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 Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/24/5303

Re: Property at Flat 13, 18 Hopetoun Street, Edinburgh, EH7 4GH ("the Property")

Parties:

Banu Bilgili, Flat 10, 6 Simpson Loan, Edinburgh, EH7 4GH ("the Applicant")

Steven Moffat, Flat 13, 18 Hopetoun Street, Edinburgh, EH7 4GH ("the Respondent")

Tribunal Member:

George Clark (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be decided without a Hearing and made an Order for Payment by the Respondent to the Applicant of the sum of £500.

Background

1. By application, dated 18 November 2024, the Applicant sought an Order for Payment in respect of the failure of the Respondent to comply with Regulation 9 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). The Applicant's complaint was that the Respondent had failed to lodge his deposit of £800 in an approved tenancy deposit scheme. The Applicant was seeking an Order for Payment of three times the amount of the deposit.

2. The application was accompanied by a document called a Licence to Occupy commencing on 1 July 2024 between the Parties, at a monthly payment of £800, with a deposit of £800. The document stated that it did not confer exclusive possession on the Licensee or create a relationship of landlord and tenant between the Owner and the Licensee. It did,

however, contain two references to “rent” in the Section of the document headed “Payment”.

3. The Applicant stated that, on 1 July 2024, she entered into an agreement with the Respondent to rent a room in the Property. It is a three-bedroom flat, and, during the tenancy, which lasted from 1 July 2024 until 31 October 2024, she resided with two flatmates, who rented the other bedrooms. The Respondent did not occupy the Property as his primary residence and did not share living spaces with the tenants. He claimed to visit the Property “only two or three times per month”. He maintained no designated personal space or bedroom within the Property, though he did retain his personal belongings there. He directed that important mail should be forwarded to an alternative address.

4. The Applicant provided evidence from Safe Deposits Scotland, My Deposit Scotland and Letting Protection Service, confirming that no deposit had been lodged with them. She also provided copies of emails between the parties, including one from the Respondent dated 31 May 2024, in which he advised the Applicant that he required “1 month’s deposit, 1 month rent in advance”. She also provided copies of WhatsApp messages, in particular, an exchange on 31 July 2024, in which the Respondent said “I’m not sure the “all bills included” can be maintained. Especially if I’m not going to be living there, long term, but it’s what was agreed years ago when I was there and it may be too complex to unravel and change it now”. He also said “I’ll pop up anyway and check the door”.

5. On 15 March 2025, the Tribunal advised the Parties of the date and time of a Case Management Discussion and the Respondent was invited to make written representations by 5 April 2025.

6. On 30 March 2025, the Respondent made written submissions to the Tribunal. He contended that the arrangement was a Licence to Occupy, not a tenancy and that, under Scots Law, a lodger agreement is valid if the landlord resides at the property and shared facilities, such as kitchen and bathroom, exist. His view was that the fact that Council Tax and utilities bills remained in his name, bank statements and correspondence from the Property’s factors were being sent to him at the Property, together with the fact that he had ongoing ties to the Property, proved that he still resided there. The Applicant entered into the agreement in the full knowledge that the Respondent was away a lot, and she was misclassifying the agreement. He contended that the phrase “if I’m not going to be living there long-term”, used in the WhatsApp message of 31 July 2024, explicitly contemplated a future scenario and presupposed he was living there at the time of writing. He referenced in that message the billing structure agreed “years ago”, confirming his historical residence from before the licence period and said that “I’ll pop up and check the door” was inconsistent with the Applicant’s allegation of non-residency”. The WhatsApp exchange confirmed his residency during the licence period. He added that, in the application form, the Applicant had stated that he was “currently residing at the Property”, undermining her whole argument. The forwarding address

was for a traffic violation while sailing and it was for a marina, which prohibits live-aboard residency. He was regularly at the Property during the period of licence, sleeping, cooking, working from his desk and maintaining the Property. He referred to the English case of *Shah v Barnet LBC* [1983] UKHL 14 and stated that in Scots law, residency hinges on habitual living and an intention to return. The back bedroom and shared spaces held his belongings and any use by others during his absences was irrelevant. The Applicant was relying on redefining residency as constant physical presence. Even if he had been absent 100% of the time (which he was not) his residency would remain intact so long as he maintained the Property as his principal home and intended to return, which he did.

7. On 16 April 2025, the Applicant's representatives, Gilson Gray, solicitors, Edinburgh responded, saying that the factual circumstances demonstrated that the arrangement bore the hallmarks of a Private Residential Tenancy. The Applicant had exclusive possession of a specified room and paid rent to the Respondent for its use. There was no meaningful sharing of facilities or domestic life with the Respondent. He occupied no bedroom of his own during the period that the Applicant lived at the Property. The Respondent stayed overnight once or twice at most. Sleeping on the sofa in the open plan living room/kitchen area. The "back bedroom" referred to by the Respondent was occupied by one of the Applicant's flatmates. Whilst his personal belongings were located in a wardrobe in that room, the room itself was rented out to a third party. The arrangement in practice should determine the matter, not the label attached to the written agreement. WhatsApp messages referred to a possible future return, not his current residence, a forwarding address was used by him, he admitted to extended absences from the Property, and evidence of Council Tax or bills in his name were not conclusive of physical residence, only arrangements to maintain his registration either for the purposes of convenience or financial advantage.

8. On 27 April 2025, the Respondent made further written submissions. He stressed that no locks were installed on bedrooms, he entered rooms freely to deliver laundry, retrieve personal belongings and perform maintenance, such as changing light bulbs, fixing doors and closing windows. The shared facilities were used by all, including himself. This was incompatible with a tenancy. He said that he stayed at the Property on 7+ occasions and that absences were irrelevant, as residency requires habitual living and intent to return. The Applicant conceded that he resided at the Property before 1 June 2024 and after November 2024, the Licence period.

Case Management Discussion

9. A Case Management Discussion was held by means of a telephone conference call on the morning of 28 May 2025. The Applicant was represented by Mr David Gray of Gilson Gray, solicitors, Edinburgh. The Respondent was also present.

10. The Respondent told the Tribunal that the Property is his only home. He is allowed to offer lodging. He was a resident landlord, so the Tenancy Deposit Scheme did not apply to him. He keeps one room as his bedroom but when he is away, he allows others to use it rather than leave it empty. All of his belongings are in that room. If he was trying to abuse the system, he would have a home elsewhere, but he does not. The forwarding address was a marina and he was not entitled to live there. If the view of the Tribunal was that he had made a mistake, it was not in any way deliberate.

11. Mr Gray stated that there was no suggestion of malice on the part of the Respondent and conceded that on occasion the Respondent stayed overnight, but he slept on the sofa. He was not a "live-in" landlord. He provided a forwarding address during the tenancy and Mr Gray did not see that this could be anything other than a Private Residential Tenancy. The Applicant had exclusive rights to a bedroom and the other bedrooms had the same arrangement. Even though the Respondent continued to come and go, he did not qualify as an owner-occupier. The matter was not contingent on his having another home. It is possible for someone to own a property but have no fixed abode.

12. The Parties confirmed that the deposit had not been refunded to the Applicant at the end of the period of her occupancy, but that she had asked the Respondent to keep it as her final month's rent.

Findings in Fact

- The Applicant resided in the Property from 1 July 2024 until 31 October 2024.
- The Applicant was contractually bound to pay a monthly sum of £800 to the Respondent and she also paid a deposit of £800.
- The Respondent did not lodge the deposit of £800 with a tenancy deposit scheme.
- The Applicant had a right to exclusive use of a bedroom and to shared use of the communal parts of the Property.
- The Property has three bedrooms and, during the period of occupancy by the Applicant, the other two bedrooms were occupied, the occupants (neither of whom was the Respondent) having the same rights of exclusive use of a bedroom and use of communal parts as the Applicant.

Reasons for Decision

13. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation to enable it to determine the application without a Hearing.

14. Under Regulation 3(1) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("The 2011 Regulations"), a landlord must, within 30 working days of the beginning of the tenancy pay the deposit to the scheme administrator of an approved scheme. Under Regulation 10, if satisfied that the landlord did not comply with any duty in Regulation 3, the Tribunal **must** order the landlord to pay to the tenant an amount not exceeding three times the amount of the tenancy deposit. Regulation 42 of the 2011 Regulations requires a landlord to provide certain information to tenants, including the name and contact details of the scheme administrator of the tenancy deposit scheme to which the deposit has been paid.

15. The main issue for the Tribunal to determine was whether the contractual arrangement between the Parties was indeed only a Licence to Occupy or whether it met the requirements of the definition of a Private Residential Tenancy. If it was a Licence to Occupy and not a tenancy, the Tribunal would have no jurisdiction to determine the application. If it was a Private Residential Tenancy, the Respondent was bound to comply with the requirement to lodge the deposit in an approved tenancy deposit scheme.

16. Section 1 of the 2016 Act defines a private residential tenancy as one under which property is let to an individual as a separate dwelling, the tenant occupies the property (or any part of it) as the tenant's only or principal home and the tenancy is not one which Schedule 1 to the Act states cannot be a private residential tenancy. Paragraph 8 of Schedule 1 to the Act provides that a tenancy cannot be a private residential tenancy if the let property would not be regarded as a separate dwelling were it not for the terms of the tenancy entitling the tenant to use property in common with another person ("shared accommodation") and from the time the tenancy was granted, the person in common with whom the tenant has a right to use the shared accommodation is a person who has the interest of the landlord under the tenancy, and has the right to use the shared accommodation in the course of occupying that person's home.

17. The document authorises the Applicant to use *the Room" and "Room" is defined as meaning "the Bedroom, Bathroom, Kitchen, Private and shared Balconies and all communal spaces". The Respondent did not challenge the contention of the Applicant that the same arrangement pertained to all 3 bedrooms. The fact that the Respondent had lived in the Property prior to the commencement of the arrangement and that he may have lived there since it ended is irrelevant. The period that matters is the time between 1 July 2024 and 31 October 2024. The evidence before the Tribunal indicated that, throughout that period, a person other than the Respondent had the right to occupy each of the bedrooms in the Property and to share the communal facilities of the kitchen and bathroom. The legal position would have been different had he retained one bedroom exclusively for his own use, but in letting out all three bedrooms on the same basis, he, albeit perhaps unwittingly, created three Private Residential Tenancies. Accordingly, he was subject to the requirements set out in the 2011 Regulations. The view of the Tribunal was that the

position was not affected by the fact that the Respondent paid utilities bills and council tax and that bank statements and other official documents were addressed to him at the Property. For the duration of the agreements which he entered into with the Applicant and others, he could not reasonably be said to have been occupying the Property even if he visited from time to time, dealt with minor repair issues and changed light bulbs and even if he had belongings there and occasionally stayed overnight, sleeping on the settee. The Applicant had exclusive use of a bedroom, irrespective of the wording of the document which said it did not confer exclusive possession. The Respondent could not have required the Applicant to remove herself from the bedroom during the currency of the agreement, so she had exclusive possession of it. In the WhatsApp message of 31 July 2024, the Respondent stated, in relation to the arrangement for paying Council Trax and utilities bills that it "was agreed years ago when I was there". This indicates that he understood the situation to be that he was not currently resident in the Property.

18. The Respondent had sought to rely on the case of *Shah v Barnet,* referred to in paragraph 6 above. The Tribunal's view was that it provided no assistance to the Respondent. It is an English case and the issue there was whether four people, who had moved into a property at different times and had separate agreements could argue that they had a collective lease which would give them protection under English landlord/tenant legislation. They were held to be licensees, on the basis that none of them were provided with exclusive possession. The Tribunal was clear in its view that, whatever the written agreement in the present case said, the Applicant had exclusive use of one bedroom. The legislation cannot be avoided by choosing words that to not match the reality.

19. Having decided that the Respondent had been under a duty to lodge the deposit in an approved Tenancy Deposit Scheme and had failed to do so, the Tribunal then considered the amount that it should order the Respondent to pay to the Applicant under Regulation 10 of the 2011 Regulations. The view of the Tribunal was that the Respondent's failure to lodge the deposit with an approved tenancy deposit scheme was based on a fundamental misunderstanding of the status of the relationship between the Parties. The Tribunal did not find that the Licence to Occupy had been a deliberate attempt to subvert the provisions of the 2016 Act. Ignorance of the law is, however, no excuse. This was a Private Residential Tenancy Agreement and, as a consequence, the Respondent was under an obligation to lodge the deposit in accordance with the 2011 Regulations. The Applicant's deposit was at risk for the entire duration of the tenancy, but the Tribunal noted that the period of the tenancy was relatively short and that it appeared that the Applicant had asked him to retain the deposit as her last month's rent.

20. Having taken into account all the facts and circumstances of this particular case, the Tribunal decided a fair, reasonable and proportionate amount that the Respondent should be ordered to pay to the Applicant would be £500.

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

George Clark

_____ **28 May 2025**

Legal Member/Chair **Date**