the difficulties in the hearing proceeding remotely. I had regard to the time during which this application and appeal had been in dependence. Although not the subject of an express overriding objective, the speedy resolution of matters before the Upper Tribunal is an aim that ought to be pursued. In light of the material submitted in advance of the hearing, it appeared that this matter was capable of being determined upon fairly and justly without further procedure. I had regard to the papers submitted by the appellants relative to the ground of appeal where permission to appeal had been granted.

[23] In his application to the Upper Tribunal, the appellants have identified four separate grounds of appeal. Only ground of appeal 1 was granted permission to proceed. In advance of the hearing of the appeal, the appellants lodged a written argument that sought to raise matters beyond the scope of the grant of permission to appeal. The appellants lodged a number of detailed papers that covered points not foreshadowed in the ground of appeal where permission had been granted. In a separate paper apart, the appellants included other aspects of their challenge relative to grounds of appeal where permission has been refused. In light of the decision on permission to appeal, I have not taken these into account.

Appellant's submission

[24] The appellants contend that the FTS has misconstrued their submissions about the bases of their claim. It is said that the FTS mischaracterised the appellants' claim as being about a failure to intimate timeously the transfer of the tenancy deposit with the receiving scheme, SDS. The appellants submit that regulation 42 prescribes information to be provided by the landlord to the tenant, not only within 30 days beginning with the payment of the tenancy deposit to LPS, but also within 30 days of a payment to the second deposit scheme, SDS.

[25] The basis of the application is a breach of regulation 3; the landlords failed to provide the prescribed information set out in regulation 42 within the period set out in regulation 3(1). There has been a failure to update inaccurate information. The timescale applicable on that circumstance in terms of regulation 42(3), is either the timescale set out in regulation 3(1) or in terms of regulation 42(3)(b).

[26] For the appellants, the conclusion at paragraph 9 of the FTS decision - that there had been a failure to advise the appellants of the transfer of funds from LPS to SDS - amounted to a breach of regulation 43 (see paragraph 4 of the appellants' submission).

[27] The appellants contend, not that there has been a failure to inform them of the transfer, but, rather, that here has been a failure to provide the prescribed information to the tenants upon payment of their deposit to a deposit scheme administrator, and that this amounts to a breach of regulation 3(1). The appellants contend that the obligation arises not only upon the payment to the first deposit scheme administrator. The transfer of the funds triggers yet another obligation in terms of regulation 3. That failure to provide the information is a breach of the obligation in terms of regulation 3.

[28] At paragraph 12 of the submission it is averred that the FTS ignored the requirement to comply with regulation 42(3) for the provision of prescribed information within 30 working days of the payment of the deposit to the tenancy deposit scheme – see 42(3)(b).

[29] The appellants take issue with the characterisation of this breach by the FTS as amounting to a failure to update the information in relation to the withdrawal of the tenancy deposit from one scheme and the payment to another scheme. For the appellants, regulation 42(3) governs how this may be characterised. The appellants seek to place a distinction between an inaccuracy and a change in the prescribed information. In support of the appellants' argument it is contended that there is an alteration "in the custody and protection of the deposit" again with reference the terms of regulation 42(3). There has been a failure to provide the prescribed information in terms of regulation 42 about where the tenancy deposit rests. That ought to be made within 30 days of the payment to SDS. The appellants say this amounts to a breach of regulation 3.

Decision

Error or Point of Law

[30] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 S.C. (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different

categories that an appeal on a point of law covers:

(i) General law, being the content of rules and the interpretation of statutory and other provisions;

(ii) The application of law to the facts as found by the First Tier Tribunal;

(iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43]).

Appeal as to fact

[31] No appeal lies to the Upper Tribunal on a point of fact. The appellants' averments in relation to whether the payments were made to SDS and reliance upon what is said to be contradictory evidence in deposit portals, are factual matters that do not arise for consideration in this appeal. An appeal as to fact does not fall within the jurisdiction of the Upper Tribunal and specifically does not arise for consideration under the ground of appeal which has been given permission to proceed.

[32] **The 2011 regulations**

Regulation 3 provides –

Duties in relation to tenancy deposits

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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

"(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—

(a)in respect of which the landlord is a relevant person; and

(b)by virtue of which a house is occupied by an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions "relevant person" and "unconnected person" have the meanings conferred by section 83(8) of the 2004 Act."

…

Regulation 23 provides:

23.—(1) A landlord may apply for repayment of a tenancy deposit from an approved scheme for the purpose of transferring it to another approved scheme.

(2) On receipt of such an application, the scheme administrator must—

(a)if so requested, pay the tenancy deposit to the other approved scheme on the landlord's behalf; or

(b)in any other case, repay the tenancy deposit to the landlord.

(3) The scheme administrator must notify the tenant in writing of the date on which the deposit was paid to the other approved scheme or repaid to the landlord.

…

Regulation 42 provides:

42.—(1) The landlord must provide the tenant with the information in paragraph (2) within the timescales specified in paragraph (3).

(2) The information is—

(a)confirmation of the amount of the tenancy deposit paid by the tenant and the date on which it was received by the landlord;

(b)the date on which the tenancy deposit was paid to the scheme administrator;

(c)the address of the property to which the tenancy deposit relates;

(d)a statement that the landlord is, or has applied to be, entered on the register maintained by the local authority under section 82 (registers) of the 2004 Act;

(e)the name and contact details of the scheme administrator of the tenancy deposit scheme to which the tenancy deposit was paid; and

(f)the circumstances in which all or part of the tenancy deposit may be retained at the end of the tenancy, with reference to the terms of the tenancy agreement.

(3) The information in paragraph (2) must be provided—

(a)where the tenancy deposit is paid in compliance with regulation 3(1), within the timescale set out in that regulation; or

(b)in any other case, within 30 working days of payment of the deposit to the tenancy deposit scheme.

…

Regulation 43 provides:

43. Where information required to be provided by the scheme administrator under regulation 22 or by the landlord under regulation 42 becomes inaccurate the person required to provide that information must ensure that revised information is provided.

[33] The FTS found that the tenancy deposit was paid to an approved scheme in terms of regulation 3(1)(a). The appellants were appraised of the situation in terms of regulation 3(1)(b). The FTS found that in failing to intimate the transfer of the tenancy deposit to a new approved

deposit scheme, the respondents were in breach of regulation 42 of the 2011 regulations.

[34] The funds were transferred in April 2023. Regulation 23 has application in relation to the transfer of a tenancy deposit. Notwithstanding the appellants' suspicions, the FTS found that the scheme administrator in the initial deposit scheme (LPS) transferred the appellants' tenancy deposit to another approved scheme (SDS), on the landlord's behalf, see regulation 23(2)(a) and finding in fact e. The receiving scheme administrator notified the appellants of the transfer – finding in fact f. The LPS scheme administrator ought to have informed the appellants in writing of the date upon which their deposit was paid to SDS – regulation 23(3).

[35] This application to the FTS concerns a complaint that there was a failure on the part of the landlord to tell the tenants of that transfer. This is a significant change. The identity of the scheme administrator in which the tenancy deposit rests must be made known to the tenant. That is clear from the regulations as a whole and is particularised in certain respects. Precisely how that failure is to be characterised, either as a failure to comply with regulation 42, or a failure in respect of regulation 3 (as the appellants contend), comes down a construction of the relevant regulations.

[36] The FTS found that in failing to intimate the transfer of the tenancy deposit to another approved deposit scheme, the respondents were in breach of regulation 42 of the 2011 regulations. If a tenancy deposit is paid to the landlord in terms of regulation 3, then in terms of the timescale set out in that paragraph, the information provided for in regulation 42(2) must be provided to the tenant within 30 days of the commencement of the tenancy.

[37] When the landlord intimates to the tenant where the tenancy deposit has been transferred to, and that information for whatever reason becomes inaccurate (for example there is an

intervening change in relation to the scheme administrator of the tenancy deposit), the duty is upon the landlord to provide information to the tenant. The timescale provided for in regulation 42(3) is either: (i) the time limit provided for in regulation 3(1), (within 30 working days of the beginning of the tenancy), regulation 42(3)(a); or, (ii) within 30 working days of payment of the deposit to the tenancy deposit scheme, regulation 42(3)(b).

[38] The tenancy deposit paid to the landlord in terms of regulation 3(1) was lodged with LPS and proper intimation was made to the appellants in that regard. Regulation 42(3)(a) does not have application here because the tenancy deposit is not, at the point of transfer to SDS, paid in compliance with regulation 3(1).

[39] Instead, the alternative arises, within 30 working days of the payment of the deposit to the tenancy deposit scheme, the information must be updated with the tenant. Regulation 43 puts the matter beyond doubt and provides that the landlord, under regulation 42, when the information becomes inaccurate, must ensure that revised information is provided.

[40] At the time of the transfer of the tenancy deposit to SDS from LPS, the information sent to the tenants at the time they originally paid the deposit, had become inaccurate or outdated. The tenant ought to have been told of this development. Regulation 42 makes the position clear. The scheme administrator ought to have notified the tenant in terms of regulation 23(3).

[41] I reject the submission that regulation 3(1) has application to the transfer of funds from scheme administrator to scheme administrator. Rather, regulation 3(1) can be given its ordinary and natural meaning as imposing an obligation upon a landlord, within 30 working days from the beginning of the tenancy, to pay the deposit to the scheme administrator and to tell the tenant who

that is, and to provide the necessary other information in terms of regulation 42.

[42] In the event of transfer of those funds, where there is inaccuracy in that original information or should it become outdated, in terms of regulation 43, the landlord must ensure that revised information is provided.

[43] It follows that there is no breach of regulation 3 of the 2011 regulations. The landlord provided the necessary information at the outset of the tenancy and relayed to the tenant the information as provided in regulation 42(2). The information became inaccurate. The duty incumbent upon the landlord in terms of regulation 43 - to ensure that the revised information had been provided to the tenant - has not been complied with. The landlord has failed to comply both with regulation 42 and with regulation 43.

[44] In light of the findings in fact made by the FTS, there was no hiatus in the protection afforded to the tenants. There was no period during which the tenancy deposit was not with a scheme administrator. The appellants had suspicions to the contrary. These were not made out. The failure to properly intimate the change of scheme administrator in respect of the tenancy deposit is a breach of the duty incumbent upon the landlord relative to regulation 43. As the FTS correctly found, there is no power provided in the regulations for payment of a penalty, fine or sanction arising from this breach of duty. Regulation 10 provides for a payment of a fine as sanction applies only to a breach of regulation 3. Regulation 3 has not been breached.

Conclusion

[45] The appeal is refused. The decision of the FTS dated 8 March 2024 is upheld.

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 Kelly
Member of the Upper Tribunal for Scotland