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

Chamber Ref: FTS/HPC/PR/21/0395

Re: Property at 6 Rowan Road, Dumbreck, Glasgow, G41 5BS ("the Property")

Parties:

Mr Kelly Brown, Mrs Emily Brown, 4A Mount Drive, Park Street, St Albans, Hertfordshire, AL2 2NY ("the Applicants")

Mr Abdullah Hamid, Mrs Zara Hamid, 35 Sherbrook Avenue, Glasgow, G41 4SD ("the Respondents")

Tribunal Members:

Neil Kinnear (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

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

Background

[1] This was an application dated 16th February 2021 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. The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* ("the 2011 Regulations").

[2] The Applicants sought payment of compensation in respect of an alleged failure by the Respondents to pay the deposit they provided of £2,200.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

[3] The Applicants provided with their application copies of a tenancy agreement, and various screen shots and mobile phone text messages.
[4] The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 16th March 2021, and the Tribunal was provided with executions of service.

[5] Both parties submitted extensive further documentation in advance of the Case Management Discussion in support of their respective positions.

[6] A Case Management Discussion was held on 15th April 2021 by Tele-Conference. The Applicants participated, and were not represented. The Second Respondent, Mrs Zara Hamid, participated, and was represented by Mr Mitchell, solicitor. The First Respondent did not participate, but was also represented by Mr Mitchell.

[7] The Applicants explained that they had signed the lease agreement on the basis that they would occupy the Property as their home for a period of at least 6 months, and probably for longer. The Applicants had explained this to the Second Respondent, who was well aware that they intended to reside at the Property and were not occupying it as a holiday let.

[8] Mr Mitchell explained that the Respondents accepted that they had not paid the deposit received from the Applicants for the Property into an approved scheme upon the basis that there was no legal requirement for them to do so, as the Property was a holiday let to which the *Tenancy Deposit Schemes (Scotland) Regulations 2011* did not apply.

[9] 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 set a Hearing. All parties and the Tribunal agreed that it would be helpful to conduct the Hearing by video-conference.

The Hearing

[10] A Hearing was held on 3rd June 2021 by Video-Conference. The Applicants participated, and were not represented. The Second Respondent, Mrs Zara Hamid, participated, and was represented by Mr Mitchell, solicitor. The First Respondent did not participate, but was also represented by Mr Mitchell.

[11] After a preliminary discussion between the parties and the Tribunal concerning the nature of the dispute between the parties with which this application was concerned, the Tribunal heard evidence from both Applicants, and from the Second Respondent.

[12] It became apparent that, in fact, there was little dispute between them concerning the factual circumstances. Rather, the dispute turned upon the legal

consequences of the arrangement between them with respect to the Property, and in particular whether the nature of the arrangement was that of a holiday let or not.

[13] It also became apparent from the evidence of the parties, that the tenancy agreement was between the Second Applicant, Mrs Brown, and the Second Respondent, Mrs Hamid. The Applicants explained that they had brought this application in both their names against both respondents upon the basis that both parties were married couples and involved in the arrangement. The Applicants readily accepted that the contract was actually negotiated and agreed between Mrs Brown and Mrs Hamid, and that their respective husbands had little involvement with that.

[14] The evidence the Tribunal heard from both parties confirmed that the First Applicant obtained new employment in Glasgow, and that he and his family moved there for that purpose. The Applicants enrolled their children at a local school, and were put in contact with the Second Respondent courtesy of the school's social media network for the purpose of finding accommodation in which to stay.

[15] The Second Respondent runs a business offering short-term lets at the Property. She runs that business herself, and operates through the Airbnb website. She had not previously let out the property for anything other than short stays, typically weekends or short holiday stays.

[16] The Second Respondent was aware that the Applicants were moving to Glasgow to stay, and that their children would attend the same school as the Respondents' children. She offered to provide accommodation at the Property for the Applicants and their children on a month-to-month basis, and the Second Applicant agreed with that proposal.

[17] As a result of being unable to use the Airbnb website, as she usually did, to set up the agreement, the Second Respondent gave the Second Applicant a written agreement headed "Holiday Letting Agreement" which ran from 3rd October 2020 to 3rd November 2020, which they both signed as landlord and tenant. Thereafter, the Second Respondent gave the Second Applicant a second agreement in similar terms which ran from 3rd November 2020 to 3rd December 2020, which again they both signed.

[18] By the expiry of the term of the second agreement, the parties' relationship had broken down due to various disputes between them concerning the condition of the Property which are not relevant to this application. As a result, no further written agreement was entered into after 3rd December 2020, and the Applicants ultimately moved out of the Property in mid-January 2021.

[19] Both parties accepted that the Applicants paid the Second Respondent a deposit of £2,200.00 at the start of the tenancy, and that the Second Respondent repaid that deposit upon their departure. Both parties agree that the deposit was not paid into an approved scheme.

[20] The Applicants sought payment of compensation in respect of the failure by the Respondents to pay the deposit into an approved scheme within 30 days of receipt of that sum.

[21] The Respondents argued firstly, that the First Respondent should not be a party to this application upon the basis that he had no involvement with the tenancy and was not the landlord. Secondly, they argued that there was no legal requirement for them to lodge the deposit, as the Property was a holiday let to which the *Tenancy Deposit Schemes (Scotland) Regulations 2011* did not apply. They relied upon the very short duration of each consecutive agreement (one month), and the fact that the Second Respondent provided the accommodation with services including bedding, toiletries and basic groceries, which they argued confirmed the nature of the arrangement as being a holiday let.

Reasons for Decision

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

[23] It is clear from the evidence of the parties, and from the terms of the written tenancy agreements provided, that the landlord in terms of the tenancy agreement was the Second Respondent, and the tenant was the Second Applicant. That being so, the Tribunal made an order removing the First Applicant and the First Respondent as parties to the proceedings, in terms of Rule 32(1) (Addition, substitution and removal of parties) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 201*7 as amended

[24] Regulation 3 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."

[25] Regulation 3 of the 2011 Regulations defines a "relevant tenancy" as follows:

> "(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.".

[26] The 2004 Act referred to in Regulation 3 is the *Antisocial Behaviour etc. (Scotland) Act 2004*. Section 84(8) of that Act defines a relevant person as a person who is not a local authority, a registered social landlord, or Scottish Homes, and an unconnected person in relation to a relevant person as a person who is not a member of the family of the relevant person.
[27] The Second Respondent falls within the definition of a relevant person, and the Second Applicant falls within the definition of an unconnected person. The tenancy agreement between them is therefore a relevant tenancy, unless the use of the Property is of a type described in section 83(6) of the 2004 Act.

[28] Section 83(6) of the 2004 Act describes a number of types of house which use as a dwelling is disregarded if they fall within a number of categories which are set out at length. The Second Respondent relies upon the category in section 83(6)(d), that "the house is being used for holiday purposes".

[29] "Being used for holiday purposes" is not further defined in the legislation. However, the equivalent provision in the preceding legislation relating to assured tenancies under the *Housing (Scotland) Act 1988* was considered by the Sheriff Court in the case of *St Andrews Forest Lodges Ltd v Grieve* 2017 G.W.D. 14-224.

[30] Section 12 of the 1988 Act excludes certain tenancies from being assured tenancies if they fall within any paragraph of Schedule 4 of that Act. Paragraph 8 of Schedule 4 specifies a tenancy which is not an assured tenancy as being "a tenancy the purpose of which is to confer on the tenant the right to occupy the house for a holiday".

[31] In considering the meaning of Paragraph 8 of Schedule 4, the learned sheriff stated in paragraph 54 of his judgement the following:
"54. Against that background, I have no difficult accepting that Mr Mulholland did not want to give the defenders security of tenure as assured tenants. However the means that he chose to achieve this result was to offer the defenders a lease, which he thought would be a holiday let. He produced a draft agreement, modelled on a holiday let agreement which the pursuer used in its Piperdam business. He referred to the occupancy agreement throughout as a 'holiday let'. But as I have explained, a holiday let is simply a tenancy which, if it satisfies the terms of paragraph 8 of schedule 4 to the 1988 Act, will not be an assured tenancy. Critically, in my opinion, whether or not the terms of paragraph 8 are satisfied is a matter of for the Court to determine in the light of the evidence before it. The tenancy does not become a holiday let just because one or both of the parties wish it so or describe it as such in a written agreement. The reality is that since March 2015 the defenders have occupied the Lodge as their only or principal home; indeed they have done so since 2007. At no time did they agree that their occupancy was for the purpose of a holiday. Nor could they have done, given that it manifestly was not. On the evidence I am quite clear that in fact and in law the defenders' occupancy of the Lodge since March 2015 has at no point been for the purpose of a holiday. So paragraph 8 of schedule 4 is not in play, and the tenancy which the parties created is not precluded by this paragraph from being an assured tenancy.".

[32] With that analysis, the Tribunal respectfully agrees. As in that case, it is for the Tribunal in this application to determine in the light of the evidence before it whether or not "the house is being used for holiday purposes" in terms of section 83(6)(d) of the 2004 Act. In particular, the Tribunal respectfully agrees with the learned sheriff that a tenancy agreement does not become a holiday let because one or both of the parties wish it so or describe it as such in a written agreement.
[33] It is clear from the evidence that at no time did the parties agree that the Applicants' occupancy was for the purpose of a holiday. The Second Respondent was well aware that the Applicants required the Property to reside in after moving to Glasgow for the First Applicant to take up new employment, and that the Applicants were enrolling their children at the same school which her own children attended in Glasgow. Both of these facts are clearly entirely inconsistent with a holiday stay. Indeed, the Second Respondent became aware of the Applicants' situation as a result of a contact from the school's social media network which advised her that the Applicants were relocating to Glasgow and that their children were enrolling at the school.

[34] For these reasons, the Tribunal did not accept the Second Respondent's submission that the Property was "being used for holiday purposes" by the Applicants, and accordingly the tenancy agreement was a "relevant tenancy" for the purposes of Regulation 3 of the 2011 Regulations.

[35] 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."

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

[37] 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.

[38] 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.

[39] 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 although the Second Respondent had considerable experience in letting property, that experience was exclusively with short holiday lets which she administered through Airbnb. The Tribunal accepted that as a result of her previous experience she misunderstood that the fact that she engaged in the business of holiday lets did not mean that if she let the Property for residential purposes, she did not need to lodge the deposit in an approved scheme. The Tribunal also noted that the Second Respondent had returned the deposit in full to the Applicants upon their departure from the Property. In these circumstances, the Tribunal considered that albeit ignorance of the terms of the 2011 Regulations is no excuse or defence to not complying with them, the foregoing factors do represent mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

[40] However, balanced against these mitigating factors, are the fact that the Second Respondent received payment of the deposit at the commencement of the tenancy and did not comply with her legal obligations as a landlord with respect to the 2011 Regulations, which regulations have been enacted to provide protection to tenants in respect of their deposit and to ensure that they can obtain repayment of their deposit at the conclusion of the lease. Albeit that the Second Respondent's previous experience was exclusively with short holiday lets, she did have considerable experience in letting property, which she undertook on a professional basis through her own business, and should have been more diligent in clarifying her obligations in that regard.

[41] Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considers that the sum of £2,000.00 is an appropriate sanction to impose.

Decision

[42] For the foregoing reasons, the Tribunal orders the Second Respondent in respect of her breach of Regulation 3 of the 2011 Regulations to make payment to the Second Applicant of the sum of £2,000.00 in terms of Regulation 10(a) of the 2011 Regulations.

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.

Neil Kinnear

9th July 2021

Legal Member/Chair **Date**