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/CV/2782

Re: Property at 37 2F1 Warrender Park Road, Edinburgh, EH9 1HJ ("the Property")

Parties:

Miss Ahala Bhara Bhat, Miss Anna Duffy, Miss Christina MacLeod, Mr Thomas Giles, Mr Jack Haveron, 56 Bryanston Court 11, George Street, London, W1H 7HD; 83 Monklands Drive, Woodford Green, Essex, IG8 0LD; 5030 Bear Lane, West Vancouver, British Columbia, Canada, V7W 1L1; 54 Old Hay Close, Dore, Sheffield, South Yorkshire, S17 3GU; 119 Ballymena Road, Carnlough, County Antrim, BT44 0LA ("the Applicant"), and

Community Help & Advice Initiative, 5th Floor, Riverside House, 302 Gorgie Road, Edinburgh EH11 3AF ("the Applicants' Representative"), and

Mr Jasper McGuinness, Markle House, East Linton, East Lothian, EH40 3EB ("the Respondent"), and

Anderson Strathern Solicitors, 1 Rutland Court, Edinburgh EH3 8EY("the Respondent's Representative")

Tribunal Members:

G. McWilliams (Legal Member) and F. Wood (Ordinary Member)

Decision

The Tribunal determine to refuse the Applicants' Application to make an order for payment to them by the Respondent.

Background

1. This is an Application for a payment order brought in terms of Rule 70 (Application for civil proceedings in relation to an assured tenancy under the Housing (Scotland) Act 1988) of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure ("the 2017 Rules"). The Application papers were sent to the Tribunal between 6th September and 19th December 2019.

2. The matter of whether the parties' tenancy agreement was an assigned short assured tenancy agreement, or a private residential tenancy agreement, was not in issue in these proceedings. For the purpose of determining this Application, the Tribunal have treated the parties' tenancy agreement as a short assured tenancy agreement, originally entered into by the Applicant Anna Duffy, and four others, on 1st August 2017, and then assigned to Ms Duffy and the Applicants Bhat, MacLeod, Giles and Haveron on 1st August 2018.

3. The Applicants sought payment of the sum of £28,300.00 from the Respondent. The sum, firstly, comprised the amount of £1000.00 in relation to claimed prohibited premium payments, of £200.00, made by each of the Applicants at the outset of their tenancy in August 2018 ("the prohibited premium issue"). Further, the sum included the amount of £27,300.00 in respect of a claimed prohibited requirement that the Applicants made advance payment of rent ("the prohibited requirement issue").

Case Management Discussions

4. A Case Management Discussion ("CMD") was held on 31st January 2020 at Riverside House, Edinburgh. A further CMD was held remotely by telephone conference call on 5th August 2020. Reference is made to the Notes on both CMD's.

Hearing

5. A Hearing took place remotely by telephone conference call on 3rd November 2020. The Applicants Mr T Giles and Mr J Haveron attended on the call with their Representative's Mr A Wilson. The Respondent's father, and property agent, Mr James McGuinness attended.

6. The Applicants' Representative Mr Wilson and the Respondent's Representative Anderson Strathern had lodged written Submissions in advance of the Hearing. The former had also lodged a written Joint Statement from all of the Applicants. Mr McGuinness had also lodged copies of documentation exchanged between himself and the Applicants.

Evidence and Submissions

7. At the outset of the Hearing Mr Wilson confirmed that the Applicants relied on the terms of his written Submission as well as their Joint Statement. The Respondent had sent an email to the Tribunal, dated 17th September 2020, confirming that he relied on the written Submission submitted by his Representative, Anderson Strathern, in particular regarding the prohibited requirement issue. Mr McGuinness reiterated this. The Tribunal heard oral evidence from the Applicants Mr Giles and Mr Haveron and from Mr McGuinness, who referred to the documentation which he had lodged. The Tribunal also heard oral submissions from Mr Wilson and Mr McGuinness.

The prohibited premium issue

8. The Applicants relied on their Joint Statement. They stated that monies paid at the commencement of the tenancy, of £200 each, were not negotiable. Mr Haveron and Mr Giles, also gave oral evidence. They said that they had two meetings with Mr McGuinness, in November and December 2017, regarding the terms of the proposed tenancy agreement. They stated that the payments for maintenance, repair and final flat clean services were discussed. They said that they asked if Mr McGuinness provided good services in this regard. They said that they did not question the payments as they were not presented as optional. They said that they were presented as part of the tenancy agreement and they were not sure how the sums to be paid were calculated or whether they had received services. They said that they had definitely received stair cleaning services. They were unsure of when they raised the matter of receipt of services during the tenancy.

9. Mr McGuinness referred to the various emails which he had exchanged with the Applicants, and his meetings with them, detailed in those communications, prior to commencement of the Agreement. He stated that the emails and meetings commenced in November 2017. Mr McGuinness said that he had discussed all the terms of the parties' agreement with the Applicants in advance of the tenancy's commencement, and all of the terms were agreed to by them. In particular he stated that there was an agreement for the Applicants to pay £200 each, at the commencement of the tenancy, to cover stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning, which matters the Applicants were ordinarily responsible for in terms of the tenancy agreement.

10. Mr McGuinness said that the Respondent entering into the tenancy agreement was not conditional on the "£200 payments" being made. He said that the Applicants were not coerced into making the payments. He stated that the Applicant Ms Duffy and the previous tenants had made similar payments in August 2017 when they had agreed to make a one-off payment for services in respect of those matters at the start of their tenancy, on the condition that the deposit was waived. He said that Ms Duffy had voluntarily entered into the arrangements for the first year of the tenancy and had approached him to

continue the tenancy, for her and the other Applicants, with the same arrangements. He stated that the Applicants had had ample time to consider the arrangements but had not expressed reservations. Mr McGuinness said that he found, through his experience as a property agent, that it was more convenient for a landlord and their tenants if the latter paid for stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning at the start of the tenancy. Mr McGuinness re-iterated that the "£200 payments" were agreed at pre-tenancy meetings. He said that the payments, and their purpose, were all discussed in detail and that the Applicants were told by him that they could attend to those matters, namely the stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning , themselves, if they wished. Mr McGuinness stated that the Applicants were happy with the terms of the tenancy agreement and, in particular, were content with the "£200 payments", which was a convenient arrangement for all parties, and was referred to in Clause 2 of the tenancy agreement. He stated that there had been no complaints from the Applicants about the services provided by the Respondent and there had been no loss to anyone as a result of this arrangement.

11. Mr Wilson, for the Applicants, reiterated the terms of his written submission, that the said "£200" payments had to be agreed to and made as a requirement of the tenancy agreement being entered into, and that they were prohibited premiums in terms of the Rent (Scotland) Act 1984 ("the 1984 Act").

The prohibited requirement issue

12. The Applicants and the Respondent, and Mr McGuinness, relied on the written Submissions lodged by the Representatives in respect of this issue.

13. Mr Haveron and Mr Giles stated that rent was to be paid over 10 months and that the Applicants left the tenancy, in May 2019, after making payments over 9 months.

14. Mr McGuinness said that student tenants would often leave their rented property at the end of their academic year, around May or June, without paying remaining rent that was due. He stated that the Respondent's tenancy agreement provided for rent to be paid over the 10 months of the academic year to try to avoid a loss of remaining rent. He stated that he had explained this to the Applicants at pre-tenancy meetings. Mr McGuinness stated that the Applicants left the tenancy early, having not paid their final month's rent. He said that the tenancy agreement also referred to a weekly rent amount as students liked to know what they would have to budget for on a weekly basis, notwithstanding that rent was to be paid monthly. He stated that the duration of the tenancy agreement was for a whole year and that students could have had use of the property for the full period of one year had they wanted it.

15. Mr Wilson, for the Applicants, reiterated the Applicants' positions, set out in his written Submission, that the Applicants' tenancy comprised 52 rental periods,

each of one week, and their alternative argument that in paying rent for a 12 months' tenancy agreement over 10 months, the Applicants were paying excess rent in advance. He submitted that the Respondent had acted contrary to the terms of Section 89 of the 1984 Act and the Applicants were entitled to recover rent paid in terms of Section 89(4) of that Act..

Findings in Fact and Law

16. The Applicants and the Respondent entered into an agreement in respect of the tenancy of the Property, commencing on 1st August 2018 and with a stated duration of 1 year.

17. At the outset of their tenancy the Applicants each paid £200.00 to the Respondent's agent Mr McGuinness, an aggregate sum of £1000.00, in respect of stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning services.

18. The said services were ordinarily the responsibility of the Applicants, in terms of Clause 11 of the parties' tenancy agreement. However the parties agreed that the services would be provided by the Respondent, and instructed by Mr McGuinness, during the tenancy, rather than be organised and carried out by the Applicants, in return for the Applicants' said payment. This was a mutually convenient arrangement of the parties and was detailed in Clause 2 of their tenancy agreement.

19. The Applicants were not required to make the payments for stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning as a condition of the grant or continuance of the tenancy.

20. In terms of Clause 2 of the parties' tenancy agreement rent was due to be paid in the sum of £676.00 per Applicant, per month, totalling £3380.00 per month, commencing on 1st August 2018, for a period of 10 months, with the final payment due on 1st May 2019. The Applicants each made 9 monthly payments of rent to the Respondent, in the aggregate sum of £3380.00, per month. They occupied the property for 10 months, until they left in May 2019.

21. The stated duration of the parties' tenancy was 1st August 2018 to 31st July 2019. The rental period of the parties' tenancy ran over the 10 consecutive months from 1st August 2018 until 1st May 2019. The Applicants had not been required to pay, and did not pay, rent before the beginning of a rental period in which it was payable.

22. The Applicants had not been required by the Respondent to pay a prohibited premium. The Respondent did not act in contravention of the terms of Section 82(1) of the 1984 Act.

23. The Applicants had not been required by the Respondent to make a prohibited requirement rental payment. The Respondent did not act in contravention of

the terms of Section 89(1)(a) of the 1984 Act and no rent is recoverable under Section 89(4) of that Act.

Reasons for Decision

24. Section 16 of the Housing (Scotland) Act 2014 provides as follows:

"16. Regulated and assured tenancies etc.
(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2)But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3)Part 1 of schedule 1 makes minor and consequential amendments."

25. Accordingly, the Tribunal now has jurisdiction in relation to claims by tenants, such as the Applicants, against a landlord, such as the Respondent, for payment under a tenancy agreement, such as the parties' tenancy agreement.

The prohibited premium issue

26. Section 82 (1) of the 1984 Act provides that "any person who, as condition of the grant, renewal or continuance of a protected tenancy, requires the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section".

27. Section 90 of the 1984 Act defines "premium" as "any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge"

28. The Tribunal considered all of the documentary and oral evidence, and submissions, in respect of this issue. The Applicants discussed the Respondent's request for payment by them of £200 each, for stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning services, which ordinarily would have been their responsibility in terms of Clause 11 of the parties' tenancy agreement, with Mr McGuinness prior to entering into their tenancy agreement. The Applicants Mr Haveron and Mr Giles confirmed this in their oral evidence. They asked if Mr McGuinness provided good services in this regard. Clause 2 of the parties' tenancy

agreement confirms the aggregate one off payment agreed by the Applicants. All of the Applicants made their payments in this regard. In their oral evidence Mr Haveron and Mr Giles said that they understood that the one off payment was not optional. They said that they did not question the payments at the time of payment. They stated that they were unsure of when they first questioned this arrangement. The original tenancy agreement showed that one of the Applicants, Ms Duffy, had also made a similar payment when the original tenancy commenced in August 2017.

29. Mr McGuinness said that the advance one off payment for such matters was a convenient way to have those costs met at the outset of the tenancy. He said that he discussed this arrangement with the Applicants, who agreed to proceed with it, and made payment at the beginning of the parties' tenancy.

30. Having considered all of the evidence and submissions in this regard, the Tribunal preferred the evidence, and upheld the submissions, given on behalf of the Respondent. Mr McGuinness had stated, in a straightforward way and with reference to his correspondence with the Applicants, that the arrangement, for the one off payment and provision of such services, was fully discussed before being entered into and implemented.

31. The Applicants, in the evidence of Mr Giles and Mr Haveron, confirmed that the terms of the tenancy had been discussed in advance. They stated that they understood that the "£200 payments" were not optional and had not made any challenge to the arrangement. Mr Giles and Mr Haveron said that, whilst unsure of the extent of services received, the Applicants had definitely received some of the agreed services. One of the Applicants, Ms Duffy, had made a similar payment for services to the Respondent in 2017. The Tribunal rejected the Applicants' evidence, and submissions, that the payments were required as a condition of the grant of the tenancy as this was inconsistent with the events prior to, at the beginning of, and throughout the tenancy. The Tribunal found that Ms Duffy's previous agreement to such services, the Applicants' agreed one off payment, and the Respondent's provision of the agreed services, established that the parties entered into a mutually convenient arrangement, and that the one off payment for the said services was not a prohibited premium.

32. Accordingly, having considered all of the evidence, the Tribunal found, on a balance of probabilities, that the "£200 payments" were fully discussed before the parties entered into a mutually convenient arrangement whereby, in return for the Applicants' payment of the aggregate sum of £1000, the Respondent, through Mr McGuinness, organised and carried out stair and window cleaning, painting touch-ups and carpet stain removal, gardening and final flat cleaning services The Tribunal found, on a balance of probabilities, that the parties had reached agreement on this convenient arrangement and that the Applicants' agreed payment was not a premium required as a condition of the grant or continuance of their tenancy.

The prohibited requirement issue

33. Section 89 of the 1984 Act forms part of Part VIII of that Act, which prohibits premiums or loans being payable by tenants. The purpose of Part VIII is to prevent landlords demanding extra payment over and above the rental payment (**Rennie**: *Leases* (2015) 22-83).

34. Section 89(1) of the 1984 Act provides that any requirement that rent shall be payable (a) before the beginning of the rental period in respect of which it is payable, or (b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months) shall be void and is a prohibited requirement.

35. Section 89(2) of the 1984 Act provides that rent for any rental period to which a prohibited requirement relates shall be irrecoverable from the tenant.

36. Section 89(4) of that Act provides that where a tenant has paid on account of rent any amount which is irrecoverable by the landlord, in terms of Section 89(1) and (2) of the 1984 Act, the tenant is entitled to recover it from the landlord or his personal representatives.

37. Section 90 (1) of the 1984 Act defines rental period as being "a period in respect of which a payment of rent falls to be made".

38. Clause 1 of the parties' tenancy agreement states:

"The lease will continue from First August 2018 and will endure for a fixed term until Thirty First July 2019, subject to other relevant conditions of this lease, both days are inclusive."

39. Clause 2 of the parties' tenancy agreement states:

"The rent will be ONE HUNDRED AND THIRTY POUNDS (£130.00) per week per person payable as follows:-

(a) One initial payment of FOUR THOUSAND THREE HUNDRED AND EIGHTY POUNDS (£4380.00) (£3380.00 + £1000.00) (£200.00 per person)
(b) A further nine payments of THREE THOUSAND THREE HUNDRED AND EIGHTY POUNDS (£3380.00) per calendar month (£676.00 per person)

The first payment includes a one off payment to cover costs, as detailed in prior correspondence. The first payment being due on 1/08/2018 and thereafter on or before the first day of each calendar month and the last payment will be on the 1/05/2019.

THERE ARE NO PAYMENTS DUE FOR THE MONTHS OF JUNE AND JULY 2019

40. The Tribunal considered all of the documentary and oral evidence, and submissions, in respect of this issue. Whilst Clause 1 of the parties' tenancy agreement stated that its term was from 1st August 2018 to 31st July 2019, the terms of Clause 2 of the parties' tenancy agreement are clear regarding the rental period. The Applicants were to pay rent in the sum of £676.00 per Applicant, per month, totalling £3380.00 per month, commencing on 1st August 2018, for a period of 10 months, with the final payment due on 1st May 2019. The Applicants agreed to pay rent over a rental period of 10 months. In terms of Clause 2 of the agreement they were not due to pay rent in the months June and July 2019. The Respondent's letter to the Applicants, dated 28th November 2017, refers to the individual Applicants' rent in weekly and monthly amounts. That letter, and the terms of Clause 2 of the tenancy agreement, expressly provide that rent payments are to be paid monthly from 1st August 2018 until 1st May 2019.

41. The Applicants Mr Haveron and Mr Giles confirmed in their oral evidence that the rent was to be paid over 10 months and that the Applicants left the tenancy after making 9 months' payments.

42. Mr McGuinness confirmed that the rent was to be paid over 10 months from 1st August 2018 until 1st May 2019, as provided for in the parties' tenancy agreement.

43. Having considered all of the evidence, and submissions, the Tribunal found, on a balance of probabilities, that the parties' tenancy agreement rental period ran during the 10 months from 1st August 2018 to 1st May 2019, as rent payments fell to be made in these months over this rental period. The Applicants were not required, by the terms of the parties' tenancy agreement, to pay rent in the months June and July 2019. The Tribunal rejected the Applicants' evidence, and submissions, that they were required to pay rent before the beginning of the rental period in which it was due, as this was inconsistent with the terms of the tenancy agreement and the operation of the tenancy. The Tribunal found that the parties paid rent each month that they occupied the property, as required in terms of the parties' agreement, and paid rent for 9 out of the stipulated 10 months of the rental period when payment of rent fell to be made. The Applicants left the tenancy without paying the rent that fell to be made in May 2019, being the last month in the agreed rental period. The Respondent had not demanded extra payment over and above the rental payments. Accordingly the Tribunal found, on a balance of probabilities, that the Applicants had not been required to pay rent before the beginning of the rental period in which it was payable and, therefore, had not been required by the Respondent to make a prohibited requirement rental payment. The Respondent did not act in contravention of the terms of Section 89(1)(a) of the 1984 Act and no rent is recoverable under Section 89(4) of that Act.

Decision

44. Therefore the Tribunal have determined to refuse the Applicants' Application to make an order for payment to them by the Respondent.

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.

Gerald McWilliams

3rd February 2021

Legal Member **Date**