



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

Chamber Ref: FTS/HPC/PR/23/1641

Re: Property at 6/5 Spittal Street, Edinburgh, EH3 9DX (“the Property”)

Parties:

Miss Yujie Ji, Miss Lu He, Miss Xinyue Yong, Miss Yuhang Huang, Unite Students - Brass Founders, 130 Scotland Street, Sheffield, S3 7DD; Arron House, Flat 72, Edinburgh, EH11 1FA; Huai An, Jiang Su, China; Suzhou, Jiang Su, China (“the Applicants”)

Miss Qin Mu, 87 Dochart Drive, Edinburgh, EH4 7LS (“the Respondent”)

Tribunal Members:

Ms H Forbes (Legal Member) and Mrs F Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment should be granted in favour of the Applicants in the sum of £2100.

Background

1. This is a Rule 103 application received in the period between 22nd May and 5th June 2023. The Applicants are seeking three times the tenancy deposit in respect of an alleged failure by the Respondent to timeously lodge the tenancy deposit in an approved tenancy deposit scheme. The Applicants lodged a copy of a private residential tenancy agreement between the parties in respect of the Property which commenced on 5th September 2022 and ended on 4th May 2023, translations of social media correspondence between the parties, information from the three approved tenancy deposit schemes indicating that the deposit was not lodged with the schemes, evidence of a bank transfer in the sum of 17,400 Renminbi (“RMB”) from the Applicants to the Respondent, information and social media exchanges regarding repairs to the Property, and confirmation from an approved tenancy deposit scheme that a tenancy deposit of £2100 was lodged by the Respondent on 19th May 2023.

2. A Case Management Discussion (“CMD”) took place by telephone conference on 30th August 2023. The Applicant, Miss Ji, was in attendance and representing the other Applicants. The Respondent was in attendance and was represented by Dr Lihe Liu, Solicitor. Following discussion, the case was continued to a hearing.
3. The Respondent’s representative lodged written representations and productions on 20th and 29th August, 13th September, and 23rd November 2023.
4. The Applicants lodged written representations and productions on 20th and 23rd August, and 21st November 2023.
5. Following correspondence with the Tribunal administration concerning the issue of whether evidence could be taken from the Applicants residing in China, the Applicants confirmed that Yujie Ji would represent them at the forthcoming hearing.

The Hearing

6. A hearing took place by video conference on 28th November 2023. The Applicant, Miss Ji, was in attendance and representing the other Applicants. The Respondent was in attendance and was represented by Dr Lihe Liu, Solicitor. Two interpreters were in attendance providing interpretation in Mandarin.

Preliminary Issues

7. Dr Liu raised two preliminary issues:
 - (i) In terms of the Housing (Scotland) Act 2006, the funds paid into a bank account in China do not meet the definition of a tenancy deposit as outlined in section 120 of the 2006 Act. The Tribunal indicated that it would reserve judgement on this legal point until after hearing the evidence.
 - (ii) The Applicant, Ms Ji, is in the UK on a student visa. It was Dr Liu’s position that representing the other Applicants would be a breach of the conditions of her visa. Ms Ji confirmed that she has a student and a work visa. Dr Liu made no further representations on this point.

Evidence of Ms Ji

8. Ms Ji said the parties had discussed the terms of the tenancy agreement and deposit in May 2022, and it was agreed that the sum of 17,400 RMB would be paid to the Respondent as a deposit. The Applicants were unable at that time to make any payment in Sterling as they were residing in China. Responding to questions from the Tribunal, Ms Ji said she understood, as a result of discussion in March and April 2022 that the deposit was to be a holding deposit to reserve the tenancy for the Applicants. She referred to social media messages between the parties in early May 2022 which had been translated

into English (p9/17) which, in her submission, showed that the Respondent had decided to convert the holding deposit to a tenancy deposit. Ms Ji referred to a discussion between parties after the Applicants came to the UK on 5th September 2023 at which time the Respondent confirmed that the RMB had been converted to cover the £2100 tenancy deposit. There was no further discussion about payment of a tenancy deposit in Sterling.

9. Responding to questions from the Tribunal, Ms Ji said she was not surprised the holding deposit had been converted to a tenancy deposit as that is the norm in China. Ms Ji confirmed she was unaware that retaining a holding deposit could be illegal in Scotland. The Applicants thought the tenancy deposit had been deposited in an approved tenancy deposit scheme at the commencement of the tenancy. At the end of the tenancy, they became aware that this had not happened.
10. Ms Ji referred to a witness being present at the meeting between the parties on 5th September 2022, and an email from the witness, which was included at page 15/17, stating that the Respondent had said the deposit paid in RMB was sufficient and no further deposit was required.

Cross-examination of Ms Ji

11. Dr Liu asked Ms Ji to point to anything in the documentation that indicated the deposit was a holding deposit. Ms Ji said the Respondent stated this during the conversation on 8th May 2022. Ms Ji said the Applicants always thought the holding deposit would be converted to a tenancy deposit. They thought the RMB would be converted to Sterling.

Further questions from Tribunal to Ms Ji

12. The Tribunal clarified with Ms Ji that she thought the RMB payment was a holding deposit initially. It was paid some time in May. Ms Ji said the rent was paid for a period of 6 months in RMB on 5th September 2022.

The Respondent's evidence

13. Dr Liu referred the Respondent to production A1, which was a chat on social media dated 3rd May 2022. The Respondent said the Applicants wanted to rent the Property. She informed them she would take the deposit and rent in Sterling. They said they had never been to the UK and did not have Sterling. They would not have Sterling until they arrived in the UK. The Respondent said she sent her UK bank details to the Applicants and they said they would pay Sterling when they arrived in the UK. She could only ask them to pay the deposit in RMB, and said she would repay the RMB when they arrived. No deposit was paid in Sterling.
14. Dr Liu referred the Respondent to production E2 and clause 11 of the tenancy agreement, which stated the sums to be paid for the rent and deposit in Sterling. The Respondent confirmed the signing details of the tenancy agreement.

15. The Respondent said she paid £2100 of her own money from her personal account to the tenancy deposit scheme after the Applicants moved out of the Property. The tenancy deposit scheme could not accept RMB. The money was returned to the Applicants following adjudication by the tenancy deposit scheme.
16. Dr Liu began to question the Respondent about damage to the Property by the Applicants. The Tribunal stopped this line of questioning as it did not appear to be relevant as the matter had been adjudicated by the tenancy deposit scheme. Dr Liu referred to a case as authority. The case appeared in his list of productions, but it had not been lodged. Dr Liu said the issue was that the Applicants had not suffered any prejudice because the full sum of £2100 had been returned to them.

Cross-examination of Respondent

17. Ms Ji asked the Respondent about the conversation between them on 8th May 2022 and whether there had been discussion about converting the holding deposit to a tenancy deposit. The Respondent said that was not discussed.

Questions from Tribunal to Respondent

18. The Tribunal asked the Respondent whether she had chased up the Applicants to provide her with Sterling when they arrived in the UK. The Respondent said the Applicants made clear when they arrived that they could not pay in Sterling. The Tribunal asked what was meant by the Respondent allowing the Applicants to pay in RMB as a 'goodwill gesture' in the Respondent's representations. She said she was willing to help them in order to facilitate their move to the UK. They asked her to accept RMB so they could move into the Property. She wanted them to pay later in Sterling. The exchange rate was low at the time, and the Respondent said it would assist the Applicants if she returned the deposit to them in RMB. Asked what the deposit sum was for, the Respondent said she considered it was to protect against damages and non-payment of rent. The Respondent said she only received Sterling from the Applicants close to the end of the tenancy.

Summing up for the Applicants

19. Ms Ji said the Applicants did not damage the Property. This was clear from the return of the deposit to them by the tenancy deposit scheme. The Respondent had told the Applicants that they would be benefitted if they paid the deposit in RMB, but this was not the case as the interest rate meant they paid a higher sum. The conversation of 8th May 2022 clearly shows the RMB had been converted to a tenancy deposit.

Summing up for the Respondent

20. Dr Liu said he was relying on his written submission of 23rd November 2023. The key point was whether there was a tenancy deposit. The Respondent had misunderstood the law that the deposit had to be in a recognised currency in order to be considered a deposit. She had acted in good faith by using her own funds to ensure compliance with the Regulations. This action reflects a genuine attempt to adhere to her legal obligations. This action stemmed from a misunderstanding.
21. Dr Liu said a deposit paid in RMB does not meet the legal definition of a tenancy deposit in terms of section 120 of the 2006 Act, and the Regulations. For this reason the case should be dismissed.
22. Dr Liu submitted that, if the Tribunal was not with him on the above point, it should be taken into account that the Applicants had received full refund of the deposit and were in a position of no loss. Dr Liu asked the Tribunal to refrain from making a financial award.

Further questions from the Tribunal

23. The Tribunal requested further information from the Respondent regarding her circumstances as a landlord, in order to determine whether there were mitigating circumstances, should they find that the Regulations had been breached. The Respondent said she had been a landlord for three years. She has three properties for let. She said she is aware of the Regulations. She has taken deposits in Sterling for her other properties and has lodged them with an approved tenancy deposit scheme within a week of taking the deposit. Responding to a question from the Tribunal as to whether it concerned her during this tenancy that the deposit had not been lodged, the Respondent said she only realised this could be an issue when the Applicants were about to move out. She became aware of the problem then.

Further submission on behalf of the Respondent

24. Dr Liu said the Tribunal should take account of the fact that the Respondent has always lodged the deposit for other tenancies. It was his position that anything that happens in China is beyond the jurisdiction of Scots law. The Tribunal should disregard any action that happened in China. The payment of 17400 RMB should be disregarded. Even if it was a deposit, it was in a Chinese bank and that put it beyond the jurisdiction of the Tribunal. If there was no deposit, there could be no penalty by the Tribunal.

Findings in Fact and Law

- 25.
- (i) Parties entered into discussion regarding the Respondent letting the Property to the Applicants in or around May 2022.

- (ii) A private residential tenancy agreement in respect of the Property and between the parties was signed by the Applicant, Ms Ji, on 9th May 2022, with a commencement date of 5th September 2022.
- (iii) The tenancy agreement stated at clause 10 that rent was £12,600 for a period of six months.
- (iv) The tenancy agreement stated at clause 11 that the deposit was £2100
- (v) On or around 3rd May 2022, the Applicants transferred the sum of 17400 RMB to the Respondent with the sum in the transfer described as 'Deposit of Edinburgh House in EH3 9DX'. This was a holding deposit.
- (vi) On or around 5th September 2022, the Applicants paid six months' rent in advance to the Respondent in RMB.
- (vii) On or around 5th September 2022, the Respondent informed the Applicants that the holding deposit had been converted to a tenancy deposit.
- (viii) The tenancy ended on 4th May 2023.
- (ix) After the tenancy ended, the Applicants became aware that the tenancy deposit had not been lodged in an approved tenancy deposit scheme.
 - (i) The deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy.
 - (ii) The deposit was lodged with an approved tenancy deposit scheme on 19th May 2023.
 - (iii) The Respondent has breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

Reasons for Decision

26. The Housing (Scotland) Act 2006 provides at section 120 that a tenancy deposit is a sum of money held as security for the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement or the discharge of any of the occupant's liabilities which so arise. It was submitted on behalf of the Respondent that funds paid into a bank account in China do not meet this definition of a tenancy deposit, and that the Tribunal had no jurisdiction over funds paid in China. The Tribunal was not persuaded by that argument. Notwithstanding that the Tribunal found that the deposit was initially intended to be a holding deposit, the Respondent chose to convert the holding deposit to a tenancy deposit, and then held a sum of money in RMB paid by the Applicants as security for the performance of their

obligations. This meets the definition in the 2006 Act. The Act does not state the currency in which the deposit must be taken.

27. The Tribunal considered the submission on behalf of the Respondent that RMB could not be paid into the tenancy deposit scheme. The Tribunal accepted that submission. The Respondent representative submitted that parties were prohibited from moving funds out of China. A Law Society article on anti-money laundering and Chinese funds was lodged on behalf of the Respondent (Production C-1). The article focussed on the risks arising from the use of Chinese informal value transfer systems, or underground banking, and set out practical measures to help mitigate the risks. The article made clear there are restrictions to moving money from a Chinese bank account, however, it was stated therein that there are limited purposes where individuals are permitted to take funds out of China up to a certain limit each year. There was no evidence led that the Respondent had attempted to transfer the deposit to her UK bank account, or that any such attempt would not be lawful in China if the proper procedure was followed. The Tribunal would have expected to see some evidence that the Respondent, having decided that the holding deposit was to be the tenancy deposit, had made some effort to ensure she could deposit the sum in the tenancy deposit scheme, either by transferring currency lawfully from China, or using her UK funds, as she eventually did after the tenancy had ended.
28. The Tribunal was unable to place any reliance on the transcripts of social media messages between the parties, as both parties claimed that the other party had mis-translated the messages into English. There was no official translation of the messages before the Tribunal. However, the Tribunal accepted the evidence of the Applicant, Ms Ji, that the deposit paid in RMB in May 2022 was intended to be a holding deposit at the time it was paid to the Respondent. Ms Ji said it was the norm in China for a holding deposit to be paid, and then converted into a tenancy deposit. The Tribunal also took into account the fact that the deposit was paid some four months before the tenancy commenced, which also tended to suggest it was a holding deposit.
29. The Tribunal did not place any weight on the email evidence of a third party who claimed to be present at the time of the meeting between the parties on 5th September 2022.
30. The Tribunal accepted the evidence of Ms Ji that the Respondent told the Applicants in September 2022 that the holding deposit had been converted to a tenancy deposit. The fact that the Respondent did not chase this matter up and insist that the Applicants paid her in Sterling tended to lend weight to the Applicant's evidence on this point. It seemed that the Respondent was content to accept RMB. The Tribunal took into account that the Respondent also accepted six months' rent in RMB, which tended to suggest it suited her purposes to have payments made in RMB, notwithstanding that the tenancy agreement stated the sums due in Sterling.

31. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised in the manner set out in the case *Jenson v Fappiano (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015)* by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal must consider the facts of each case appropriately.
32. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020, where it was stated '*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.*'
33. The Tribunal considered the Upper Tribunal case of *Ahmed v Russell, 2023 S.L.T. (Tr) 33 (2023)*, lodged on behalf of the Respondent, where it was held *inter alia* that the purpose of the sanction was not to compensate the tenant: the level of sanction should reflect the level of overall culpability measured against the nature and extent of the breach.
34. The Applicants were entitled to have confidence that the Respondent would comply with her duties as a landlord. The Tribunal took into account the fact that there was no actual loss to the Applicants, as the actions of the Respondent in placing the deposit in an approved tenancy deposit scheme, albeit after the tenancy ended, meant parties had the benefit of dispute resolution.
35. Notwithstanding that there was no loss to the Applicants, the Tribunal considered this to be a serious matter, given that the Applicants' deposit was not lodged with an approved tenancy deposit scheme timeously as required by Regulation 3, and remained unprotected for the duration of the tenancy. The Tribunal noted that the Respondent has three properties for let, and has been letting for three years. She claimed to have lodged the tenancy deposits for other tenants, however, she said she only became aware of the Regulations when the Applicants were about to move out. This suggests an unacceptable ignorance of her obligations as a landlord. The Respondent ought to have been aware that the deposit must be lodged in accordance with the Regulations.
36. Taking all the circumstances into account, the Tribunal considered it fair and just to impose a penalty of £2100, which is one times the tenancy deposit. The Tribunal observed that the penalty may have been greater, had the Respondent not lodged the deposit with the tenancy deposit scheme after the tenancy ended.

Decision

37. The Tribunal grants an order against the Respondent for payment to the Applicants of the sum of £2100 in terms of Regulation 10(a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.

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.

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Legal Member/Chair

4th December 2023
Date