Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) Act 2014 on an application made under Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/1111

Re: Property at 2/2, 1612 Dumbarton Road, Glasgow G14 9DB ("the Property")

Parties:

Mr Agbaraoluwa Oladiran, Plot 448 Close 17, Mayfair Garden Estate, Lekki, Lagos, Nigeria ("the Applicant")

Miss Iwona Grazyna Majzuk-soska ("the Respondent")

Tribunal Members:
George Clark (Legal Member) and David Wilson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be granted and made an Order for Payment by the Respondent to the Applicant of the sum of One Hundred and Forty Pounds (£140).

Background

By application, signed by the Applicant on 21 March 2019, the Applicant sought an Order for Payment in respect of the failure of the Respondent to lodge a tenancy deposit in an approved tenancy deposit scheme, as required by Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

The application was accompanied by copy bank statements for the Applicant's account with Santander Bank and screen shots of text messages between the Parties. The Applicant stated that, at the end of the tenancy, the Respondent had only repaid £60 of the deposit and had given no reason for retaining the balance of £140.

At a Case Management Discussion on 8 October 2019, it was noted that the following course of events was not in dispute:

- There had been a tenancy agreement between them which had ended on 30 December 2018 and the deposit had not been paid by the Respondent into an approved tenancy deposit scheme.
- The Applicant had stated that he wished to proceed under Rules 103 and 68 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations"). On 29 March 2019, the Tribunal had contacted the Applicant, asking him to identify only one Rule under which he wished to proceed. In the application, the Respondent was designed as "Miss Iwona" and the Tribunal did not when contacting the Applicant regarding the Rule under which he wished to proceed, raise the issue of the incomplete designation of the Respondent. The Applicant had submitted a second application on 10 April 2019, stating that he wished to proceed in terms of Rule 103 of the Rules, but again identifying the Respondent only by her first name and title. The Tribunal had acknowledged receipt of the application on 11 April 2019 and had asked the Applicant to confirm the full name of the Respondent. The Applicant had provided the full name of the Respondent on 16 April 2019.
- The Tribunal had asked the Applicant to provide a copy of his tenancy agreement, but he stated that he was unable to do so, as the Respondent had never provided him with an agreement. On 21 May 2019, the Tribunal had asked the Applicant to submit an amended application, including the full name of the Respondent, giving the end date of the tenancy and confirming whether the Respondent had lived at the Property during the tenancy. On 20 May 2019, the Applicant had submitted an application which met those requirements, and this was acknowledged by the Tribunal on 5 June 2019.

On 18 June 2019, the Tribunal advised the Applicant that it had rejected his application on the ground that it was frivolous within the meaning of Rule 8(1)(a) of the Regulations, as it had not been received until 10 April 2019, more than three months after the end of the tenancy. The Applicant sought leave to appeal that Decision, referring to his earlier application. The Tribunal decided instead to Review the Decision at its own instance and determined that it should be recalled, and the matter continued for further procedure. The Tribunal did not make a finding as to whether the application had been made timeously.

In written representations, the Respondent raised the issue of whether the application had been made timeously, pointing to the fact that the original application of 21 March 2019 referred to two Rules under which it would proceed and also failed to give the Respondent's full name. The Respondent contended that both these issues meant that the application had not been made, within the meaning of Rule 5 of the 2017 Regulations, until 16 April 2019, when the full name of the Respondent was submitted. The Respondent argued further that, even if the application was made on 21 March 2019, it could not be granted, as the tenancy in question was not of a type that is subject to the Regulations. The Respondent offered to prove that she was in fact resident at the Property, as her only or main residence, throughout the tenancy.

In discussion at the Case Management Discussion on 8 October 2019, the Applicant accepted that he had specified two grounds in his original application but did not accept that that invalidated the application. He also accepted that, if information

required by Rule 103 of the 2017 Regulations was missing from his application dated 21 March 2019, then the application would have been submitted after the three months deadline. He submitted however, that he had complied with Rule 103. He had never known the Respondent by any name other than "Miss Iwona" and had asked her to give fuller details on several occasions, something she had refused to do. He had only been able to give fuller details following further research online, after the Tribunal had asked him for it. He denied that the Respondent had lived at the Property at any time during the period of his tenancy, He stated that she had lived with her husband, but that he had been unable to ascertain their address. He had asked for this information, but the Respondent had refused to provide it.

The Respondent denied that she had refused to provide information identifying herself to the Applicant.

At the Case Management Discussion, the Tribunal was not able to make sufficient findings to determine the case, so adjourned the matter to a Hearing at which the following matters would be addressed:

(i) Is it a requirement of the Rules that an application specify only one rule under which it is to proceed, in order for the application to be "made" within the terms of Rule 5?

(ii) Is it a requirement of Rule 103 that the respondent's full name be provided in an application under that rule, in all circumstances?

(iii) If the answer to question (ii) is in the negative, did the Applicant in this case provide sufficient information to meet the requirements of Rule 103?

(iv) If the answers to questions (i) and (iii) indicate that the application was made timeously, was the Applicant's tenancy a "relevant tenancy" within the meaning of the Regulations?

The Hearing

A Hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow on the afternoon of 11 December 2019. The Applicant participated by way of a telephone conference call from Lagos, Nigeria. The Respondent was present and was represented by Kirstie Donnelly of Bannatyne Kirkwood France & Co solicitors, Glasgow. The Respondent was also assisted by a Polish interpreter.

The Applicant told the Tribunal that he had been a tenant in the Property from August to December 2018. The Property had two bedrooms and a sitting room, which had a bed in it. He gave the names of two persons who had lived in the Property, Patricia and Wade. Wade had the sitting room as his bedroom. The Applicant stated that he had been interviewed by "Miss Iwona" and Patricia. Nobody else, apart from Patricia and Wade, had stated at the Property while the Applicant was there. The agreement had been that he would be refunded the deposit when he left the Property. He had not been provided with a tenancy agreement. The Applicant had stayed on for a week beyond the date he had expected to leave, as he was waiting for his visa to arrive at the Property. The Respondent had told him he would have to pay for that week but he had said he would not do that until he had a written tenancy agreement, She had failed to provide a tenancy agreement and had failed to lodge the deposit.

Ms Donnelly suggested to the Applicant that he had been looking for a fixed short-term lease, but he replied that he had not necessarily been seeking a short-term let, as he had been looking for an internship in Glasgow. He accepted that he had paid his rent by bank transfer and that the bank details must have been given to him by the Respondent. Ms Donnelly referred the Applicant to a screenshot of his own bank account, which contained a Payee's name as "Majzuk" and put it to him that he was aware of the Respondent's surname. The Applicant's response was that he had only known the Respondent as "Miss Iwona" and that the Respondent had given him bank details and asked him to put "Majzuk" as the reference on internet payments. Questioned by Ms Donnelly, the Applicant denied that the Respondent had lived in the Property. He was not in touch with the two people he had named as living there with him and stated that on two occasions during the tenancy he had spent a few days in London. Ms Donnelly told him that the Respondent's position was that she was involved in a work project that involved her staying away from time to time for up to a week.

Ms Donnelly called the Respondent as a witness. The Respondent stated that she co-owned the Property with her husband. The had lived at Spiershall Close and had purchased the Property in 2009 for their 17-year-old daughter, who had stayed there until 2014. As a result of marital difficulties, the Respondent had moved into the Property. She confirmed that a letter, produced to the Tribunal, from Glasgow Housing Association, dated 26 February 2014, regarding the tenancy of Spiershall Close was addressed solely to her husband. The Property at Dumbarton Road was a two-bedroomed second-floor flat with a sitting room, kitchen and bathroom. She had advertised a room on a website called Spare Room and the Applicant had taken it. Nobody else was living in the Property at the time, apart from the Respondent herself. The Applicant had said that he wanted a room for a short time but could not go through letting agents as they expected any tenant to stay at least six months. She had given the Respondent her bank details for rental payments and had told him that the Payee name was her surname. The Respondent told Ms Donnelly that she did not know the two people referred to by the Applicant as Wade and Patricia. She also stated that her employers had introduced a new system of customer service and that this had resulted in her undertaking coaching and consulting work, which involved long working hours, including weekends, and travel to and from offices in Birmingham and Belfast. She had been more often at work than in the Property. The Applicant was also often away from the Property and the Respondent had received information once or twice that he was in London. She had received a message at one point that he was just back from London and there was a problem with the boiler in the Property.

Ms Donnelly referred the Respondent to a document which she confirmed was a Council Tax bill for the Property dated March 2018. The Respondent confirmed that she had been living at the Property at that time. She also confirmed that a Student Loan agreement, a copy of which was also produced, had been addressed to her at the Property, as was a letter from the property factors and a Television Licence, which had been taken out in April 2018.

The Respondent then told the Tribunal that on 18 December 2018, she had been involved in an accident and had broken her leg. She had been in hospital until 21

December. Her husband had collected her and, as she could not walk without crutches, so could not realistically access the Property and required assistance to go to the toilet, have a shower and prepare food, she could not return directly to the Property on discharge from hospital, so had returned to her husband's flat instead.

The Respondent told the Tribunal that, apart from the Applicant and her, nobody had ever lived in the Property during the tenancy. The only person called Wade that she knew was a work colleague and she said that nobody named Wade had ever resided at the Property.

Ms Donnelly asked the Respondent to explain why the Applicant would have been communicating with her by text message when she was living at the Property. The text referred to was one in which the Applicant said he had just returned from London and there was a problem with the boiler in the Property. The Respondent said that she had been on one of her work-related trips at the time. She also confirmed that her husband had collected the keys at the end of the tenancy, as she had been unable to walk until mid-February 2019, as a result of her accident.

In response to a question from the Tribunal, the Respondent stated that she had checked local room rates in Glasgow. They averaged £20, so she had deducted £140 from the deposit in respect of the extra days that the Applicant had stayed on while he awaited his visa.

The Applicant repeated that he had asked for a tenancy agreement, but it had never been provided. The television licence had been obtained before his tenancy started and, had the Respondent also been staying at the Property, they would have communicated directly, not by text message.

Ms Donnelly the called as a witness the Respondent's husband, Mr Jacek Jan Majzuk-Budek. He confirmed that he was the co-owner with the Respondent, of the Property, which they had bought for their daughter. Following separation from him, the Respondent had moved out of the house at Spiershall Close and had gone to live at the Property. He had only met the Applicant once, at the end of the tenancy and, from what he knew, nobody else had been living in the Property and, so far as he could remember, the Respondent lived there, but had some travel related to her employment. He had taken the Respondent back to his house when she was discharged from hospital after breaking her leg, as she could not manage by herself. Cross-examined by the Applicant, Mr Majzuk-Budek said that he could not remember if his wife had been in the Property when he had gone there with a technician, to fix the boiler.

The Applicant told the Tribunal that he stood by his own testimony and the written representations that he had made to the Tribunal.

Ms Donnelly then proceeded to make submissions to the Tribunal and referred to the four matters identified by the Tribunal at the Case Management Discussion on 8 October 2019, namely:

(i) **Is it a requirement of the Rules that an application specify only one rule under which it is to proceed, in order for the application to be "made" within the terms of Rule 5?**
Ms Donnelly submitted that in terms of Rule 5(2) of the 2017 Regulations, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met. In the present case, the application as originally lodged referred to two Rules, not one. A Tribunal member, acting under delegated powers, had asked that it be made under only one Rule. It was submitted on behalf of the Respondent that the Tribunal had decided at that stage that an application must specify only one Rule under which it is to proceed. Further, Rule 12 of the 2017 Regulations permitted the Tribunal to direct that two or more applications could be heard together. This inferred that applications under different Rules must be made separately. Ms Donnelly submitted that an application must be made under only one Rule.

(ii) **Is it a requirement of Rule 103 that the respondent's full name be provided in an application under that rule, in all circumstances?**
The Respondent's position was that Rule 103(a)(iii) of the 2017 Regulations should be interpreted as meaning that an application must state both the first name and the surname of the parties, this being the accepted practice in the sheriff court, where an Initial Writ which contained only a first name would not have been warranted. Ms Donnelly referred the Tribunal to *Macphail on Sheriff Court Practice (3rd edition) at Para 9.78*, where it is stated "Wherever possible, the full name and correct designation of each party should be stated in the instance" and that it should be kept in mind that "accuracy is the foundation of procedure...and laxity which springs from carelessness will not necessarily be condoned" and "in an undefended case a serious error in the name of a defender may render any decree against him inoperable." Ms Donnelly submitted that any Order against "Miss Iwona" would not be enforceable and that her full name was required. *Macphail* had continued "Parties' full forenames and surnames should be stated, where these are known". The Applicant had been aware of the Respondent's surname, as it appeared on his bank transfer details, and he ought to have designed her properly when making the application, using all names known to him. The overriding objective set out in Rule 2 of the 2017 Regulations was to deal with the proceedings justly, "avoiding delay so far as compatible with the proper consideration of the issues". The Tribunal Rules could not be properly interpreted as allowing applications to be made when such important details as the full name of the Respondent were omitted.

(iii) **If the answer to question (ii) is in the negative, did the Applicant in this case provide sufficient information to meet the requirements of Rule 103?**
Ms Donnelly told the Tribunal that interpretation of the Rules in the 2017 Regulations indicates compulsory elements which must be provided. Rule 103(a)(iii), for example, makes it clear that the landlord's registration

number should be provided "if any", but it was submitted that the names and addresses of the parties were mandatory and had to be provided in order to meet the Rule 103 requirements. In the present case, the original application, received on 25 March 2019, had referred to two Rules. On 29 March 2019, the Applicant had been advised by the Tribunal to submit an application referring to only one Rule. On 10 April 2019, the Tribunal had received another application which referred only to Rule 103, but again, it did not contain the full name of the Respondent. This was requested by the Tribunal on the following day and the Applicant had provided it on 16 April 2019. The Tribunal's letter of 18 April 2019 acknowledged acceptance of the application and it was at that stage that the application was deemed to be made.

Ms Donnelly submitted that, at best, the application was made in terms of Rule 5 when all the mandatory elements of Rule 103 had been provided. The Applicant did not satisfy the application requirements until 16 April 2019, which was beyond the deadline for raising an application in respect of a failure by a landlord to pay a deposit into an approved scheme. She referred the Tribunal to the Decision of the Upper Tribunal for Scotland in the case of *Timmins and Coyle* (FTS/HPC/PR/18/0353 and UTS/AP/18/0008), where Sheriff Bickett had upheld an appeal against a Decision of the Tribunal that an application was frivolous as being time-barred. Ms Donnelly contended that this was distinguishable from the present case in that the defect in the application was simply that it had not been signed. Signature was mandatory in terms of Rule 103 of the 2017 Regulations. The Upper Tribunal had held that the omission had been fairly minor and that whilst time limits were important, specific circumstances should be accounted for, and had upheld the appeal. The present case was distinguishable in that the original application had referred to two Rules, which was incompetent and that was the only application lodged within the three-month time limit. Without the surname of the Respondent, no *prima facie* case could be made. It was not a minor omission. The Applicant knew the Respondent's surname but omitted it and there had been no unnecessary delay which took the application beyond the cut-off date, unlike *Timmins and Coyle*.

(iv) **If the answers to questions (i) and (iii) indicate that the application was made timeously, was the Applicant's tenancy a "relevant tenancy" within the meaning of the Regulations?**

Ms Donnelly then submitted that even if the Tribunal was not with her in relation to Items (i) to (iii), the Tribunal had to consider whether it was a "relevant tenancy" in terms of Regulation 3(3) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"), namely any tenancy or occupancy arrangement in respect of which the landlord is a relevant person and 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) of the Antisocial Behaviour etc. (Scotland) Act 2004 ("the 2004 Act"). Ms Donnelly stated that the Tribunal had heard evidence that the Property had been the Respondent's main residence during the period of the tenancy and that the Applicant had rented a room there. The

Respondent had provided documentation which supported her position, namely a Council Tax bill, a television licence and a Student Loan Agreement and had stated in evidence that her work took her away from home, sometimes for a few days or even a week. The Respondent's husband had confirmed that she had moved to the Property when they separated and that, on her discharge from hospital, she had not returned to the Property as she required assistance with daily living tasks and this could best be offered by her husband in his house. Ms Donnelly invited the Tribunal to find that the Respondent's husband had been a credible witness and she asked the Tribunal to find that the Respondent was not a "relevant person" as defined in the 2004 Act but rather was one who occupied the Property as her only or main residence and that, as such, she was not obliged to comply with Regulation 5 of the 2011 Regulations, as she satisfied the Section 83(6) exception in the 2004 Act. No evidence had been provided to support the Applicant's contention that other people (not the Respondent) were living in the Property during the period of his tenancy and there was evidence that the Respondent had been living there during that period, so the tenancy was not a "relevant tenancy" because the Respondent was a resident landlord.

The Applicant concluded the proceedings by telling the Tribunal that it had been very difficult for him to find out the surname of the Respondent. She had not registered as a landlord and had not provided him with a tenancy agreement, so had not given him proper information as to her identity. He only ever knew her first name. The evidence he had submitted showed that the Respondent had not been residing in the Property during the period of his tenancy. It had been rented to him and two other people.

The Parties then left the Hearing and the Tribunal retired to consider the application and all the evidence before it, including the evidence given at the Hearing and the submissions of the Parties.

Reasons for Decision

The Tribunal first considered the issue of whether an application must specify only one Rule under which it is to proceed. The Applicant's original application dated 21 March 2019 specified Rule 103 and Rule 68. The view of the Tribunal was that, whilst the application could not have been considered by the Tribunal under both Rules together, the Applicant had in fact included the Rule under which he eventually elected to proceed and the Tribunal would not be giving effect to the overriding objective in Rule 2 of the 2017 Regulations were it to reject the application on that ground alone, as the effect would have been that the Applicant would only have had one day to submit a new application before it became time-barred, the Tribunal having e-mailed him on 29 March asking him to resubmit the application under one Rule number without warning him that his action was about to become time-barred. The Tribunal determined that the application was timeously made, albeit later adjustments were made by way of amended application forms. The removal of the reference to Rule 68 had been an amendment, accepted by the Tribunal.

The Tribunal then considered the fact that the Respondent's surname had not been included in the initial application. The Tribunal noted that the rent payments were

made by bank transfer using the reference "Majzuk" and Ms Donnelly had argued that the Applicant must, therefore, have known that was the Respondent's surname. The Tribunal noted, however, that the Student Loan Statement and television licence both referred to the Respondent as "Iwona Majzuk-soska", not "Iwona Majzuk". The Tribunal also noted that the Respondent had not provided the Applicant with a written tenancy agreement which, presumably, would have contained her full name, and that the Applicant was insistent that he had only ever known her as "Miss Iwona". On the balance of probabilities, the Tribunal determined that the Respondent had failed to provide the Applicant with her full name and that the Applicant had, in his application, referred to her by the only name he knew. The Applicant had, when asked to do so by the Tribunal, carried out research and ascertained the Respondent's surname, but the Tribunal had not sought that information until 11 April 2019 and again, having regard to the overriding objective, the Tribunal determined that it would not be just to reject the application on the ground that it did not contain the Respondent's full name when originally lodged, when the Tribunal had failed to spot the omission on receipt of the application. The Tribunal did not consider that this determination contradicted the views of Sheriff Macphail to which Ms Donnelly had referred in her submissions on behalf of the Respondent. The view of the Tribunal was, therefore, that the Applicant had complied with the requirements of Rule 103 of the 2017 Regulations.

The Tribunal then considered the final submission on behalf of the Respondent, namely whether the tenancy was a "relevant tenancy" as defined in Section 3(3) of the 2011 Regulations. Regulation 3 of the 2011 Regulations requires a landlord who has received a tenancy deposit in connection with a relevant tenancy to lodge it with an approved tenancy deposit scheme. Regulation 3(3) defines a "relevant tenancy" as "any tenancy or occupancy agreement in respect of which the landlord is a relevant person and by virtue of which a house is occupied by an unconnected person". Regulation 3(4) of the 2011 Regulations states that the expression "relevant person" has the meaning conferred by Section 83(8) of the Antisocial Behaviour etc (Scotland) Act 2004. That Section relates to the requirements of landlord registration, and "relevant person" is defined as a person who is not a local authority, a registered social landlord or Scottish Homes. Section 83 of the 2004 Act provides that an application for registration must specify the address of each house which is subject to a lease or an occupancy arrangement by virtue of which an unconnected person may use the house as a dwelling and Section 83(6) states that the use of a house as a dwelling shall be disregarded if it is the only or main residence of the relevant person.

The view of the Tribunal was that, for the purposes of Section 3(3) of the 2011 Regulations, it was incorrect to look beyond the wording of Section 83(8) of the 2014 Act to define "relevant person" and that the exception in Section 83(6) applied only to the matter of landlord registration. Accordingly, the definition of "relevant person" included the Respondent in this case. The Applicant was an "unconnected person" as he was not a member of the Respondent's family. Accordingly, the requirements of Section 3(3) of the 2011 Regulations had been met and the tenancy was a "relevant tenancy".

The Tribunal noted that it had heard two entirely conflicting accounts in relation to who actually occupied the Property during the tenancy. The Applicant stated that he

shared with two other people, neither of whom was the Respondent. The Respondent stated that she had lived at the Property as her main residence until she broke her leg on 18 December 2018 and that nobody else, apart from the Applicant had been living there. The Applicant provided no evidence to support his assertion. The Respondent provided a television licence valid until 30 April 2019, so presumably issued in April 2018, a letter from the Student Loans Company dated 18 September 2018 and a Council Tax Demand letter dated 3 March 2018. The tenancy had, however, begun in August 2018 and the television licence and Council Tax Demand letter both preceded that date. The Tribunal did not doubt that the Respondent had, at some time, lived at the Property, but was not convinced from the documentation provided that she resided there after the tenancy began. It seemed curious to the Tribunal that the Parties communicated entirely by text message and did not appear to have had any contact with each other at the Property itself and the Tribunal was not persuaded that the evidence of the Respondent's husband established that she had been living at the Property during the tenancy. He had stated only that, "as far as he could remember", she had been living there. Accordingly, the Tribunal made no finding as to whether the Respondent occupied the Property as her main residence at any time during the tenancy.

Having held that the tenancy was a "relevant tenancy" for the purposes of Regulation 3 of the 2011 Regulations, the Tribunal determined that the Respondent had a duty under Regulation 3 of the 2011 Regulations to pay the deposit to the scheme administrator of an approved scheme. She had failed to do so, and the Tribunal was bound, under Regulation 10, to order the Respondent to pay to the Applicant an amount not exceeding three times the amount of the deposit.

The Tribunal recognised that the tenancy had lasted only a short time and that the sum involved, the unpaid balance of £140, was relatively small. The Applicant had been put to considerable inconvenience, as he was no longer living in the UK, but the Respondent's failure to comply did not merit a payment at the higher end of the range available to it. The view of the Tribunal was that a fair, proportionate and just amount to order the Respondent to pay was the amount of the deposit that had been retained by her.

Decision

The Tribunal determined that the application should be granted and made an Order for Payment by the Respondent to the Applicant of the sum of One Hundred and Forty Pounds (£140).

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.

George Clark — 11 December 2019

Legal Member/Chair — **Date**