Housing and Property Chamber
First-tier Tribunal for Scotland

Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 ("2011 Regulations")

Chamber Ref: FTS/HPC/PR/17/0506

Re: Property at 12/24 Ethel Terrace, Edinburgh, EH10 5NA ("the Property")

Parties:

Mrs Xiaohui Zhou, 28 Oxgangs Road North, Edinburgh ("the Applicant")

JFT & KLM Greig Trust, Byresloan Farm, Cardowrie Loan, Markinch, KY7 6HJ ("the Respondent")

Tribunal Member:

Pamela Woodman (Legal Member)

Background

1. The Applicant made an application to the First-tier Tribunal for Scotland (Housing and Property Chamber) (**"the Tribunal"**) under regulation 9 of the 2011 Regulations and in accordance with the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (**"HPC Rules"**) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, (**"2017 Regulations"**). More specifically, the application was made in terms of rule 103 *(Application for order for payment where landlord has not paid the deposit into an approved scheme)* of the HPC Rules.

2. The order sought from the Tribunal was an order for payment of three times the amount of the tenancy deposit as a result of the Respondent (as landlord) not having paid the tenancy deposit into an "approved scheme" (as defined in the 2011 Regulations). The Applicant stated that the tenancy deposit was £1,200.

3. The application form was accompanied by copies of the following:

    a. Short assured tenancy agreement between JFT & KLM Greig Trust and Ms Zhou Xiaohui dated 18 September 2017 (**"Tenancy Agreement"**);

b. Document (**"Termination Document"**) requesting termination of the lease and setting out certain anticipated financial consequences of doing so, signed by the Applicant dated 3 October 2017, with a handwritten initialled note on it acknowledging receipt of 2 sets of keys;

c. Evidence of payments totalling £2,200 (plus a credit card fee);

d. E-mail correspondence dated 3 October 2017 onwards between the Applicant and Kenneth Greig (**"Mr Greig"**);

e. Text message correspondence apparently between the Applicant and Mr Greig over the same period as the e-mail correspondence referred to above; and

f. E-mail correspondence dated [26?] October 2017 onwards between the Applicant and Braemore (letting agent).

4. A notice of acceptance of the application was issued by the Tribunal dated 21 December 2017 under rule 9 of the HPC Rules.

5. Each of the Parties was sent a letter by the Tribunal dated 29 December 2017 confirming that the application had been received, intimating the date of the scheduled case management discussion and noting that written representations from the Respondent must be received by 16 January 2018.

6. Written representations were provided by Heather Greig, as trustee, on behalf of the Respondent dated 11 January 2018, accompanied by various appendices which, in summary, comprised a printout of certain sections from the mygov.scot guidance for landlords on tenancy deposits; various e-mails between (a) the Applicant and Braemore, (b) Mr Greig and Braemore, and (c) the Applicant and Mr Greig; details of requests from the Applicant to the Respondent and the Respondent's position with regard to them; and part of a complaint form to the Council of Letting Agents about Braemore Property Management noting the name of the Applicant as the complainer.

7. Neither Party was able to confirm whether (or not) a completed form AT5 had been provided by, or on behalf of, the Respondent to the Applicant before the Tenancy Agreement was entered into but it was not essential to determine that point in the particular circumstances of this application.

8. A case management discussion (**"CMD"**) was scheduled for 10am on Wednesday 31 January 2018 in room D25 at George House, 126 George Street, Edinburgh EH2 4HH.

9. This decision arises out of the CMD.

Key relevant legal provisions

10. Regulation 9(1) *(Court orders)* of the 2011 Regulations is in the following terms:

> "A tenant who has paid a tenancy deposit may apply to the sheriff for an order under regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of that tenancy deposit."

11. Regulation 3(1) *(Duties in relation to tenancy deposits)* of the 2011 Regulations is in the following terms:

> "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."

12. Regulation 9(2) *(Court orders)* of the 2011 Regulations is in the following terms:

> "An application under paragraph (1) must be made by summary application and must be made no later than 3 months after the tenancy has ended."

13. Regulation 10 *(Court orders)* of the 2011 Regulations is in the following terms:

> "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; or
>
> (ii) provide the tenant with the information required under regulation 42."

14. With effect from 1 December 2017, the functions and jurisdiction of the sheriff on matters arising out of the 2011 Regulations (and various other civil matters) in relation to any "assured tenancy" (as defined in section 12 of the Housing (Scotland) Act 1988) were transferred to the Tribunal by virtue of section 16 of the Housing (Scotland) Act 2014.

15. Rule 17(4) of the HPC Rules is in the following terms:

> "The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision."

The proceedings, namely the CMD on 31 January 2018

16. In addition to the Legal Member and Sinead O'Connor (clerk to the CMD), the following persons participated in the CMD:

    a. the Applicant;

    b. Heather Greig, trustee (and representative) of the Respondent (**"Mrs Greig"**);

    c. Teresa Blaik, the interpreter appointed by the Tribunal;

    d. Maliya Ma, as witness for the Applicant, (**"Ms Ma"**); and

    e. Mr Greig, as witness for the Respondent.

17. The Legal Member explained the purpose of the CMD, the procedure which would be followed and the potential outcomes from the CMD, which could involve (amongst other things) awarding or refusing a payment order or the referral to a hearing. The Legal Member highlighted that, as was explained in the letter sent to each of the Parties by the Tribunal dated 29 December 2017 notifying the Parties of the CMD, the Tribunal may do anything at a CMD which it may do at a hearing.

18. The Legal Member explained that, whilst there may be related matters which were relevant in considering the application before the Tribunal today, no action, step or decision may be taken in relation to those other matters by the Tribunal as they were not the subject of the application currently before it. In particular, she noted (and confirmed later in the CMD) that today's CMD would (and could) not deal with any dispute regarding the return of the tenancy deposit itself.

19. In summary, the following facts were confirmed by both Parties to be agreed, admitted and/or accepted:

    a. The Applicant paid £2,200 in total to the Respondent, via the letting agent (Braemore). This comprised one month's rent of £1,000 and the tenancy deposit of £1,200.

    b. As at the date of the CMD, the full £2,200 had been retained by the Respondent and none of it had been repaid to the Applicant.

    c. As at the date of the CMD, the tenancy deposit had not been paid into an "approved scheme".

    d. The tenancy had originally been granted for 6 months and the Applicant moved into the Property, as a tenant, on 18 September 2017. That was the commencement date of the tenancy.

    e. Mr Greig, rather than Mrs Greig, was the primary person with whom the Applicant communicated (by e-mail, phone and text message) in relation

to matters regarding the Property and the tenancy after the date of commencement of the tenancy.

f. The Termination Document had been drafted by Mr Greig and provided in person to the Applicant at a meeting at the Property on 3 October 2017. The Applicant had signed two copies of the Termination Document, one of which was retained by the Applicant and one by Mr Greig. Mr Greig had initialled the Applicant's copy of the Termination Document to acknowledge safe receipt of two sets of keys to the Property. The keys to the Property had been returned on 3 October 2017 by the Applicant to Mr Greig during their face-to-face meeting. Ms Ma was present at the Property during this meeting and witnessed all of this.

g. The Applicant ceased to have access to, or possession of, the Property after the keys were handed over on the evening of 3 October 2017.

20. There was not agreement between the Parties regarding the date of termination of the tenancy (and so the Tenancy Agreement) –

a. the Applicant thought that the date of termination was 3 October 2017 when she signed the Termination Agreement and returned the keys for the Property to Mr Greig, whom she believed had received them from her on behalf of the landlord (i.e. the Respondent); and

b. Mrs Greig, on behalf of the Respondent, did not think that the tenancy had terminated on that date. No express representations (written or oral) were made as to when the Respondent considered that the lease had terminated or would terminate.

21. Mrs Greig confirmed a number of other matters which were relevant in the circumstances of this application, namely that:

a. The Property was the only property of which she was a "landlord", either as an individual or as a trustee, and that the Property was the only property leased out by the Respondent, which was a trust of which she (but not Mr Greig) was a trustee. She noted that she had an emotional attachment to the Property as it had previously been owned by her aunt, who had died in December 2016.

b. There was no bank account for the Respondent when the tenancy commenced but one was set up. The tenancy deposit cleared through the Respondent's bank account on Friday 29 September 2017. Mrs Greig intended to pay the tenancy deposit into an "approved scheme" in the week beginning 2 October 2017, but the Applicant "left" the Property on 3 October 2017.

c. Mrs Greig was aware that the Respondent had 30 working days from commencement of the tenancy to lodge the tenancy deposit in a scheme (of which she was aware there were three) but, in light of the Applicant's departure from the Property, she consulted the mygov.scot website. Here

she found reference to a tenancy deposit being able to "be used to cover costs", such as for "damage to the property", "bills that are left unpaid, like fuel or telephone bills" and "unpaid rent". Therefore, she believed that the Respondent could retain the tenancy deposit as the Applicant had signed up to a 6 month tenancy but had left early. She did not realise that the tenancy deposit should have been lodged retrospectively.

d. Mrs Greig did not investigate with any of the "approved schemes" as to whether or not it was possible to lodge the tenancy deposit after the Applicant had left the Property, in other words if an "approved scheme" would accept and register the tenancy deposit in such circumstances.

e. Mrs Greig had not seen the Termination Document prior to Mr Greig providing it to the Applicant.

22. The Applicant confirmed that her understanding was that, upon signing the Termination Agreement and returning the keys to Mr Greig, the financial arrangements set out in the Termination Agreement were agreed by (or on behalf of the Respondent), namely that rent of £500 would be payable for the period from 18 September 2017 to 3 October 2017, that the balance of rent paid (i.e. £500) would be repaid to the Applicant and that the tenancy deposit of £1,200 would be returned if the Property was left in a satisfactory (i.e. clean) condition. The Applicant stated that she had spent a lot of time on 3 October 2017 cleaning the Property but Mr Greig refused to inspect the Property when he was there to receive the return of the keys to the Property.

23. Copy e-mail correspondence had been provided by both Parties which included the following statement from the Applicant on the afternoon of 3 October 2017: "I can pay for you reasonable for ending this lease, but if it was too outrageous, I think I would continue to complain and live in your flat. Obviously that result is unpleasant for us all. You know the contract is unfair for me from the start and know what I have suffered."

24. It was alleged, on behalf of the Respondent, that the Applicant had threatened to change the locks on the Property, which Mr and Mrs Greig believed to be a genuine threat. This was wholeheartedly denied by the Applicant.

25. In oral submissions made on behalf of the Respondent, it was noted that it was important for the Respondent to have the Applicant leave the Property; they had to get her out of the Property.

26. In addition, both Parties provided documentation and made oral submissions with regard to a number of matters of disagreement between the Applicant and the Respondent which further indicated that the landlord-tenant relationship was very difficult from the start and had essentially broken down by 3 October 2017. The detail of the matters of disagreement was not relevant for the purposes of this particular application.

27. The Applicant sought to introduce additional written submissions during the CMD which the Legal Member was told were additional e-mails between the Parties

prior to termination (and so, based on the Applicant's view of when this occurred, from on or before 3 October 2017). However, the Legal Member did not permit those to be introduced because, based on a brief description of their content, they were not considered to be relevant for the purposes of this particular application, as well as not having been lodged timeously.

28. E-mail correspondence between the Applicant and Mr Greig had been provided by the Applicant which evidenced that the Applicant had repeatedly from 11 October 2017 onwards requested the return of the tenancy deposit (as well as the "balance" of rent for the period after 3 October 2017 (being £500)) from the Respondent. This included an e-mail dated 27 October 2017 in which the Applicant noted that "If a landlord doesn't register a deposit, then a tenant can apply to the sheriff court and the court can order the landlord to pay the tenant up to three times the amount of the deposit." The response from Mr Greig to this e-mail was to request a postal address. There followed an exchange of e-mails around the need for a postal address and that this was required in terms of the Tenancy Agreement but the matter of the return of the tenancy deposit was not addressed by Mr Greig, other than to note that there would be council tax and utilities to be paid for by the Applicant. The Applicant accepted by e-mail that she should pay for these "for the 15 days". Mr Greig (on 31 October 2017) noted that a postal address was required in order "to continue", which presumably referred to discussions regarding the return of the tenancy deposit.

29. The Applicant explained during the CMD that she had not provided a forwarding address for two reasons, namely (a) she did not know why the Respondent required it and felt threatened by this request and (b) she did not have a stable, fixed address and was staying with various friends until she found somewhere else to stay on a more permanent basis.

Findings of fact

30. The Legal Member was satisfied, on the balance of probabilities and based on the documentation provided, that:

    a. The application related to an "assured tenancy" (as defined in section 12 of the Housing (Scotland) Act 1988) and so the Tribunal had jurisdiction to hear the case.

    b. There was a landlord (i.e. the Respondent, which was not a local authority, registered social landlord or Scottish Homes) who had received a tenancy deposit (which was expressly referred to in the Tenancy Agreement, which the Applicant had referred to in her application and which was agreed during the CMD to have been paid) in connection with a relevant tenancy (the Applicant being an "unconnected person" relative to the Respondent and the use of the Property not falling within any of the types set out in section 83(6) of the Antisocial Behaviour etc. (Scotland) Act 2004, as amended). This was all relevant in order to allow the Legal Member to find that regulation 3 of the 2011 Regulations was applicable in the particular circumstances of this case.

31. Based on the written representations provided on behalf of the Respondent, it was noted that the Property had been re-let to another person as of 6 December 2017. Whilst this point was not discussed during the CMD, it would not be a tenable position for the Respondent to suggest that the tenancy of the Property with the Applicant had ended any later than 5 December 2017. The date of termination (whether 3 October 2017 (as submitted by the Applicant), 5 December 2017 or some other date in between those two dates) was not a matter which required to be determined in the particular circumstances of this application. However, for the purposes of regulation 9(2) of the 2011 Regulations, the Legal Member found that the application was made "in time" by being "made no later than 3 months after the tenancy has ended" (whichever possible date of termination was used).

32. The Tenancy Agreement itself made reference to the 2011 Regulations and how the tenancy deposit would be dealt with after the end of the tenancy. Clause 4 of the Tenancy Agreement was of particular relevance.

33. Upon making telephone enquiries to each of the three "approved schemes", the Legal Member was orally advised on 30 January 2018 that a tenancy deposit would be accepted by the "approved scheme" even if the relevant tenancy had terminated before the tenancy deposit was paid into an "approved scheme".

34. Clause 2.73 of the Tenancy Agreement required the tenant to provide a forwarding address for correspondence "as soon as is practicable just before or immediately at the end of the tenancy".

Reasons for decision

35. The 2011 Regulations were intended (amongst other things) to put a landlord and a tenant on an equal footing with regard to any tenancy deposit which was paid in connection with the grant of a tenancy and also to provide a mechanism for resolving any dispute between them with regard to whether a tenancy deposit was to be returned to a tenant or retained by a landlord, and that whether in whole or in part.

36. Both Parties had appeared credible in the giving of their oral submissions to the Tribunal.

37. The Respondent had admitted that the tenancy deposit had not been paid into an "approved scheme" within 30 working days of the beginning of the tenancy and so the Respondent had also not provided the Applicant with the information required under regulation 42 of the 2011 Regulations. Accordingly, the Legal Member was satisfied that the Respondent had not complied with the duties on a landlord as set out in regulation 3(1) of the 2011 Regulations. The 2011 Regulations provide for strict liability for non-compliance with the regulation 3 duties and so the Tribunal "must order the landlord to pay the tenant an amount not exceeding", in this particular case, £3,600.

38. The exact amount of such an order for payment was then a matter for the discretion of the Tribunal. Sheriff Welsh, sitting in Edinburgh Sheriff Court in

January 2015 in the case of Marcus Jenson v Giuseppe Fappiano which also involved the 2011 Regulations, found that there should be "a fair, proportionate and just sanction in the circumstances of the case". The Legal Member agreed with such an approach.

39. In determining what would be a "fair, proportionate and just sanction" in the circumstances of this particular case, the Legal Member:

    a. Accepted that the Respondent was a first-time landlord, a so-called "amateur" landlord;

    b. Noted that Mrs Greig, on behalf of the Respondent, had accepted during the CMD that she had made a mistake by not reading all of the mygov.scot guidance for landlords on tenancy deposits, in particular the sentences which read "You must prove that you have a claim to retain some or all of the deposit. If you can't – the adjudicator must return the deposit to the tenant". Accordingly, on behalf of the Respondent, Mrs Greig had erroneously believed that the Respondent was entitled to retain the tenancy deposit without taking any further steps;

    c. Found that, by failing to pay the tenancy deposit into an "approved scheme", the Respondent had deprived the Applicant (and the Respondent) of the free dispute resolution mechanism which would otherwise have been available;

    d. Noted that the Respondent was willing to pay the tenancy deposit into an "approved scheme" now;

    e. Acknowledged that it was Mr and Mrs Greig's belief that the Applicant might change the locks on the Property but that was not to say that the Legal Member accepted that that belief was correct or founded;

    f. Found that there was a very difficult relationship between the Parties which had clearly broken down;

    g. Found that it was reasonable for the Applicant to assume that, in providing the Applicant with the Termination Document, Mr Greig was acting on behalf of the Respondent given that prior communication had been with him regarding earlier matters of disagreement relating to the Property regarding furniture etc;

    h. Found that it was reasonable for the Applicant to assume that, in signing the Termination Document (based on its terms which had been drafted by Mr Greig) and handing over the keys to the Property to Mr Greig, the tenancy deposit would be returned to the Applicant if the Property was left in satisfactory condition;

    i. Noted that the Applicant repeatedly requested the return of the tenancy deposit and, in an e-mail on 27 October 2017, made reference to the

potential consequences of a failure to pay the tenancy deposit into an "approved scheme", albeit without making explicit reference to the 2011 Regulations - if nothing else, this should have caused the Respondent to check that the position being maintained by the Respondent (in retaining the tenancy deposit) was correct from a legal perspective;

j. Noted that the Applicant did not dispute that she would be liable for council tax and utilities for the period of her occupation of the Property and, by e-mail, appeared to confirm that these could/should be deducted from the tenancy deposit in respect of "15 days" of occupation; and

k. Took into account that (i) the period between the commencement of the tenancy (i.e. 18 September 2017) and the date of the CMD (i.e. 31 January 2018) was approximately 4½ months and (ii) the period between the deadline for paying the deposit into an "approved scheme" in terms of regulation 3 of the 2011 Regulations (i.e. 30 October 2017) and the date of the CMD, was approximately 3 months. Therefore, as at the date of the CMD, the non-compliance by the Respondent with its duties in terms of regulation 3 of the 2011 Regulations had continued for approximately 3 months, during which time the tenancy deposit had not been protected in an "approved scheme".

Decision

40. The Tribunal decided that a fair, proportionate and just sanction in the circumstances of this particular case was for the Respondent to be ordered to pay the Applicant an amount of £600 *(six hundred pounds sterling)* as a result of the Respondent's failure to comply with its duties in regulation 3 of the 2011 Regulations, and that payment should be made on or before Friday 16 March 2018. Accordingly, the Respondent was ordered to do so.

41. The Tribunal also decided that (a) the tenancy deposit of £1,200 must be paid by the Respondent into an "approved scheme" on or before Friday 16 March 2018 in order (amongst other things) to provide the Applicant and the Respondent with access to the dispute resolution mechanism provided through an "approved scheme" with regard to the return of the deposit and (b) the Respondent must provide the Applicant with the information required under regulation 42 of the 2011 Regulations. Accordingly, the Respondent was ordered to do so. Should all three of the "approved schemes" refuse to accept the tenancy deposit, then the Respondent was required to provide, to the Tribunal, written confirmation from each such "approved scheme" to that effect.

42. In addition, the Tribunal directed the Applicant to provide the Respondent with a forwarding address within 14 days, and so on or before 14 February 2018.

43. The orders and direction referred to in paragraphs 42 to 44 inclusive were intimated orally to the Parties by the Legal Member during the CMD (after it resumed following adjournment).

Right of Appeal

In terms of Section 46 of the Tribunals (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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

P Woodman

5 February 2018

Legal Member/Chair **Date**