



DECISION NOTICE OF SHERIFF DAVID M BICKET

on an application to appeal  
in the case of

MR WILLIAM WOOD, MRS BARBARA WOOD,  
Flat 3, Elm House Court, Denholm, Hawick, TD9 8PG  
per Community Help & Advice Initiative,  
Riverside House, 5<sup>th</sup> Floor, 502 Gorgie Road, Edinburgh, EH11 3AF

Appellants

and

MS GILLIAN JOHNSTON,  
Yhanbank, Eliots Park, Peebles, EH45 8HB

Respondent

**FTT Case Reference FTS/HPC/PR/18/3464**

11 June 2019

**Decision**

[1] On application in terms of Regulation 3 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 for permission to appeal to the Upper Tribunal, permission to appeal having been refused by the First-tier Tribunal, refuses permission to appeal in terms of Regulation 3(6)(a) thereof.

### **Reasons for the decision**

[2] An appeal is available on a point of law only, not a dispute on the facts. The error of law which appears to be averred is “that the Tribunal misdirected itself as to the factors to be considered in assessment of the level of penalty to be awarded under Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The Tribunal took into consideration irrelevant points in its assessment of the award. The award is a penalty for breach of regulations, not compensation for a damage inflicted. The Tribunal erred in its finding the landlord to be an ‘amateur’. The Tribunal erred in finding a lower standard is expected of some landlords. The Tribunal decision undermines and fails to uphold the statutory scheme”.

[3] The background to the matter is set out in the decision of the First-tier Tribunal for Scotland Housing and Property dated 7<sup>th</sup> March 2019, and the subsequent refusal of leave to appeal dates 24 April 2019.

[4] Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 states “if satisfied that the landlord did not comply with any duty in Regulation 3 the Sheriff -

- (a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and
- (b) may, as the Sheriff considers appropriate in the circumstances of the application, order the landlord to
  - (i) pay the tenancy deposit to an approved scheme;
  - (ii) provide the tenant with the information under Regulation 42”.

[5] The First-tier Tribunal narrated that the breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 was admitted by the respondent. The respondent accepted that she had failed to place the deposit within the appropriate scheme. The respondent had set

out a list of mitigatory factors which are narrated in full at page 2 of the First-tier Tribunal's decision to refuse leave to appeal on 24 April 2019. In the decision itself which was dated 7 March 2019 as a finding in fact the whole of the deposit was repaid on the date of the ending of the tenancy and the First-tier Tribunal found that the appropriate sum to pay the appellants for the breach of the regulations was £50. The reason given for that was 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.

[6] The regulations do not stipulate precisely what sum should be paid as a penalty. The First-tier Tribunal is given a discretion as to the appropriate amount which it must order the landlord to pay the tenant. The words "not exceeding three times the amount of the tenancy deposit" are used which means that in this case the absolute maximum that the First-tier Tribunal could have ordered to be paid was set, but in my view no minimum was set. The First-tier tribunal took account of the information given to it by the respondent. It appears to be accepted in the application for leave to appeal that the award is a penalty for breach of Regulations, not compensation for a damage inflicted. The error in law specified is that the Tribunal erred in finding the landlord to be an "amateur" and therefore found a lower standard was expected of some landlords.

[7] 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 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.

[8] In my view therefore no error in law is demonstrated in the decision of the First-tier Tribunal and they appear to me to have operated within their discretion in selecting the penalty which they imposed. For that reason, no appeal is available.

**Appeal Provision**

[9] The appellant may make a written application within 14 days of receipt of notice of this Decision to the Upper Tribunal for this Decision to be reconsidered at a hearing.

Sheriff David Bicket

Member

11 June 2019