Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 3 and 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/18/0198

Re: Property at 55 Thornwood Drive, Glasgow, G11 7TT ("the Property")

Parties:

Mr Joshua Franchetti, Mr Scott Robertson, 3/2 353 West Princes Street, Glasgow, G4 9EZ ("the Applicant")

Strata Rescom Ltd, 637 Pollockshaws Road, Glasgow, G41 2QG ("the Respondent")

Tribunal Members:

Alison Kelly (Legal Member)
Angus Lamont (Ordinary Member)

The Applicants represented themselves. The Respondent was represented by Mr Ross, solicitor.

Background

The Application was brought under Rule 103 of the The First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

A Case Management Discussion took place on 19th March 2018.

It was agreed at the CMD that the points at issue were:

1. **Was the £950 paid by the Applicants to the Respondent at the commencement of the tenancy a deposit or was it an advance payment of rent.**
2. **Whether there was actually a tenancy agreement between the parties as the Applicants were, as far as the Respondent was concerned, in breach from the beginning as they moved others in to the property thereby creating a House in Multiple Occupation.**

Directions were also issued at the CMD. The Respondent was directed to lodge a copy of the current title to the property within at least 14 days before the date of the Oral Hearing, and both parties were directed to lodge a list of witnesses they intended to call at least 14 days before the hearing.

The Tribunal Administration Office received an email from the Respondent's solicitor on 27th April 2018 seeking and adjournment of the hearing, stating that they had only recently been reinstructed in this case, that the directions had not ben complied with, and seeking a fresh date to carry out further investigations and comply with the Directions. This request was refused. A further email was received the day before the hearing confirming the name of the witness that the Respondent intended to call and that they would be seeking to lodge a letter from a building contractor regarding the damaged ceiling.

The hearing commenced and the Tribunal asked the Respondent's solicitor to confirm why the Directions had not ben complied with. He advised that he had only been reinstructed in relation to the matter on the previous Friday, and that pressure of business had caused the Respondent to focus on other matters.

Mr Ross could not produce a copy of the title; his firm does not have a conveyancing department. He had been told by Najif Jaffri, his witness today that the title is in the name of Syed Nasir Jaffri. He confirmed that his client is Najif Jaffrey, who is responsible for managing and operating the property firm.

Mr Ross asked that he could call his witness despite not having lodged a List of Witnesses timeously, and that he would speak to the agreement between the parties and subsequent communications.

Mr Ross also asked to lodge late a report prepared by a property company on the state of the damaged ceiling.

The Applicants objected to both the witness being called and the document being lodged.

The Tribunal adjourned to consider these preliminary matters.

After consideration the tribunal reconvened and advised the parties that they had decided to allow the witness to be called, but were refusing the lodging of the document as it was not relevant to the issues to be decided.

The Tribunal discussed the issues with both parties and noted that the following facts were agreed:

1. The tenancy began with a Short Assured Tenancy Agreement dated 23rd June 2017
2. The Applicants had been issued with a receipt by the Respondents which stated "Deposit Paid" and the sum was £950
3. The tenancy came to an end by mutual agreement on 13th November 2017.

It was also agreed that the onus was on the Respondent to prove his position and that he should lead.

Mr Ross then called Mr Najif Jaffri to give evidence.

Mr Jaffri confirmed that he was the manager of Strata, which is a letting office and property company. They buy, sell and rent properties, both on their behalf and on behalf of others. They manage around 70 properties.

Mr Jaffri confirmed that the property at 55 Thornwood Drive is owned by his brother, Syed Nasir Jaffri. Syed Jaffri is the director of Strata, but does not take anything to do with the day to day running of the property and Mr Najif Jaffri is responsible for the day to day running. He has been doing this type of work for about 30 years.

Mr Jaffri confirmed that the property was advertised and the applicants responded to the advert. The letting was handled by Zara Ali, an employee of the company.

Mr Jaffri said that the payment of £950 was a security deposit for taking the property off the market. He said that this was his firm's practice in most cases. Paying the sum shows to the landlords that the tenants are serious. After the tenancy commences the money is taken towards rent.

Mr Jaffri was asked by his solicitor if there had been any issues with the tenancy. Mr Jaffri said that there hadn't been per se. He then said that there were a few issues which had to be resolved. He said that when the tenants first took occupation there had been others staying in the property. The Applicants were told that this couldn't continue and the company wrote to them regarding this. Mr Ross then referred Mr Jaffri to the letters which were produced to the Tribunal, numbers 1 and 2, and Mr Jaffri confirmed that they had been sent. He also confirmed that no notice To Quit had been served.

Mr Jaffri said that he felt that the Applicants were trying to dupe him by having other people living in the property, and they then began to make up things.

Mr Jaffri said that after the first warning letter he gave the Applicants the benefit of the doubt as they had said they had guests staying over. He told them that if they did not rectify the situation he would take action to end the tenancy. He said he received no communication from the tenants, and felt that they were ignoring him.

Mr Jaffri was asked by his solicitor why the tenancy came to an end, and he said that the ceiling fell in and the tenancy came to an end shortly thereafter. He said that he was of the view that the Applicants had caused the damage themselves.

Mr Jaffri's solicitor asked if there was rent outstanding when the tenancy came to an end. Mr Jaffri said that he believed that there was one, or possibly two months outstanding. He said that the £950 was used towards that rent. A bank

statement had been lodged by him, and the Tribunal asked for clarification of where the £950 was as it was not on the statement. Mr Jaffri was very vague on this point.

The Tribunal asked Mr Jaffri if the rent was put in to a rent account for the Applicants and if rent statements had been issued to them. Mr Jaffri said that the £950 would be paid in to a rent account for the applicants at the beginning of the tenancy. He did not tend to issue statements of rent.

The Tribunal asked Mr Jaffri how the figure of £950 had been arrived at, bearing in mind that the monthly rent was £750. Mr Jaffri said there was no formula for calculating this, and that the figure was decided on a case by case basis.

Mr Jaffri was then asked by his solicitor if he still used the same tenancy agreement. Mr Jaffri said that he didn't, as the law had changed and he now uses the standard lease issued by the Scottish Government.

The Tribunal asked Mr Jaffri if it was normal practice to take deposits from tenants, and he said that it was. He was asked why a deposit hadn't been taken in this particular case, but he said that he couldn't recall.

The Tribunal then asked for clarification of a point in paragraph 4 of the letter dated 8th March 2018, sent by LKW Solicitors to the Tribunal on the Respondent's behalf. The letter stated that "we would at this stage point out that our client's usual practice is to ensure that any deposit is placed in the registered tenancy deposit scheme as soon as possible. In this case the funds were held back since our client was concerned that given the on-going potential breach of the lease, they might have to terminate the lease straight away." The Tribunal asked for clarification of what was meant by "held back". Mr Jaffri said that the money would normally by this stage have been put in to a tenancy deposit scheme but there were issues here which meant they might have to bring the tenancy to an end. He was asked if that meant that the money was in fact a deposit, and he accepted that it was, and would have gone in to a scheme if there hadn't been an issue with the tenants. He said that he was aware that deposits should be paid in to a scheme within 30 days of being received, but he felt justified in holding it back in this case. He said that after finding out that the Applicants had other people staying in the property he decided not to put the deposit in to the tenancy deposit scheme.

The Tribunal again asked where the £950 was credited and Mr Jaffri was vague. He said it was the tenants' money and was allocated to the tenant.

The Applicants were asked if they had any question for the witness. Mr Robertson asked the witness if the letters, productions 1 and 2, had been sent by recorded delivery. Mr Jaffri confirmed that they had been sent by first class post. The Applicants stated that they had never received the letters.

The witness's evidence was then brought to a close.

The Applicants were asked if they had anything they wished to put before the Tribunal. Mr Franchetti stated that in addition to the £950 they had paid £750 up front as the first month's rent. They had not made any verbal agreement with anyone that the £950 was towards rent and the receipt led them to believe that the money was not anything other than a deposit.

Mr Jaffri interjected that the Applicants had been given plenty of time to read the tenancy agreement before they signed it, and that the Agreement made no mention of a deposit being payable.

The Tribunal asked if anyone had anything further to say.

Mr Ross on behalf of the Respondent submitted that the Tenancy Agreement made no mention of a deposit, and that the payment fell out with the remit of the regulations and therefor the application should be dismissed.

The Applicants confirmed their position was that a deposit had been paid and not put in to a deposit scheme.

The Tribunal adjourned to consider their decision.

Findings In Fact

1. The parties entered on to a Short Assured Tenancy Agreement dated 23rd June 2017
2. The applicants paid £950 to the Respondents
3. The tenancy came to an end by mutual agreement on 13th November 2017
4. The payment of £950 constituted a deposit in terms of section 120 of the Housing (Scotland) Act 2006 and therefor falls to be paid in to a tenancy deposit scheme in terms of Regulation 3 of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

Reasons For The Decision

The Tribunal was satisfied that the sum of £950 paid by the Applicants was a deposit in terms of section 120 of the 2006 Act. There was a receipt issued by a member of the Respondent's staff which clearly stated the word "Deposit". Mr Jaffri's own evidence did not support the Respondent's contentions that it was a payment towards rent, particularly given that he gave evidence that he had deliberately held the payment back from the scheme due to ongoing issues.

As far as the contention that the tenancy was not a tenancy because the Applicants had moved other people in, the Tribunal decided that such an argument was not relevant. If the Respondents had issues with the Applicants being in breach of the tenancy there were remedies for this available.

After the conclusion of the Tribunal Mr Jaffri said that he was taking action against the Applicants in relation to damage done to the property. Had the

deposit been lodged in a scheme he would have had a remedy available to him.

The Applicants, in their application, seek return of their deposit. In terms of the 2011 Regulations the Tribunal does not have power to order return of the deposit, but in terms of Regulation 10 if satisfied that the Landlord did not comply with any duty in regulation 3, the Tribunal must order the Landlord to pay the Tenant an amount not exceeding three times the amount of the Tenancy Deposit.

In this case the Tribunal found that the Respondents were not ignorant of the law but made a choice not to place the deposit in an approved scheme. The explanation given for their actions contravened the legislation and the spirit of it.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondent should pay to the Applicants the sum of £1,900, representing twice the amount 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.

ALISON KELLY

Legal Member/Chair

1/5/18

Date