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 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/21/0131

Re: Property at 39 Queen Square, Glasgow, G41 2BD ("the Property")

Parties:

Mr Fraser Jamieson, Dyke of Lornie, Errol, Perth and Kinrosshire, PH2 7TQ ("the Applicant")

Mr John MacPherson, 39 Queen Square, Glasgow, G41 2BD ("the Respondent")

Tribunal Members:

Ms H Forbes (Legal Member) and Mrs E Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that that an order for payment should be granted against the Respondent and in favour of the Applicant in the sum of £480 and orders the Respondent to lodge the tenancy deposit with an approved tenancy deposit scheme.

Background

1. By application received in the period between 18th January and 22nd February 2021 and made under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules"), the Applicant applied for an order in terms of Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the Regulations"). The Applicant lodged copy notifications from the three approved tenancy deposit schemes, screenshots of electronic communications made between the parties, and copy bank statements.

2. The Tribunal had regard to written representations from the Applicant lodged on 26th March and 9th April 2021.

3. The Tribunal had regard to written representations from the Respondent lodged on 30th March 2021, and video evidence, productions and written representations lodged on 15th April 2021.

4. By email dated 29th April 2021, the Respondent provided a pro-forma tenancy agreement purporting to be a short assured lease agreement

5. A Case Management Discussion ("CMD") took place by telephone conference on 29th April 2021. Both parties were in attendance. The case was set down for a hearing as to whether the tenancy is a 'relevant tenancy' in terms of Regulation 3.

6. On 24th May 2021, a representative appointed by the Respondent lodged further productions and video evidence.

7. On 25th May 2021, the Respondent's representative lodged written representations and a list of witnesses.

The Hearing

8. A hearing took place by telephone conference on 1st June 2021. Both parties were in attendance and the Respondent was represented by Ms Kirstie Donnelly, Solicitor.

9. The start of the hearing was delayed due to technical difficulties with access to the platform on which video evidence is viewed. A further work space was set up on the platform, and the video evidence was resubmitted.

10. During the hearing, Ms Donnelly emailed a copy of the actual tenancy agreement between the parties. A short adjournment took place to allow everyone to read the tenancy agreement. It was agreed that its terms were identical to a pro-forma tenancy agreement previously lodged by the Respondent.

Evidence from Applicant

11. The Applicant referred to his previous submissions in writing and at the CMD. It was his position that he had a tenancy of a separate dwelling, and that the tenancy deposit he had paid in the sum of £320 should have been placed in an approved tenancy deposit scheme. The Property was defined as a fully furnished flat, and advertised as a furnished bedsit. It was one of two self-contained bedsits on the ground floor of the property at 39 Queen Square, Glasgow ("the larger subjects"). The Applicant noted that the Respondent did not state with any confidence at the CMD that he and his family shared the bathroom, and had only said this towards the end of that discussion. The Applicant pointed out that the tenancy agreement does not state that the landlord will use the bathroom, and that he could not use the Respondent's bathroom.

12. Responding to questions from the Tribunal, the Applicant said the Respondent and his family absolutely did not use the bathroom. His bedsit was right next to the bathroom and he would have heard who used it. He accepted that they may have used it when he wasn't there.

13. Responding to questions from the Tribunal, the Applicant said he had a kitchen, including a fridge, in his room. He clarified that the there was an outdoor fridge in the back garden that could be used from time to time.

Cross-examination of Applicant

14. Under cross-examination, the Applicant said there were shared facilities, and these were not mentioned in the tenancy agreement. The tenancy agreement did not say much about what would happen in practice. There was a shared washing machine and dryer in the basement. The Applicant said that he used the wi-fi provided by the Respondent. He denied that he used the Respondent's fridge or that he helped himself to alcohol from the fridge. The Applicant agreed there was a social bubble put in place during lockdown between himself, the Respondent and his family, and another tenant. They socialised in the garden during lockdown. The Applicant agreed that council tax was included with the rent. Asked whether he had been a private residential tenant elsewhere, the Applicant said he had been and he accepted that, generally, private residential tenants were responsible for their own council tax. The Applicant said there was access to the rear garden which was shared in common with other tenants and the Respondent and his family. The Applicant denied that the bedsit was part of the Respondent's home. Asked whether there was a good relationship with the Respondent, the Applicant accepted that there was, to an extent. The Applicant said there was access to his room via a common hallway.

Evidence from Respondent

15. The Respondent is a caterer for large projects. He has been a registered landlord for 10 or more years. He rents other properties as well as the property at 39 Queen Square.

16. The Respondent talked through a video of the layout of 39 Queen Square. The video showed a communal path and intercom at the front door, with a buzzer for each property within the larger subjects. There are two bedsits side-by-side on the ground floor, with a self-contained flat opposite. Stairs lead to the lower ground floor where there are two basement flats and a shared laundry area. The garden has a pizza oven, barbecue, fridge, oven and bar, as well as a sitting area.

17. The Respondent said the garden was often used for entertaining. Anyone using the garden would use the toilet on the ground floor. That's why it was there. It was a common part of the property. The Respondent said he viewed the bathroom as part of his house. There was no 'private' notice on the

bathroom door. It was used routinely. The Respondent and his family and their cleaner used the laundry facilities in the common area.

18. The Respondent said he was responsible for paying the council tax for the bedsits. He said he had an amicable relationship with the tenants. They had formed a social bubble. He had acquired PPE for the tenants and his family and there was a cleaning rota. He offered a 20% discount on rent to tenants. He said the Applicant took advantage of that but could not substantiate that he had lost 20% of his wages, so the arrangement stopped. The Applicant used the greenhouse and undertook gardening tasks.

19. The Respondent said all those in the building interacted like family. The tenants felt safe and looked after. The Respondent's flat is on the first floor and it extends into the attic space. There are two bathrooms within his flat. He has a washing machine in his flat. The central heating boiler in his flat also supplies the two bedsits. There are electricity meters in the bedsits. The other three flats are fed by a separate boiler.

20. The Respondent confirmed that the tenants of the self-contained flats within the larger subjects pay their own council tax. Their tenancy deposits are lodged with an approved tenancy deposit scheme. He does not see himself as a resident landlord as far as these tenants are concerned, because they pay their own council tax.

21. Responding to questions from the Tribunal, the Respondent said his family have used the shower in the shared bathroom on occasion when they have been getting work carried out to their flat. It was his position that the Applicant was there when he and his family used the bathroom. Asked whether the Applicant had access to the Respondent's flat, he said it was locked if he and his family were out but, otherwise, the door was open.

22. The Respondent said all the properties within the larger subject have individual designated addresses, with the exception of the bedsits. All the mail comes through the main door.

23. Responding to questions from the Tribunal as to why he had directed the Applicant to contact a tenancy deposit scheme at the end of the tenancy as reflected in the email of 4th January 2021, the Respondent said he thought he had put the deposit in the scheme, then he recalled that he had not done so, as he considered the bedsit part of his house and he did not have to lodge the deposit. He kept the deposit in a separate account.

Cross-examination of the Respondent

24. The Respondent said he put the deposits of all tenants that paid their own council tax in an approved tenancy deposit scheme. Asked whether it would have been reasonable to have told the Applicant this at the start, the Respondent said he would have told him if asked.

25. The Applicant referred to the condition of the shared bathroom and the Respondent explained that all occupants used and cleaned the bathroom. His cleaner regularly cleaned the bathroom.

26. There was some discussion about the shared garden and the Respondent said he had, on occasion, asked the tenants not to use it while he entertained a sick friend and his mother in law.

27. Responding to questions from the Tribunal, the Respondent said the designation of the bedsit in the tenancy agreement as 'Flat G2' was only a point of reference for the Respondent to identify the properties. The postal address was '39 Queen Square'.

Re-examination of the Respondent

28. The Respondent said there was personal expensive artwork on the walls of the entrance hallway and throughout the building. He confirmed that the designation 'Flat G2' was only for convenience, as were the individual buzzers. The Respondent said that tenants also used the garden for entertaining.

Evidence of Mr Pall – witness for Respondent

29. Mr Sukhwinder Singh Pall is a current tenant of the bedsit adjacent to the one previously let to the Applicant. He is 58 years old and has been made redundant. He was previously a utility agent/warrant officer.

30. Mr Pall has lived in the bedsit in the larger subjects for almost three years. He described himself as a lodger. He said the bathroom was shared by all three properties on the ground floor, and the Respondent and his family. Responding to questions from the Tribunal as to the frequency of use of the bathroom, Mr Pall said 'I'm never there'. He claimed not to know how often the bathroom was used, but said there were occasions when it was occupied and he would have to wait to use it. He said this was all explained to him when his tenancy commenced.

31. Mr Pall said the washing facilities were shared. He accesses his property by the common hallway belonging to the Respondent. There is a locked door on his bedsit. Responding to questions from the Tribunal, he said he used the postal address 'Ground 2' for his property. He confirmed that the garden was used for entertaining although that had happened less often since lockdown.

Cross-examination of Mr Pall

32. Mr Pall confirmed he did not have access to the Respondent's bathroom. Asked whether it was inconvenient to have so many people using the bathroom, he repeated that sometimes he had to wait to use the bathroom.

33. Asked about cleaning arrangements, Mr Pall said all users cleaned up after themselves. Everyone chipped in and the Respondent sometimes cleaned the bathroom. Responding to questions from the Tribunal, Mr Pall denied there was a rota between the two bedsit tenants to clean the bathroom. He said each person using the bathroom supplied their own soap and toiletries. Cleaning products and toilet roll were sometimes supplied by himself or the Respondent.

34. Asked whether the tenant in the self-contained flat on the ground floor used the shared bathroom, Mr Pall said no, as it had its own bathroom.

35. Mr Pall said the Respondent could enter his room after asking permission.

36. Mr Pall said mail was sent to him at the main address. Mail was usually left in the main hall and the buzzer was only used to notify him of a delivery such as food or a parcel.

Evidence of Mr Hill – witness for Respondent

37. Mr Robert Hill is a 39 year old engineer and a former tenant of a self-contained flat on the ground floor of 39 Queen Square. He moved out three months ago.

38. It was Mr Hill's understanding that the bathroom on the ground floor was communal and anyone could use it. When people gathered in the garden, everyone used that bathroom. He had used it on occasion when helping around the property.

39. Mr Hill confirmed the Respondent was a resident landlord and said he was always in the garden, as were his wife and daughter.

Cross-examination of Mr Hill

40. Asked whether he would be aware of who was using the bathroom, if he was out at work much of the time, Mr Hill said he did jobs around the property, such as fixing appliances. Asked whether he was a tenant or a lodger, Mr Hill said he believed he was a tenant as he had a self-contained flat. He said the Respondent and his family were friendly and he sometimes ate with them or joined them in the garden. He confirmed his address as Flat 0/1, 39 Queen Square.

Summing up by Applicant

41. The Applicant said the evidence pointed to the fact that he had a tenancy and was not a lodger. The tenancy agreement supported that. There had been constant reference to a lease and a fully furnished flat. He had exclusive use of the property. The Landlord did not have constant access to the bedsit.

42. The Applicant refuted what had been said about the bathroom. Mr Pall's evidence was not accurate, and he had backtracked when asked about the third tenant on the ground floor using the bathroom. There was an arrangement between the two tenants to clean the bathroom. They took week about. He said he never saw the Respondent anywhere near the bathroom, nor did he see others use it; however, he was at work every day. He said he would have been annoyed if others had been using it. He bought his own cleaning products, removing them from the bathroom when he had used them.

Summing up on behalf of Respondent

43. Ms Donnelly adopted her written representations. She submitted that the evidence supports the Respondent's position. He is a resident landlord. The bedsit occupied by the Applicant was within the wider family home of the Respondent. The bathroom was shared and the Respondent and his family had access to it. They used the bathroom and the shower, as did *ad hoc* visitors. The entrance hallway forms part of the Respondent's home. The Respondent is a resident landlord, this was not a relevant tenancy, and the tenancy agreement was not a private residential tenancy.

44. It is an established fact that 39 Queen Square was the Respondent's only or principal home. The laundry facilities were shared, as was the wi-fi, central heating and outdoor facilities. The bedsits did not pay their own council tax. They did not have separate postal addresses. Responding to questions from the Tribunal, Ms Donnelly accepted that issues such as shared wi-fi, laundry facilities, no council tax, and no individual address did not preclude a tenancy from being a relevant tenancy.

45. It was accepted that the laundry facilities were shared. The Applicant had accepted there was a social bubble and that the garden facilities were shared. The use of the bathroom was in dispute.

Other matters

46. There was some discussion about the relevant legislation. Ms Donnelly submitted that section 101 of the Anti-social Behaviour (Scotland) Act 2004 was relevant.

47. Responding to questions from the Tribunal, Ms Donnelly said the Respondent conceded that he could have issued a better tenancy agreement to reflect the correct situation in respect of the bedsit.

48. The Respondent said everyone used the front entrance although there had been keys available for a back door at one time. Responding to questions from the Tribunal as to the status of the self-contained flats if the access hallway was considered to form part of the Respondent's home, it was Ms Donnelly's position that they may also not be relevant tenancies for the

purposes of the Regulations, stating that this would not affect the outcome of this particular case.

49. Asked whether the larger subjects should be treated as a House in Multiple Occupation ("HMO"), Ms Donnelly said she had no instructions on that matter, stating that it would be inappropriate for her to answer, and that it was not a relevant matter for consideration by the Tribunal.

50. It was the position of the Applicant that the status as an HMO was relevant, and that it may be the case that the Respondent should have an HMO licence.

51. There was further discussion regarding the shared bathroom. The Respondent said that until February 2020, the cleaner cleaned the shared bathroom every Saturday. The Applicant denied this was the case, and pointed out that the witnesses did not mention it.

52. The Applicant said the case had had personal repercussions for him, including affecting his social mobility and that he had to move to the other side of the country. He had always been obliging and forthcoming, unlike the Respondent at the start of the case.

53. The Applicant said the Respondent should have explained matters at the start of the tenancy, and should have understood the position in relation to the tenancy deposit, particularly as he had rented other properties.

54. The Tribunal adjourned to consider whether to hear submissions on the amount of any award to be made if the Tribunal was to find that there had been a breach of the Regulations. Upon re-adjourning, parties were asked for their views. It was agreed that submissions should be heard in this regard, and that the Tribunal could ask for written submissions if further information was required.

Amount of any award to be made

Representations for the Respondent

55. Ms Donnelly invited the Tribunal to make a low award, stating that an award of three times the deposit was not automatic. Although maximum awards had been made in early Sheriff Court cases, the Tribunal case law more recently showed the wide discretion available to the Tribunal. The Respondent is a registered landlord. He has not sought to flout the rules and regulations. He believes he is a resident landlord and, therefore, did not have to lodge the deposit. There was no malice involved, and it was an honest belief.

56. Ms Donnelly said the Applicant's submissions regarding financial difficulties were irrelevant. The tenancy ended due to lockdown and financial difficulties. It did not end because of difficulties in the relationship between the parties. Ms Donnelly referred the Tribunal to the Sheriff Court case of *Jensen -v-*

Fappiano B646/14, where an award was made of one-third of the tenancy deposit. A copy of the case was not provided to the Tribunal.

57. The Respondent was content for the deposit to be lodged with an approved tenancy deposit scheme. Enquiries had been made, and this was possible. This would ensure that adjudication could take place in regard to return of the deposit.

Representations by the Applicant

58. The Applicant's position was that, although there was no malice involved on the part of the Respondent, the same weight should be given to ignorance and its ramifications. The Applicant said it was unfair to cite cases without giving notice. His decision to leave the Property had been affected by other circumstances. The full penalty of three times the deposit had been awarded in other cases simply for not protecting the deposit, and it should be awarded in this case.

59. The Applicant was content for the deposit to be lodged with an approved tenancy deposit scheme so that adjudication could take place regarding return of the deposit.

Findings in Fact and Law

60.

(i) The Property is a self-contained bedsit within the larger subjects of 39 Queen Crescent, Glasgow.

(ii) The Respondent and his family reside in a self-contained flat on the first and attic floors of the larger subjects. The flat is the Respondent's only or main residence.

(iii) Access to the Property is through a common entrance corridor used by all the properties within the larger subjects.

(iv) The parties entered into a tenancy agreement in respect of the Property which commenced on 28th January 2020 and ended on 19th January 2021.

(v) The Applicant shared a bathroom with the tenant in the adjacent bedsit.

(vi) On occasion, other persons used the shared bathroom.

(vii) The tenancy agreement is a private residential tenancy agreement in terms of the Private Housing (Tenancies) (Scotland) Act 2016.

(viii) The tenancy agreement is a relevant tenancy for the purposes of the Regulations.

(ix) The Applicant paid a deposit of £320 at the start of the tenancy.

(x) The deposit was not lodged with an approved tenancy deposit scheme and remained unprotected throughout the duration of the tenancy.

(xi) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

Reasons for Decision

61. Regulation 3(b) provides for exemptions to the requirement to lodge a deposit, as set out within Section 83(6) of the Antisocial Behaviour Etc. (Scotland) Act 2004 ("the 2004 Act"). In terms of Section 83(6)(e) such an exemption is created where *'the house is the only or main residence of the relevant person'.*

62. Section 101(1) of the 2004 Act defines a house as *'a building or part of a building occupied or intended to be occupied as a dwelling'.* Section 101(2) states, *'if two or more dwellings within a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part.'*

63. For the purposes of the Regulations, the Tribunal found that 'the house' was the bedsit with shared bathroom. 'The house' was not the only or main residence of the Respondent.

64. The Tribunal found that both parties occupied individual dwellings within the larger subjects. All the dwellings within the larger subjects used the same common access hallway and corridor.

65. The Tribunal accepted the evidence of the Respondent and his witnesses that, on occasion, including when guests or tenants were in the communal garden, other persons used the shared bathroom.

66. However, the Tribunal accepted the evidence of the Applicant that he was not aware of this occurrence, and that he had been informed at the start of the tenancy that he and the adjacent bedsit tenant shared the bathroom.

67. The Tribunal found the witness, Mr Pall, not to be credible or reliable in certain parts of his evidence. When asked about the frequency of use of the bathroom by others, he was flippant and evasive, claiming that he was never there, which rather undermined his evidence on this matter. He initially said all three tenants on the ground floor used the bathroom. He changed his evidence when challenged under cross examination, stating that the third tenant did not use the bathroom. The Tribunal noted that he made no mention of a cleaner cleaning the bathroom on a weekly basis, stating that everyone just cleaned up after themselves. The Tribunal accepted the evidence of the

Applicant that he and the adjacent tenant had a rota for cleaning the bathroom.

68. Although the Tribunal accepted the evidence of the Respondent that he and his family had used the bathroom on occasion, the Tribunal did not consider that this met the test envisaged in section 101(2) of the 2004 Act, in that both dwellings were not sharing the same toilet or washing facilities. The Respondent's self-contained flat had two bathrooms that were not available to the Applicant. The Tribunal did not consider that occasional passing use of a bathroom by others constitutes two households sharing toilet and washing facilities.

69. The Tribunal noted the evidence of the Respondent that, on occasion, the self-contained flats on the lower ground floor had also allowed their bathrooms to be used by persons in the communal garden. If the reasoning of the Respondent was followed, that arrangement could also be described as properties sharing the same toilet or washing facilities. It does not. It simply indicates that, on occasion, and usually with permission, people use other people's toilet facilities.

70. The Tribunal took the view that the use of the bathroom by persons other than the two bedsit tenants was simply a matter of convenience, in that people, in passing, made use of an accessible bathroom from which they had not been explicitly barred.

71. The Applicants' deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy as required by Regulation 3. The deposit remained unprotected throughout the duration of the tenancy.

72. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.

73. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020 which states: *'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.'*

74. The Tribunal considered this to be a serious matter, with the deposit unprotected throughout the duration of the tenancy; however, the Tribunal did not consider it to be a case at the most serious end of the scale.

75. The Tribunal took into account the mitigating circumstances put forward by the Respondent. However, the Tribunal felt that there had been a failure by the Respondent to recognise his responsibilities as a landlord, particularly given that he was aware of the Regulations, and in the habit of using a tenancy deposit scheme for deposits from tenants of other properties both within the larger subjects and elsewhere. The Tribunal noted that his evidence was that he had not lodged the deposit because the tenants of the bedsits did not pay their own council tax. He seemed unaware at the end of the tenancy whether or not he had lodged the deposit, informing the Applicant that he should contact the tenancy deposit scheme. This demonstrates a level of ignorance and carelessness in relation to the Regulations.

76. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £480 to the Applicant, which is one and a half times the tenancy deposit.

77. The Tribunal makes the observation that it was entirely entitled to ask questions about whether or not, if the Respondent's argument that he and the bedsit tenants occupied the same dwelling was correct, the dwelling ought to have been registered as an HMO. The Tribunal is also entitled to take an inference from the fact that it does not appear to have been so registered. While this matter was not given any weight in reaching a decision, the Tribunal observed that it may further illustrate a concerning degree of ignorance on the part of an experienced landlord.

Decision

78. The Tribunal grants an order against the Respondent for payment to the Applicant of the sum of £480 in terms of Regulation 10(a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

79. The Tribunal orders the Respondent to pay the deposit to an approved scheme to allow adjudication in respect of return of the deposit.

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.

H Forbes

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Legal Member/Chair

4th June 2021
Date