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 Sections 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/3371

Re: Property at 18 Great George Street, Glasgow, G12 8LN ("the Property")

Parties:

Mr Muhamad Haziq Afif Bin Muhamad Her, 2/1 35 Crow Road, Glasgow, G11 7RT ("the Applicant")

Mr Ahmad Qureshi, whose current whereabouts are unknown ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

[1] This was an application dated 22nd October 2019 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The application was made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* ("the 2011 Regulations").

[3] The Applicant sought payment of compensation in respect of an alleged failure by the Respondent to pay the deposit he asserts he provided of £400.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

[4] The Applicant provided with his application copies of a tenancy agreement, e-mail and mobile phone text correspondence between the parties which confirmed on the Landlord's agent's part payment of money by the Applicant "which we withhold for security", bank statements showing the payment of the deposit, and correspondence from the Applicant's agent in respect of the Property (designating himself as "Mo M", and known to the Applicant as "Adam") which stated that "we do not take deposits".

[5] The Respondent could not be validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal, as the Applicant has never been provided with his address.

[6] When sheriff officers attended at the address in Dundee listed for the Respondent in the Register of Landlords to effect service, they met a resident of that property who confirmed that she was a tenant, had never heard of the Respondent, and that her landlord was a completely different individual.

[7] As the Respondent's present whereabouts were unknown, service was validly effected by advertisement in terms of Rule 6A of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, and the Tribunal was provided with the Certificate of Service by advertisement.

[8] A Case Management Discussion was held on 6th March 2020 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant appeared, and was accompanied by Mr Smith of Glasgow University SRC Advice Centre. The Respondent had not responded to this application at that time.

[9] The Applicant explained that after requesting repayment of his full deposit after the end of the tenancy on 28th August 2019, his request was refused.

[10] The Applicant had also checked the Register of Landlords, and found that the Respondent was registered as landlord of the Property, but as earlier noted, the supplied contact address was not one where the Respondent resided or might be contacted at.

[11] The lease agreement purports to be a short assured tenancy agreement which commenced on 1st September 2018. Legally, this form of agreement could no longer be created from 1st December 2017, and accordingly the agreement may be treated as a private residential tenancy agreement.

[12] The Landlord is designed in the agreement as Westend Lets Ltd. That company is dissolved, and it was not clear what relationship it had with the Respondent. The Tribunal noted that its registered office is listed as the Property, which is entered on the Land Register with the Respondent listed as proprietor. In those circumstances, the Tribunal proceeded on the basis that it had some connection with the Respondent.

[13] The Applicant sought payment of compensation in respect of the Respondent's failure to lodge his deposit in an approved scheme.

[14] The Tribunal was satisfied that the Respondent did not comply with his duty under regulation 3, and accordingly it ordered the Respondent to pay the Applicant the sum of £1,200.00 (three times the amount of the tenancy deposit), and ordered the Respondent to pay the tenancy deposit of £400.00 into an approved scheme.

[15] Thereafter, by letter dated 7th December 2020, the Respondent's then representative applied to the Tribunal for recall of its decision of 6th March 2020. The application was not timeous in terms of Rule 30(4) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, coming outwith the period of 14 days from the date of the decision.

[16] The Respondent's representative explained in its letter that the Respondent had only first found out about the decision and order on 8th October 2020 as a result of his applying to Glasgow City Council for renewal of his landlord registration.

[17] The Respondent's representative sought recall upon two bases. Firstly, it asserted that the Applicant was well aware that the Respondent resided at the Property. Secondly, as a result of that fact, the Respondent was not required as a resident landlord to place the deposit in an approved scheme.

[18] The Respondent sought recall of the Tribunal's decision of 6th March 2020 upon the basis that it was in the interests of justice to allow the application to be considered by the Tribunal.

[19] The Respondent acknowledged that the application for recall was not timeous, but invited the Tribunal to extend the period of 14 days provided in Rule 30(4) of the Rules on cause shown in terms of Rule 30(5) upon the basis that due to difficulties in obtaining legal advice during the coronavirus pandemic, it had taken him some time to obtain legal advice and representation.

[20] A copy of the application had been intimated to the Applicant, who had failed to respond to the Tribunal and failed to intimate any opposition to it.

[21] The Respondent's representative withdrew from acting for the Respondent on 7th January 2021. The Tribunal thereafter made contact with the Respondent, who confirmed that he still wished to proceed with this application.

[22] In those circumstances, the Tribunal considered that the Respondent has shown cause for it to extend the period of 14 days in terms of Rule 30(5) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. It considered that it was just that its decision be recalled on the bases that the Respondent asserted that his whereabouts were known to the Applicant, and that in the event that he was a resident landlord he might have a *prima facie* defence to this application.

[23] A further Case Management Discussion was held on 13th July 2021 by Tele-Conference. The Applicant did not participate, but was represented by Mrs Speirs of Glasgow University SRC Advice Centre. The Respondent did not participate, but was represented by his son, Mr Mahmood.

[24] Mrs Spiers confirmed that the Applicant's position had not changed. Mr Mahmood explained that his father's position was that he had resided at the Property from about 2007 or 2008, and had been residing there when the Applicant rented accommodation in the Property. He explained that the Property was a large house, which had been sub-divided into studio flats. The Respondent's position was that the Applicant knew he resided there, and that he was a resident landlord and as such was not subject to the requirement to lodge the deposit which he took from his various tenants.

[25] Both parties accepted that there were clear and substantial factual disputes between them as to the circumstances surrounding this matter, which could only be determined by the Tribunal after hearing evidence, and for that reason the Tribunal should set a Hearing.

[26] Thereafter, the Respondent's son withdrew from acting for his father and indicated that the Respondent would represent himself.

The Hearing

[27] A Hearing was held on 19th August 2021 by Tele-Conference. The Applicant did not participate, but was represented by Mr Smith of Glasgow University SRC Advice Centre. The Respondent participated, and was not represented.

[28] The Tribunal heard evidence from the Respondent, which was in very short compass. He had lodged in advance of the Hearing copies of letters from his mortgage lender addressed to him at the Property over a period of several years, and a copy of his driving licence which also narrated his address as being at the Property.

[29] The Respondent gave evidence that he resided at the Property, and had done so since 2007. He stated that he resided in the basement of the Property, which was a separate and self-contained flat accessed through a separate flight of stairs from the front of the Property and from a door into the garden at the back.

[30] The Respondent explained that the Property contained a further six self-contained flats, each of which had its own kitchen, bathroom and bedroom/lounge. Each is accessed through its own separate door from a common close, which is accessed from a common stair door at the front of the Property.

[31] The Respondent gave evidence that he met a man called Adam in his local butchers, who recommended Westend Lets Ltd as a good and cheap letting agent. He contacted Mohammed Mahmood, who he believed ran the letting agency and instructed him to act on the Respondent's behalf. He left everything to him, including registering the Respondent on the register of landlords.

[32] The Respondent stated that he did not really know any of those involved with Westend Lets Ltd, and had ceased allowing them to act for him once he received a copy of the Tribunal's decision and realised that the letting agent had not been acting properly and had been dissolved on 8th January 2019. He explained to the Tribunal that he received payment of the rent for the Property in cash, which was dropped off

at his door by someone on behalf of Westend Lets Ltd once a month. He accepted that the entry at Companies House for Westend Lets Ltd disclosed that Mr Mahmood was the sole director of the company and noted its dissolution on 8th January 2019.

[33] In response to questions from the Tribunal, he accepted that he had thereafter incorporated a new company which was also called Westend Lets Ltd, on 18th November 2019. He did so, he said, in order to provide a vehicle for him to continue to manage and let out the various flats at the Property.

[34] In response to further questions from the Tribunal about the entry for the company he incorporated on 18th November 2019, he accepted that his son was also a director, and expressed surprise that the entry also listed Mohammed Mahmood as the third director noting the same date of birth for him as that given for the company earlier dissolved on 8th January 2019.

[35] The Respondent was unable to explain why Mr Mahmood was a director, and claimed to be unaware of this fact. He claimed that he did not know Mr Mahmood, and had no dealings with him. He also confirmed that Mahmood is a common surname in his community, and that Mr Mahmood was not related to him or his son, with whom he shared the same surname.

[36] Finally, in response to a final question from the Tribunal, the Respondent stated that he had not produced any utilities bills addressed to him at the property, nor any council tax documentation. He stated that he had not paid council tax for the last 5 or 6 years.

Reasons for Decision

[37] This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

[38] Regulation 3(1), (3) and (4) of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

> "(1) 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.
> (3) A *"relevant tenancy"* for the purposes of paragraphs (1) and (2) means any tenancy or occupancy arrangement—
> (a) in respect of which the landlord is a relevant person; and
> (b) 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) (application for registration) of the 2004 Act.
> (4) In this regulation, the expressions *"relevant person"* and *"unconnected person"* have the meanings conferred by section 83(8) of the 2004 Act."

[39] The relevant parts of Sections 83(6) and 83(8) of the *Antisocial Behaviour etc. (Scotland) Act 2004* ("the 2004 Act") provide as follows:

"(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if–

(e) the house is the only or main residence of the relevant person;

(8) In this Part–
"relevant person" means a person who is not–
(a) a local authority;
(b) a registered social landlord; or
(c) Scottish Homes; and
"unconnected person", in relation to a relevant person, means a person who is not a member of the family of the relevant person."

[40] The Respondent argued that he was a resident landlord, in consequence of which the 2011 Regulations did not apply to him. The Tribunal took the Respondent to mean that the 2011 Regulations did not apply to him as he argued that the tenancy agreement was not a relevant tenancy.

[41] The Respondent's submission is incorrect. To be a relevant tenancy, the Respondent requires to be a relevant person, and the Applicant an unconnected person, both as defined in section 83(8) of the 2004 Act. The Respondent is not a local authority, a registered social landlord, nor Scottish Homes, and is therefore a relevant person.

[42] The Applicant, who occupied the Property in terms of the lease agreement is not a member of the Respondent's family, and therefore is an unconnected person.

[43] The remaining question is whether the use of the Property as a dwelling is disregarded on the basis that it is the only or main residence of the Respondent. It is not. On the Respondent's own evidence, there are a number of entirely separate residential units contained within the fabric of the same building, including his own and the Property, but these are all separate self-contained flats which share no facilities in common other than the access stair to the separate front doors of each unit. Indeed, the Respondent's evidence is that his own basement flat does not even share its access with the other units in the building, and has its own separate access.

[44] As the property which the Respondent let to the Applicant is not his only or main residence, it does not fall within the exemption contained I n section 83(6) of the 2004 Act, and accordingly the 2011 Regulations do apply to the Respondent. The Respondent as landlord was required to pay the deposit into an approved scheme. He failed to do so.

[45] Regulation 10 of the 2011 Regulations provides as follows:

> "If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal -
> (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 First-tier Tribunal 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."

[46] The Tribunal is satisfied that the Respondent did not comply with his duty under regulation 3, and accordingly it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

[47] In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

[48] In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.

[49] In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the fact that the Respondent appears to have failed to comply with important legal obligations incumbent on a landlord.

[50] The Respondent was registered as landlord, but accepted that the address provided to the register of landlords as a contact address was not his. He failed to lodge the deposit with an approved scheme, in terms of the regulations incumbent upon him. Neither the Applicant nor the Tribunal was able to make contact or trace him earlier in these proceedings, which resulted in the Tribunal making an award against him in his absence.

[51] The Tribunal did not consider any of the Respondent's evidence to be remotely credible. His explanation that he engaged letting agents believing them to be reputable, without knowing who their personnel were is difficult to believe. His evidence that having realised that Westend Lets Ltd were a dissolved company and had not dealt with his affairs properly, he then incorporated a new company using the same name to act as his letting agent is extraordinary. His evidence that he was unaware that one of his co-directors in the new company which he had set up was the very individual whom he did not know and had let him down previously (Mr Mahmood) is absurd. He stated that he had not paid council tax for the last 5 or 6 years, despite

asserting that he owned and lived in the basement flat at the Property, and failed to give any explanation for this.

[52] The 2011 Regulations have been enacted to provide protection to tenants in respect of their deposit and ensure that they can obtain repayment of their deposit at the conclusion of the lease. The period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (approximately 35 months to today's date).

[53] The Tribunal considered the Respondent's breach to be flagrant, and in these circumstances, the Tribunal considers that the sum of £1,200.00 (three times the amount of the tenancy deposit) is an appropriate sanction to impose.

[54] In terms of regulation 10(b)(i) of the 2011 Regulations, the Tribunal may, if it considers it appropriate in the circumstances of the application, order the landlord to pay the tenancy deposit into an approved scheme.

[55] In the circumstances of this application, the Tribunal considers it appropriate to order the Respondent to pay the tenancy deposit of £400.00 into an approved scheme. Once that has been done, the parties can then utilise the approved scheme dispute resolution mechanism to determine to whom the sums representing the deposit should be repaid.

Decision

[56] For the foregoing reasons, the Tribunal orders the Respondent in respect of his breach of Regulation 3 of the 2011 Regulations:

(1) to make payment to the Applicant of the sum of £1,200.00 in terms of Regulation 10(a) of the 2011 Regulations; and
(2) to make payment of the tenancy deposit of £400.00 into an approved scheme in terms of Regulation 10(b)(i) of the 2011 Regulations.

[57] The Tribunal will also draw the attention of landlord registration to this decision and statement of reasons.

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.

30 August 2021

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Legal Member/Chair **Date**