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 Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations")

Chamber Ref: FTS/HPC/PR/20/2199

Re: Property at 12 Caley Brae, Uddingston, G71 7TA ("the Property")

Parties:

Mr Juan Martin Bailo, 0/2, 159 Wellshot Road, Glasgow, G32 7AU ("the Applicant")

Mr Graham Devine, 92 Wellington Street, Cremorne, Melbourne, Victoria, 2121, Australia ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member) and Gerard Darroch (Ordinary Member)

Decision (in absence of both the Applicant and the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £600 should be made in favour of the Applicant.

Background

1. The Applicant seeks an order in terms of Regulations 9 and 10 of the 2011 Regulations. A tenancy agreement and copies of emails between the parties were lodged in support of the application. A copy of the application was served on the Respondent and the parties were notified that a case management discussion ("CMD") would take place on 5 January 2021 by telephone conference call. Prior to the CMD, the parties both lodged submissions and the Respondent notified the Tribunal that he did not intend to participate in the CMD.

2. The CMD took place on 5 January 2021. The Applicant participated. The Respondent did not. The Legal Member noted the issues which were in dispute and continued the matter to a hearing. Following the hearing, the Tribunal issued a decision and made an order in favour of the Applicant. This was

successfully appealed by the Respondent and the case was remitted back to the First-tier Tribunal.

3. On 14 September 2022, the Tribunal issued a direction asking the parties to confirm whether they wished a hearing to take place by telephone, WEBEX or in person. The direction was issued because the Respondent had previously indicated that the hearing should take place in person. However, in July 2022 the Respondent advised the Tribunal that he had sold his property in Scotland, was travelling in Asia and that his correspondence address was in Melbourne, Australia. The Applicant responded to the direction, stating that he would not attend the hearing either in person, by WEBEX or by telephone, on the advice of his doctor, but wished the Tribunal to make a decision based on the documentary evidence which had been submitted. The Respondent did not respond.

4. The parties were notified that the hearing would take place by telephone conference call on 31 January 2023 at 10am. They were provided with the telephone number and passcode. The Applicant again notified the Tribunal that he did not intend to participate but wished to rely on the documents lodged. The Respondent did not respond, or lodge written submissions.

5. The hearing took place on 31 January 2023. Neither party participated.

The Hearing on 31 January 2023

6. The Tribunal noted that the direction and letter notifying the parties of the arrangements for the hearing had only been sent to the Respondent by email, although he had provided a correspondence address. The email address had been provided by the Respondent to the Tribunal and had been used previously by the Respondent when communicating with the Tribunal.

7. The Tribunal also noted that both parties had previously lodged documents and submissions. These appeared to establish that the main issues in dispute were-

(a) When did the tenancy terminate and is the application time barred?
(b) Is the application incompetent because it has only been made against one of the owners/landlords of the property?
(c) Is the Applicant entitled to an order for payment and what sum should be awarded.

8. The Tribunal noted that the lease between the parties started on 20 November 2018. Although it was a private residential tenancy (because it started after 1 December 2017) the parties appear to have agreed an initial fixed term of 6 months to 19 November 2019, with a proviso that it could end on "such other date as may be agreed between the parties". From the documents lodged by both parties, it also appeared that the tenancy continued monthly after the initial term, with the rent being due on 20th of each month. The Applicant notified the Respondent that he was terminating the tenancy, although a copy of the notice was not lodged. There followed a series of emails between the parties starting on 14 July 2020, when the Respondent asked the Applicant to confirm when he

was moving out and stating that a daily rental rate would apply if he has not moved out by the 19th of July. In his submissions, the Respondent stated that the Applicant notified him by telephone that they moved out on 15 July 2020. This was denied by the Applicant who stated that he moved out on 18 July 2020 and put the keys through the letterbox on that date. The Tribunal noted that for the purposes of the time limit specified in the 2011 Regulations, the relevant date is the date that the tenancy ended and not the date when the Applicant vacated the property, unless these are one and the same.

9. The Respondent lodged a series of submissions stating that the application ought to have been made against both him and his wife, as she was the joint landlord. The Respondent was notified that Mrs Devine could make an application to be added as a party but had not done so.

10. The Tribunal noted that none of the submissions lodged address the reasons for the failure to lodge the deposit in an approved scheme or the consequences of this for the Applicant.

11. Rule 29 of the Tribunal Procedure Rules states that the Tribunal may proceed with a hearing in the absence of a party. Rule 18 states that the Tribunal has the power to determine the application without a hearing. The Tribunal concluded that the hearing should be adjourned to another date, to provide the parties with a further opportunity to participate. However, the parties were notified that if either or both failed to attend, the Tribunal could make a decision on the application based on the documents and submissions lodged and this might result in an award against the Respondent in terms of the Regulations. A direction was issued which required both parties to lodge further documents and to participate in the hearing or provide an explanation, with evidence, if they were unable to participate.

12. The parties were notified that a hearing would take place by telephone conference call on 17 April 2023. They were provided with the telephone number and passcode. Prior to the hearing the Applicant notified the Tribunal that he did not intend to participate in the hearing and that he wished to rely of the documentary evidence already submitted. He did not lodge any further documentation. The Respondent did not contact the Tribunal or respond to the direction.

The Hearing on 17 April 2023

13. The Hearing took place on 17 April 2023. Neither party participated and no evidence was led. The Tribunal noted that the parties had been notified of the date and time of the hearing and advised that a decision could be made in their absence. The Tribunal determined that a decision would be made on the application based on the written submissions and the documents lodged.

Findings in Fact

14. The Applicant is the former tenant of the property.

15. The tenancy started on 20 November 2018.

16. The Respondent is the former owner and former landlord of the property.

17. The Applicant paid a deposit of £350 to the Respondent at the start of the tenancy.

18. The tenancy terminated on 19 July 2020.

19. The application was lodged with the Tribunal on 17 October 2020.

20. The deposit paid by the Applicant was not lodged by the Respondent in an approved tenancy deposit scheme.

Reasons for Decision

21. 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.

(1A) Paragraph (1) does not apply –

(a) Where the tenancy comes to an end by virtue of section 48 or 50 of the Private Housing (Tenancies) (Scotland) Act 2016, and
(b) The full amount of the tenancy deposit received by the landlord is returned to the tenant by the landlord,
Within 30 working days of the beginning of the tenancy.

22. Regulation 9 of the 2011 Regulations states –

(1) A tenant who has paid a tenancy deposit may apply to the First-tier Tribunal for an order under Regulation 10 where the landlord did not comply with any duty in regulation 3 in respect of their tenancy deposit.
(2) An application under paragraph (1) must be made no later than 3 months after the tenancy has ended.

Is the application time barred?

23. In his written submissions, the Respondent stated that the application had been submitted to the Tribunal outwith the three-month time limit specified in Regulation 9. The basis of this claim is that the Applicant vacated the property on 15 July 2020 and not the 18th or 19th July, as stated by the Applicant. This is denied by the Applicant who stated that he moved out of the property on the 18th but that the tenancy terminated on the 19th.

24. The Tribunal is satisfied that the date on which the Applicant moved out of the property is irrelevant. It is the date on which the tenancy ended which is key to whether the Applicant has complied with Regulation 9(2). The Tribunal notes that both parties lodged a copy of their email correspondence which took place between 14 and 19 July. Although a copy of the Applicant's notice was not provided, it appears that the Respondent was aware that the Applicant was terminating the tenancy as he sent an email on 14 July asking the Applicant to confirm when he would be moving out and stating that if it was after the 19th of July, a daily rental should be paid. This suggests that the rent had been paid up to the 19 July. The Respondent also confirmed that he recovered possession of the property on the 19 July and that he had notified the Council that he would be liable for Council Tax from this date. The Applicant submitted an email from Council Tax which confirmed that his liability for this ended on 19 July 2020. He also submitted an email to the Respondent dated 19 July 2020 which stated that he moved out on the 18 July and put the keys through the letterbox. The Tribunal is satisfied that the tenancy ended on 19 July 2020.

25. In terms of Rule 5 of the Tribunal Procedure Rules 2017, an application is "made" on the date that it is lodged in the manner set out in the relevant rule. Rule 103 requires an Applicant to lodge a copy of the tenancy and evidence of the end of the tenancy with the application. These were lodged on 17 October 2020, with the application form. The Tribunal issued a request for further information. However, the Applicant had complied with Rules 5 and 103 on 17 October 2020. The application was therefore lodged within the time limit and is not time barred.

Is the application incompetent because it was only made against the Respondent?

26. The Respondent claims that the application is incompetent because his wife is not named as joint Respondent. It is not claimed that the application names the wrong Respondent, only that it ought also to include Mrs Devine. The Respondent did not provide any evidence to support the claim that Mrs Devine was one of the landlords, although he was directed to do so. A search of the Register of Landlords confirmed that Mr Devine was a registered landlord at the relevant time and the tenancy agreement was only signed by him and the Applicant. All correspondence lodged by both parties is between the Applicant, his partner and Mr Devine. The Tribunal is satisfied that the Applicant may have been entitled to make the application against Mrs Devine as well as the

Respondent, if she was the joint owner, but that he was not obliged to do so. The application is competent.

Is the Applicant entitled to an order and what sum should be awarded?

27. 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**.

28. The Tribunal is satisfied that the deposit paid by the Applicant was not lodged in an approved scheme. Evidence in the form of emails from all three approved schemes was lodged. Furthermore, although the Respondent submitted extensive representations, he did not dispute this fact. The Tribunal is therefore satisfied that it must make an order in favour of the Applicant.

29. As neither party participated in the hearing, the Tribunal did not hear evidence from the Applicant about the impact of the deposit being retained or the Respondent's reasons for failing to lodge it. Furthermore, no evidence was produced as to whether the deposit has been returned to the Applicant since the application was submitted, although it seems likely that it has not.

30. In the case of Rollett v Mackie (2019 UT 45), the Upper Tribunal refused the appeal by the Applicant who argued that the maximum penalty ought to have been imposed. Sheriff Ross commented that the "level of penalty requires to reflect the level of culpability" and that "the finding that the breach was not intentional…tends to lessen culpability" (13). He goes on to say, "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."

31. It is not clear whether the Respondent made a conscious decision to retain the deposit or if his failure was due to oversight. He has offered no explanation. The Applicant lodged an email from the Respondent dated 19 July 2020, in response to an enquiry about the location of the deposit. It states " Stop acting like a spoiled child. I advised you what would happen with the deposit when you moved in". This suggests that the failure to lodge the deposit may have been deliberate. However, absent additional information or evidence about the alleged discussion at the start of the tenancy, it is not possible to be certain that this was the case. In addition, although the Applicant states that the Respondent is an experienced landlord, with other properties, no evidence was produced to support this claim .

32. The Tribunal requires to base the award on the facts and circumstances of the case. None of the aggravating factors highlighted by Sheriff Ross have been established. However, the deposit was unsecured for the whole of the tenancy, a period of 20 months, and the Applicant was deprived of the opportunity to use

the scheme adjudication process to seek recovery of the deposit. In the circumstances, the Tribunal concludes that an award of £600 should be made.

Decision

33. The Tribunal determines that an order for payment of the sum of £600 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.

Josephine Bonnar, Legal Member **17 April 2023**