



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulation 9 Tenancy Deposit
Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”)
Chamber Ref: FTS/HPC/PR/20/0628**

Re: Property at 11/2, Moncrieff Terrace, Edinburgh, EH9 1NB (“the Property”)

Parties:

Mr Min Cheng Wu, 43/26 Viewcraig Gardens, Edinburgh, EH8 9UW (“the Applicant”)

Mrs Nuxiao Chen, 42 Castle Terrace, Berwick Upon Tweed, TD15 1NZ (“the Respondent”)

Tribunal Members:

**Josephine Bonnar (Legal Member)
Ahsan Khan (Ordinary member)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £2340 should be made in favour of the Applicant.

Background

1. By application dated 22 February 2020, the Applicant seeks an order against the Respondent in terms of Regulation 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. A copy tenancy agreement and copy text messages were lodged with the application. The application states that the Respondent failed to place a deposit of £780 in an approved tenancy deposit scheme.
2. A copy of the application and supporting documents were served on the Respondent by Process Server on 9 July 2020. Both parties were advised that a Case Management Discussion (“CMD”) would take place by conference call on 11 August 2020 at 10pm. Both were provided with a telephone number and passcode. The application called for a CMD at 10am on 11 August 2020. Both parties participated. As a preliminary matter, the Respondent referred to a letter and email, advising that she was willing to pay the sum of £780 to settle the

matter. Following discussion, both parties confirmed that they wished to have the CMD continued to a later date, to allow for advice to be taken and possible settlement of the dispute. The Legal Member determined that the CMD should be adjourned to a later date for advice and possible settlement.

3. The application called for a further CMD on 22 September 2020 at 10am. Both parties participated. The Applicant advised the Legal Member that he wished to proceed with the application. The Legal Member proceeded to discuss the application with the parties. The Legal Member noted that the Applicant states that he was the tenant of the property from 12 December 2018 until 1 February 2020, that he paid rent at the rate of £780 per month and a deposit of the tenancy of £780. The Respondent denies that the Applicant rented the property from her and states that she received neither rent nor deposit from him. She denied all knowledge of the name on the tenancy agreement, Jill Chen. At the conclusion of the CMD the Legal Member determined that the matter should proceed to a hearing. Both parties were notified that a hearing would take place by telephone conference call on 11 November 2020 at 10am. Prior to the hearing both parties lodged further documents.
4. The application called for a hearing by telephone conference call at 10am on 11 November 2020. Both parties participated.

The Documents

5. The Applicant lodged: -
 - (a) One page tenancy contract for the property signed and dated by Jill Chen on 9 December 2018 and the Applicant on 15 December 2018. It states that the rent is £780, payable in cash, and that deposit of £780 is to be paid. It states that the Applicant will pay for gas and electricity in terms of the bills received for the property.
 - (b) Copy of text messages between "Min" and "Jill" which stated that the tenancy will end on 1 February 2020. The message from Jill states that the keys are to be left in the mailbox and that the deposit will be returned when the electric and gas meters are checked.
 - (c) Photograph of a bank statement for period April to August 2019, showing payments to Edinburgh City Council of £100 per month and Scottish Gas of £22.04 per month.
 - (d) Scottish Power bill dated 16 June 2016.
 - (e) Photographs of the top section of Nationwide current account statements in the name of M Cheng Wu for period July 2019 to January 2020, addressed to the Applicant at the property address.
 - (f) Emails with "Jill via Gumtree" in relation to the property, arranging viewing by a friend of the Applicant and confirming the address.

- (g) Photographs and property particulars/advert.
- (h) Sky broadband bill dated 27 September 2020.
- (i) Text messages between “Jill” and “Min” regarding sky broadband 13 – 15 January 2019.
- (j) Text messages with “Farah” 5 – 20 December 2018 regarding viewing the property and transfer of the deposit.
- (k) Nationwide bank statement dated 7 January 2019 showing transfer to “Farah” of £300 on 11 December 2018 and £480 on 20 December 2018.
- (l) Text messages from “Farah” with photographs of the property.
- (m) Text messages with “Jill”, 19 December 2018 to 11 January 2019, regarding visit by “Jill” on 12 January 2019 and payment of rent.

6. The Respondent lodged: -

- (a) Photograph of router with sticker on it with an email address and password.
- (b) Nationwide credit card statement showing payments to SKY in November 2019.
- (c) Sky Bills 28 December 2018 - 28 December 2019.
- (d) Council tax bills for the property.
- (e) Scottish Gas Bill for 14 August 2019 - 11 October 2019 showing direct debit of £22.04 per month and confirming monthly payment increase.
- (f) Scottish Gas bill for 13 October 2018 – 11 April 2019 showing direct debit of £10 per month and confirming monthly payment increase.
- (g) TSB statement showing payments to Scottish Gas of £10 in January to April 2019, £22.04 in June to September 2019, and £17.36 in October to December 2019. Also showing Council tax payments of £100 per month.
- (h) Copy simple procedure timetable from Edinburgh Sheriff Court.
- (i) Invoice for boiler.
- (j) Photographs of common area.
- (k) Unsigned text messages addressed to “Nuxiao”, sender’s name not identified, demanding payment of £3000 to settle case.

The Hearing

The Applicant's evidence

7. Mr Wu advised the Tribunal that he had been living in London and studying part time. He wanted to return to Edinburgh to study full time. He saw an advert for the property on Gumtree. He arranged for a friend to view the property on his behalf. He was then sent a contract to sign. He signed it and sent it back by post, although he cannot remember the address to which it was sent. He transferred money to his friend to pay the deposit and secure the property. He transferred the money in two instalments, as shown on the bank statement he lodged which show transfers to Farah on 11 December 2018 of £300 and 20 December 2018 of £480. He advised that Farah was a friend of a friend. On receipt of the deposit, the Respondent gave the keys to the property to Farah. Mr Wu advised that he moved into the property at the beginning of January 2019, and that the Respondent came to the property to explain how everything worked and to collect the first instalment of rent. As stated in the tenancy contract, rent was to be paid each month in cash. The Respondent would message him to advise that she was coming to collect the rent. She did not want to inconvenience him so asked him to place the rent in an envelope, in the letterbox of the property. She had a key and accessed the letterbox by opening the door with a key. The first time he opened the door to check who was collecting the envelope, but she assured him that she had used this arrangement before. He only saw her on these two occasions. After that she would collect the rent, but they did not meet. The utility bills remained in the name of the Respondent. She would message him with details of the sums due for gas and electricity and he would pay what was due, with the rent. He did not pay for use of the internet as this was included in the rent. At the end of the tenancy he cleaned the flat. The Respondent told him to leave the keys in the letterbox. He waited to hear from her regarding the deposit. He waited two weeks and then sent a message. In her response she said that she was struggling to find another tenant because of the time of year and that she intended to retain 70% of the deposit because of this. She asked for his account details, but he refused because he did not accept her reason for retaining part of the deposit.
8. In response to questions from the Tribunal Mr Wu advised that the photographs and property details he lodged are from Gumtree and were obtained after he moved out of the property. He said that they show that the Respondent intended to continue to rent out the property. He was asked about a copy Scottish Power bill which he had lodged on 22 September 2020. This appears to relate to 2016. He said that this had been sent to him by the Respondent. He had not noticed that it did not relate to the period of the tenancy. He said that the copy bank statement lodged on the same date was the Respondent's bank statement, sent to him as evidence of the payments she was making to Scottish Gas. They show payments of £22.04 per month. He was asked whether he had thought the letterbox arrangement for payment of rent somewhat unusual. He answered that he had a similar arrangement with a previous landlord. He was not comfortable with it but had been desperate to get a flat and the Respondent

wanted cash payments. He advised the Tribunal that he does not know the second name of the friend, Farah, who assisted him. She was a friend of a friend, now out of the country. He was asked about the Sky statement he lodged which is dated September 2020, as this is outwith the period of his tenancy. He said he still had the password for the account, so downloaded the statement. He said that the password details for the wifi had been sent to him, as shown on the copy text message he had lodged. There was no sticker on the router when he lived at the property. He asked the Respondent to sort out access. However, she provided him with the email address and password so that he could sort it out himself. In response to questions regarding the text messages lodged by the Respondent, demanding payment of £3000 to settle the case, he denied having sent them. He stated that he did not recognise the phone number. When asked about the Council tax, he advised that students do not have to pay council tax, so he did not do anything about that.

9. Mr Wu concluded his evidence by saying that he believes that he has proved his case.

The Respondent's evidence

10. Mrs Chen advised the Tribunal that she is the owner of the property. She purchased it about 5 years ago and lived there for a year following the purchase. It was too small. Her late father-in law stayed for a year after she moved out. She has been living in England for the last three years. The property has been empty. She has not had the time or energy to deal with the flat as she works for the NHS and is renovating her main home, a six bedroom country house. She was going to sell, but a friend advised her to keep it as an investment. She has never let it out and it has been unoccupied for three years, except when friends or acquaintances are in Edinburgh, when they stay there. This is only occasionally. There is a key safe at the property for her friends and acquaintances. She believes that Mr Wu must have broken into the key safe to get the key and then moved into the property. He had no authority to do so. He lived there rent free. She received no money from him. She has never met him or sent him letters. She has never had a gumtree account. She stated that the evidence lodged by Mr Wu is fabricated. She confirmed that she accepts that he did occupy the property from January 2019 until February 2020. She did not visit the property during that time but paid the bills and council tax by direct debit. On 20 February 2020 she went to the property. She found the boiler and cooker to be broken but was not initially suspicious. A plumber later advised that the defect in the boiler was due to it being used but not maintained. She only became aware of the Applicant when she was served with papers by the Tribunal. She had recently been in a car crash and decided to offer payment of £780 as a goodwill gesture. He didn't accept it and she learned his true purpose, to coerce more money.
11. In response to questions from the Tribunal Mrs Chen advised that she continued to pay utilities and broadband for the property so that these were available when her friends and acquaintances were staying there. She stated that this was an occasional thing and that no one had asked to stay there between January 2019 and 1 February 2020. She does not have anyone to

manage or look after the property for her. She just pays the bills by direct debit. There are only 2 sets of keys – her set and the set in the key safe. When asked how Mr Wu could have got hold of her bank statement for 2019, she said he must have hacked into her account using information found in the flat. She said that he had put together a mountain of fabricated evidence. She confirmed that the property shown on the gumtree advert submitted by Mr Wu, is her property. She said he must have created a gumtree account using photographs taken by him and that the tenancy contract had also been created by him. She has never advertised the property for rent. She said that he had been a squatter.

- 12.** Mrs Chen was asked how Mr Wu would have known that the property was unoccupied. She confirmed that there is a communal door to the street, which is not locked. A communal area inside leads to the door of the flat. She said that you hear so many stories about people watching a property over time and leaving a piece of paper in place to see if it is still there. The communal door was not locked. She also stated that there is no post box in the communal area. In response to questions, Mrs Chen advised the Tribunal that she went to the property on 20 February 2020 and found the cooker and boiler to be broken. The defect to the boiler was lack of maintenance rather than damage. The property was otherwise in good condition, a bit of wear and tear. She was not suspicious about the condition of the property. She referred the Tribunal to the text messages, sent anonymously, in which he demanded £3000 in cash. It was put to her that the language in the text message was not consistent with the language in the documents lodged by Mr Wu and the English was less fluent. Mrs Chen said she could not account for this, maybe he got someone else to send it for him. When asked about the photograph of the sticker on the router, which she added to show the sky account email and password although these are not required to access the wifi, she said this was for her acquaintances or herself when at the property, as its difficult managing two households. She said that she did not own other properties and was not a landlord. She had kept the flat as an investment and the costs of keeping it were not high.
- 13.** In response to questions Mrs Chen advised that she had gone to the flat on 20 February 2020 because she was in Edinburgh to meet a friend for a coffee. It had nothing to do with Mr Wu having moved out of the property, as she did not know this. It was the first time she had been at the property in over a year. She was asked about the text messages she had lodged and how Mr Wu obtained her mobile number. She said he may have obtained her number when he hacked into her broadband account. She confirmed that she has a mortgage for the property and pays £560 per month by direct debit. She has never considered letting the property out to cover her costs as she does not like the idea of someone living in the property.
- 14.** Mrs Chen concluded her evidence by pointing out that Mr Wu was not registered for Council tax at the property and that he had failed to collect recorded delivery mail sent by her. She said he had provided a bundle of fabricated evidence and no substantiated evidence.
- 15.** The Tribunal adjourned to consider the evidence. Following an adjournment, the Tribunal advised that they had determined that the Applicant had been the

tenant of the property and that he had paid a tenancy deposit of £780 to the Respondent. Parties were invited to make submissions on the level of the award which should be made. The Applicant advised that he was seeking the maximum award due to the stress he has suffered and the fact that he has been accused of falsifying evidence. He said he was angry. The Respondent advised that she did not wish to make a submission on the level of the award.

Findings in Fact

16. The Applicant is the former tenant of the property in terms of a tenancy agreement dated 9 and 12 December 2018.
17. The Respondent is the owner and former landlord of the property.
18. The Applicant paid a deposit of £780 prior to the start of the tenancy
19. The deposit was paid to the Respondent in cash, by a friend of the Applicant.
20. The tenancy terminated on 1 February 2020
21. The deposit was not lodged by the Respondent in an approved tenancy deposit scheme.

Reasons for Decision

22. Regulation 3 of the 2011 Regulations states – “(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.”
23. The Applicant lodged a substantial bundle of documents in support of the application. These include a copy of a tenancy agreement and copies of his bank statements showing his address as the property address during the relevant period. He submitted email and text correspondence with a person called Jill, the landlord of the property, in relation to the viewing of the property by a friend, payment of the deposit, payment of the rent, terminating the tenancy and arrangements for return of the keys. The Applicant gave oral evidence at the hearing. His evidence was consistent with the documentary evidence lodged. It was also consistent with some of the documents lodged by the Respondent in relation to payment of the utility bills. The Tribunal found the Applicant to be credible and reliable and concluded that the oral evidence given at the hearing, when taken together with the documentary evidence, appeared to establish that he had been the tenant of the property for 13 months from 1

January 2019 and 1 February 2020 and that he had paid a deposit of £780, which had not been returned to him at the end of the tenancy, and had not been lodged in a tenancy deposit scheme.

- 24.** On the other hand, the Tribunal found the Respondent to be neither credible nor reliable. She also lodged documents. The majority of these were copies of bills for the property. These are all in the name of the Respondent. However, the Applicant advised the Tribunal at the hearing, and the CMD on 22 September 2020, that the utilities were never in his name and that he gave money to Jill Chen for the gas and electricity bills. This arrangement is also reflected in the tenancy contract which he produced. These documents therefore do little to advance the Respondents case, particularly since the Respondent does not dispute that the Applicant occupied the property during the relevant period. The Council tax accounts are also of no real value. As the Applicant stated during the hearing, students are not required to pay council tax, so he would have had no reason to register his tenancy with the Local Authority. The Respondent's defence is based on unsubstantiated allegation and speculation. At the CMD she advised the Legal Member that, although she had no knowledge of it, her acquaintances who use the flat from time to time, may have been involved in Mr Wu's occupation of the property. At the hearing, her position had changed. She now claims that, as the Applicant did not have permission to live at the property, he must have broken into the key safe to get access. Prior to this he must have observed the property and worked out that it was empty. He lived there for 13 months, without being discovered, either by her or any of her acquaintances who occasionally use the flat when staying in Edinburgh. She did not visit the property throughout that period. She continued to pay the utilities, the Sky bill, and her mortgage. She happened to be in Edinburgh for the first time in over a year, shortly after the Applicant says the tenancy came to an end and visited the flat. She noticed a problem with the boiler and the cooker but was not suspicious as to the cause. She says that she did not become aware of the Applicant's occupation until she was served with a copy of the application by the Tribunal.
- 25.** When asked about the documentary evidence produced by the Applicant, the Respondent argues that all the documents must have been fabricated by him. When asked how he obtained a copy of her bank statement, she claimed that he must have hacked into her bank account, using information he found in the flat. She concedes that the Gumtree photographs and property particulars submitted by the Applicant, do relate to her property. Her explanation is that the Applicant must have set up a gumtree account, with the property details, so that he had evidence for his application. However, the Respondent's allegations lack detail as to how the Applicant achieved these extensive "fabricated" documents and she provided no evidence to support any of her allegations. The Tribunal is satisfied that the Applicant's documents are genuine and that they support his position.
- 26.** The Tribunal had concerns about other aspects of the Respondent's evidence. In particular, the text messages which she lodged and which she claimed were evidence of the Applicant attempting to extort money from her. The messages

are unsigned and do not identify the sender. The Tribunal noted that the language of the messages is very different from that used by the Applicant in the text messages and emails that he lodged. Furthermore, the Respondent's messages suggest that the sender's written English is not fluent. The text messages and emails submitted by the Applicant indicate that his written English is fluent. The Tribunal is therefore not persuaded that the messages were sent by the Applicant. In any event, they are irrelevant since they do not relate to the issue of whether the Applicant was the lawful tenant of the property. The Tribunal also had some difficulty with the Respondent's evidence that she left a valuable property, unoccupied and unattended, for large periods of time, while continuing to pay substantial mortgage, utilities, and council tax. She stated that there were only 2 sets of keys, one in a key safe and the other in her possession, in England, and that no one managed or checked on the property for her. The Tribunal notes that the owner of a property is not obliged to let it out. However, for a valuable property to have been left completely unattended for such a long period of time is highly unusual. The Tribunal concludes that the only reasonable explanation for the Applicant's uncontested occupation of the property for over a year, is that it was lawfully let to him by the Respondent. The Tribunal is also satisfied that "Jill Chen", the individual who met both the Applicant and his friend at the property, and collected the rent and deposit, was either the Respondent herself, or someone acting on her behalf.

27. The Tribunal determined that the Respondent let the property to the Applicant and that the tenancy was a relevant tenancy in terms of the 2011 Regulations. The Tribunal is also satisfied that the Applicant paid a deposit of £780 in connection with the tenancy. As the Respondent denies receiving any money from the Applicant, it is not in dispute that no funds were lodged in an approved scheme. The Tribunal is also satisfied that the Applicant has complied with Regulation 9(2) of the 2011 Regulations which requires an application to be lodged within 3 months of the end of the tenancy. The application was submitted on 22 February 2020, three weeks after the tenancy ended on 1 February 2020.
28. Regulation 10 of the 2011 Regulations stipulates that if the Tribunal is satisfied that the landlord did not comply with a duty in terms of regulation 3, it " **(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.**" The Tribunal therefore determines that an order must be made in favour of the Applicant.
29. The Respondent made no submission to the Tribunal regarding the level of the award. This was perhaps to be expected, since she gave evidence to the Tribunal that there was no tenancy and no deposit. The Tribunal therefore notes that this is not a case where the landlord has forgotten to lodge the deposit or lodged it late when it came to his or her attention. It would appear that the Respondent's actions were deliberate and that she had no intention of lodging the deposit in a scheme. Furthermore, the Respondent failed to return the deposit at the end of tenancy.

- 30.** Prior to the CMD the Respondent notified the Tribunal that an offer to settle had been made by her. Prior to the hearing the Respondent lodged a medical report and advised that the offer had been made because of her state of health at that time, and for no other reason. The Tribunal has taken no account of the offer, or the Applicant's rejection of it. It was made without admission of liability and is not relevant to the issue to be determined by the Tribunal.
- 31.** Once satisfied that a deposit had been paid, the Tribunal must determine the level of penalty to be imposed in the circumstances of the case. No mitigation has been offered by the Respondent. On the other hand, the Tribunal notes that the Applicant has been put to considerable inconvenience and stress and has suffered financial loss. He was accused of breaking into the property, occupying it illegally, hacking into the Respondent's accounts and falsifying and fabricating evidence to support his claim. His deposit was completely unprotected throughout the tenancy and the Respondent's insistence on a cash payment, without a receipt, left the Applicant in a very vulnerable position.
- 32.** In the Upper Tribunal decision *Rollet v Mackie* 2019 UT 45, Sheriff Ross commented, "(14) 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." The Tribunal is satisfied that at least three of these factors – deliberate or reckless failure, denial of fault and actual loss – are present in this case. The Tribunal is therefore satisfied that the Respondent's failure is at the most serious end of the scale and that her actions warrant the imposition of the maximum penalty of three times the deposit, being the sum of £2340.

Decision

- 33.** The Tribunal determines that an order for payment of the sum of £2340 should be made in favour of the Applicant.

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.