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 Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011/176 and under Section 16 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/PR/22/1730

Re: Property at 15 Mentone Gardens, Edinburgh, EH9 2DJ ("the Property")

Parties:

Kesiena Ugbogure, Flat 2, 31 Harewood Crescent, Edinburgh, EH16 4XS ("the Applicant")

Zeshan Ahmed, 12 Arboretum Road, Edinburgh, EH3 5PN; and Kamran Ahmed, c/o 61A Queen Street, Edinburgh, EH2 4NA ("the Respondents")

Tribunal Members:

Joel Conn (Legal Member)

Decision (in absence of the Respondent)

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

Background

1. This is an application by the Applicant for an order for payment where the landlord has not complied with the obligations regarding payment of a deposit into an approved scheme under regulation 9 (court orders) of the *Tenancy Deposit Schemes (Scotland) Regulations 2011/176* in terms of rule 103 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Procedure Rules"). The tenancy in question was a Private Residential Tenancy ("PRT") of a room at the Property (with shared facilities) by the Second Named Respondent to the Applicant (though the Tenancy Agreement stated it was by the First Named Respondent and implied it was for the full Property) commencing on 1 February 2022. The Tenancy came to an end on 30 April 2022.

2. The application was dated 3 June 2022 and lodged with the Tribunal shortly thereafter. It was originally raised against the First Named Respondent only but was amended prior to service to be against both Respondents. The application relied upon evidence that a deposit of £750 was due in terms of the Tenancy, paid to the First Named Respondent around the commencement of the tenancy (the Applicant said it was paid on 31 January 2022 and provided a bank statement showing payment of £1,500 of the deposit and first month's rent), but never paid into an approved scheme. The application did not specify the level of award sought other than to request "compensation immediately". A parallel application was raised (under reference CV/22/1729) seeking repayment of the deposit itself.

The Case Management Discussion

3. On 20 September 2022 at 10:00, at a case management discussion ("CMD") of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote conference call, there was appearance by the Applicant only. The Applicant confirmed that he insisted on his application.

4. The Applicant confirmed that he had not heard from the Respondents, nor anyone on their behalf, since the lodging of the application. The clerk confirmed no correspondence or papers had been received. I noted that service of the application by Sheriff Officers upon the First Named Respondent had delivered papers to his wife on 15 August 2022, and upon the Second Named Respondent at his contact address (Saltoun Lettings) that appears on the Landlord Registration database. Having waited until 10:08 to commence the CMD, I was satisfied to consider the application in the Respondents' absence. (No one for either Respondent attempted to call into the teleconference by the time of its conclusion around 10:40.)

5. I took the Applicant through the application papers and sought some further information. I drew the Applicant's attention to the Land Register information stating that the owner of the Property was the Second Named Respondent and Subhaan Ahmed; and that the Landlord Registration database named only the Second Named Respondent as landlord. The Applicant stated that he only dealt with the First Named Respondent and did not know of the Second Named Respondent's involvement until after the end of the tenancy. (He believed that the Second Named Respondent and Subhaan Ahmed may be the First Named Respondent's parents.)

6. Between the papers and the submissions, I noted the following:
   a) The Applicant is a student. He and his wife moved from Nigeria to Edinburgh and required to stay in hotel accommodation for a period.
   b) His wife then found the room at the Property on a website called "Spare Rooms".
   c) He dealt only with the First Named Defender, principally contacting each other through WhatsApp. (A long WhatsApp transcript was included within the papers.)

d) He was told by the First Named Defender that the rent of £750/month included all bills, except gas which needed to be split between the others in the Property.

e) The Property comprised of a shared kitchen and bathroom on the ground floor; a bedroom on the ground floor that the Applicant and his wife lived in; a second-floor bedroom (with en suite) that an English woman ("D") lived in; and a second-floor twin bedroom what two students from Hong Kong lived in. The ground floor bathroom was used by everyone except D. They all shared the use of the ground floor kitchen. All bedrooms had individual locks.

f) At no time did either of the Respondents nor any of their family members live at the Property with the Applicant. The Applicant believed D moved in around 2 months prior to the Applicant and his wife, and the students from Hong Kong around 1 month prior.

g) The Applicant and his wife started to look for new accommodation in March 2022 and told the First Named Respondent. Viewing commenced during this period, discussed between them by WhatsApp. (I noted the texts by the First Named Respondent to the Applicant where, during a disagreement over the suitability regarding a proposed viewing (given the Applicant's wife's work schedule) the First Named Respondent stated: "I am the landlord here not you." (7 April 2022 at 15:47) and "Nobody is bashing into the room, I am the owner of the property." (7 April 2022 at 15:49).)

h) The Applicant believed that all occupants moved out around 30 April 2022 as the First Named Respondent gave them "notice" to move out for that date.

i) The "notice" provided to the Applicant was solely by WhatsApp. He referred to the line in the WhatsApp exchange of 7 April 2022 at 15:49: "I am giving you a notice to leave my property by the end of April." The Applicant received no other notice in any form regarding termination of the PRT by the Respondents.

j) After the Applicant vacated, and requested return of the deposit, the First Named Respondent refused to provide it, claiming that Council Tax of £1,200 was due by him for the three months he occupied. The Applicant believed that the Property was exempt (given that 3 out of 5 of the occupants were students) plus that the £750 rent had been inclusive of all bills except electricity.

k) The Applicant has checked with all three approved tenancy deposit scheme providers and none have his deposit. He has never received any correspondence suggesting that the deposit is held by any of the three.

7. I noted the terms of the Tenancy Agreement. Along with referring to the First Named Respondent as the only landlord (and not mentioning either the Second Named Respondent nor Subhaan Ahmed who are actually the owners); it reads as if the whole of the Property (and not just a single room) are included in the PRT. Further:

a) It refers at clause 4 to "shared facilities" of "Kitchen/Living Room" (which does not appear accurate, as it excludes the bathroom, and there was no shared living room).

b) The deposit provisions are in clause 10 and refer to My|deposits Scotland as the tenancy deposit scheme provider to be used.

c) Clause 25 includes a requirement that the "Tenant will notify the local authority that they are responsible for paying the council tax and any other associated charges" and that "the Tenant will be responsible for payment of any council tax…".

d) At clause 26, the "Tenant undertakes to ensure that the accounts for the supply to the Let Property of [gas/electricity/telephone/TV licence/internet/broadband] are entered in his or her name with the relevant supplier. The Tenant agrees to pay promptly all sums that become due for these supplies relative to the period of the tenancy." (Emphasis in the original, suggesting that the highlighted wording was supposed to be amended by appropriate deletions before the Tenancy Agreement was signed.)

8. I asked the Applicant for his submissions on appropriate compensation. He stated that he would be satisfied with £750. He explained that he required to borrow a deposit for his next property and this was "mentally exhausting".

9. No motion was made for expenses.

Findings in Fact

10. Neither of the Respondents resided at the Property during the period January to April 2022.

11. The Second Named Respondent, as co-proprietor of the Property, let a room with shared facilities at the Property to the Applicant under a Private Residential Tenancy dated 31 January 2022 commencing on 1 February 2022 ("the Tenancy").

12. The First Named Respondent was incorrectly stated as the landlord in the Tenancy Agreement.

13. Throughout the Tenancy, the First Named Respondent held himself out to be landlord of the Property, such as through text exchanges.

14. The Tenancy Agreement at clause 10 required the Applicant to make payment of a deposit of £750 and narrated that the "scheme administrator" for holding the deposit under the 2011 Regulations was "My|deposits Scotland".

15. The Tenancy Agreement provided to the Applicant was accompanied with a copy of the "Easy Read Notes for the Scottish Government Model Private Residential Tenancy Agreement" which contained at section 10 the guidance: "The landlord has to pay the deposit to one of the schemes within 30 working days from the start of the tenancy".

16. The Applicant paid a deposit of £750 to the First Named Respondent on or about 31 January 2022.

17. Neither of the Respondents, nor anyone on their behalf, has paid the Applicant's deposit into an approved tenancy deposit scheme provider.

18. The Tenancy was brought to an end on or about 30 April 2022.

19. As the deposit has never been lodged, the Second Named Respondent is in breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011/176.

20. The Second Named Respondent has been the landlord of the Property since around December 2016.

21. On receiving the Applicant's deposit, the Respondents were aware of the need to lodge the Applicant's deposit with a tenancy deposit scheme provider.

22. At the conclusion of the Tenancy, the Applicant has not been afforded access to the adjudication scheme under Tenancy Deposit Scheme in terms of his tenancy deposit for the Property.

23. The Applicant has not been able to recover his deposit from the Respondents and has required to take steps to raise a separate application before the Tribunal to do so.

24. The Applicant was inconvenienced by the failure to obtain return of his deposit and required to borrow funds to secure a further rented property, which he found to be a cause of significant stress to him.

Reasons for Decision

25. The Procedure Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal. In light of the submissions by the Applicant, and the absence of any appearance by the Respondents to contradict the submissions provided, I was satisfied both that the necessary level of evidence had been provided through the application and orally at the CMD, and that it was appropriate to make a decision under regulation 10 of the 2011 Regulations at the CMD.

26. I directed myself to publicly available information and noted the following:
    a) The Second Named Respondent owns a further property (a flat in the Pilton area) which he purchased in August 2018. No one is registered as a landlord against this property. In both the Title Sheets for the Property and the Pilton flat, the Second Named Respondent gives his address as 12 Arboretum Road, Edinburgh (which is the address that the First Named Respondent resides at). This appears to be a property owned, since 2000 (on the Sasine Register) by members of the Respondents' family, suggesting it may remain the Second Named Respondent's home address, and therefore the Pilton flat may be rented out. I did not investigate whether any properties were owned by the Second Named Respondent in other registration counties.
    b) An application under the Tenancy Deposit Schemes (Scotland) Regulations 2011/176 has previously been raised in regard to the Property. An award of £1,200 (being 1.5 times the deposit in question) was awarded on 19

August 2020 under reference PR/20/1272. The application (and award) was only against the First Named Respondent. No query appears to have been raised in that application to who was the true owner of the Property. The tenancy agreement considered in the 2020 application, as in the current case, stated the First Named Respondent as the sole landlord. I shall not repeat the terms of the decision, but it is noticeable that in that case:

i. There was no attempt to lodge the deposit.
ii. Issues arose at the end of the tenancy in regard to return of the deposit, which were only resolved because the First Named Respondent requested that an incoming tenant pay their deposit direct to the applicant in that case, as repayment of the applicant's deposit.
iii. All material communication again appeared to be electronically, and there is a brief reference in the decision to "the abusive nature of the WhatsApp messages" on a date after the end of the tenancy.

27. I was satisfied to accept the submissions of the Applicant as factually well-founded, but in any event there was no contradiction being made by the Respondents. Therefore, I see no grounds to doubt the payment of the deposit; that it was not lodged appropriately; that it has not been returned; nor that the reasons for it not being returned are related to alleged Council Tax liability (which would not normally be for a landlord to collect and recharge to a tenant).

28. It does appear that the Applicant's understanding of what the £750/m payment included, his liability for utilities, and how Council Tax was administered and levied, were at odds with the information available to him in the Tenancy Agreement (and also the explanatory notes). I do not see that this has any bearing on the question of the 2011 Regulations however.

29. This application involves the most fundamental breach of the 2011 Regulations, being complete failure to lodge the deposit or return it at the end of the Tenancy. Further that leads to the denial to the Applicant of the two core protections that the tenancy deposit scheme provides: confidence that funds are safely held; and access to the arbitration system if there is any dispute over return of the deposit.

30. There is every sign of a systemic failure by the Second Named Respondent (and the First Named Respondent whom he appears to have entrusted to act as his agent in some capacity) in regard to the handling deposits. The 2020 decision evidences this. The poor drafting in the Tenancy Agreement, the failure to clarify who is the landlord, and the text messages where the First Named Respondent incorrectly asserts that he is the landlord, and texts to the Applicant asking him to leave (without providing a proper Notice to Leave with full information or appropriate notice), all further suggest systemic issues with the Second Named Respondent's control of the Property and obligations as a landlord. The Property appears to be three bedsits with shared kitchen and bathroom, for transient tenants and foreign students, whom would be amongst those most requiring of the protections of the 2011 Regulations. (I am concerned that there may be a further rental property in Pilton where the Second Named Respondent is not registered as a landlord, though I am not taking this into account as I have no evidence that the property in Pilton is in fact rented out.)

31. In coming to a decision, I reviewed decisions from the Upper Tribunal for Scotland. In *Rollett v Mackie, [2019] UT 45*, the then Sheriff Ross notes that "the decision under regulation 10 is highly fact-specific to each case" and that "[e]ach case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT. Assessment of what amounts to a 'serious' breach will vary from case to case – it is the factual matrix, not the description, which is relevant." (paragraph 9)

32. In regard to that "factual matrix", Sheriff Ross reviews with approval the reasoning of the Tribunal at first instance in that case (at paragraph 10). Generalised for my purposes, the Tribunal made consideration of:
    a) the purpose of the 2011 Regulations;
    b) the fact that the tenant had been deprived of the protection of the 2011 Regulations;
    c) whether the landlord admitted the failure and the landlord's awareness of the requirements of the Regulations;
    d) the reasons given for the failure to comply with the 2011 Regulations (in that case, also related to the landlord's representative);
    e) whether or not those reasons effected the landlord's personal responsibility and ability to ensure compliance;
    f) whether the failure was intentional or not; and
    g) whether the breach was serious.

    Applying that reasoning, the Tribunal held – and the Upper Tribunal upheld – an award of two times the deposit. In analysing the "factual matrix" in that case, Sheriff Ross noted:

> *In assessing the level of a penalty charge, the question is one of culpability, and the level of penalty requires to reflect the level of culpability. Examining the FtT's discussion of the facts, the first two features (purpose of Regulations; deprivation of protection) are present in every such case. The question is one of degree, and these two points cannot help on that question. The admission of failure tends to lessen fault: a denial would increase culpability. The diagnosis of cancer* [of the letting agent in *Rollett*] *also tends to lessen culpability, as it affects intention. The finding that the breach was not intentional is therefore rational on the facts, and tends to lessen culpability.*
>
> *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. None of these aggravating factors is present.* (paragraphs 13 and 14)

33. The Upper Tribunal considered a case where the Tribunal regarded a low level of culpability in *Wood v Johnston, [2019] UT 39*. The Tribunal at first instance had awarded £50 (though it is not possible from the UT's opinion to determine what this was as a multiplier of the original deposit). Sheriff Bickett noted that parties to the appeal were agreed that "the award is a penalty for breach of

Regulations, not compensation for a damage inflicted" (paragraph 6) and, like Sheriff Ross in *Rollett*, analysed the nature of the breach, though in briefer terms. In *Wood*, it was noted that the Tribunal at first instance had made the award in consideration that "the respondent owned the property rented, and had no other property, and was an amateur landlord, unaware of the Regulations. The deposit had been repaid in full on the date of the end of the tenancy." Sheriff Bickett refused permission to appeal and thus left the Tribunal's decision standing.

34. Apart from the possibility that the Second Named Respondent has no other rental properties, I see no match in the current case to the circumstances in *Wood*. In applying the reasoning in *Rollett* to the current case, the purposes of the 2011 Regulations are to ensure that a tenant's deposit is insulated from the risk of insolvency of the landlord or any letting agent, and to provide a clear adjudication process for disputes at the end. In the case before me, neither have been achieved, with losses caused to the Applicant. This is now a repeated failure, with (at least) reckless failure to observe responsibilities, and (due to non-appearance and non-communication) a denial of fault. On consideration of matters, I am of the view that this case discloses a serious breach.

35. As there has been a breach, an award must be made in terms of regulation 10 of the 2011 Regulations. The terms of regulations 9 and 10 of the 2011 Regulations are clear that the order is against the landlord. The First Named Respondent is not the landlord, but some form of agent. I make no order against him. In regard to Subhaan Ahmed's liability, the application has not been raised against her (though I think it would have been competent to have done so). Only the Second Named Respondent has held himself out as landlord in the Landlord Registration database and it is open to the Applicant to seek the order against only one of the co-proprietors as they would be jointly and severally liable in regard to claims against the "landlord". I am thus satisfied to grant the order now, and against only the Second Named Respondent (with no order against the First Named Respondent).

36. In the circumstances, I regard the highest sanction to be appropriate, reflecting the high culpability of the Second Named Respondent and the fact that this is the second application regarding a deposit being seriously mis-handled at this Property. I am awarding £2,250 under regulation 10 of the 2011 Regulations, being three times the deposit and hold this as the appropriate award in consideration of the law and all the facts. I shall apply interest on the sum under Procedure Rule 41A at 8% per annum from the date of Decision as an appropriate rate.

37. I would request that the Tribunal clerk send a copy of this Decision and that in the parallel application CV/22/1729 to City of Edinburgh Council for their information in regard to the Second Named Respondent's registration as a landlord both in regard to the Property and his other property holdings.

Decision

38. I am satisfied to grant an order against the Second Named Respondent for payment of the sum of £2,250 to the Applicant with interest at 8% per annum running from today's date.

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.

Joel Conn
_____
Legal Member/Chair

20 September 2022
_____
Date