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/22/4407

Re: Property at 9/6 Calder Gardens, Edinburgh, EH11 4JB ("the Property")

Parties:

Mr Mariusz Kiklica, Flat 10, 13 Ravelston Terrace, Edinburgh ("the Applicant")

Mr Steven Kermack , 1 Flat 17, Woodcroft Road, Edinburgh, EH10 4FD ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member) and Eileen Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for payment of the sum of £700 should be made in favour of the Applicant.

Background

1. The Applicant seeks an order in terms of Regulation 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). Three tenancy agreements, a text message regarding the Applicant moving out of the property on 3 October 2022, a deposit protection certificate stating that a deposit of £350 had been lodged on 30 April 2019, and a screenshot of a payment of £700 to Steven Kermack on 2 April 2019 were lodged with the application.

2. A copy of the application was served on the Respondent by Sheriff Officer. Both parties were advised that a case management discussion ("CMD") would take place by telephone conference call on 21 March 2023.

3. The CMD took place at 2pm on 21 March 2023. Both parties participated.

Summary of discussion at CMD

4. In response to questions from the Tribunal, the Applicant confirmed that the reason for the application was that a deposit of £700 had been paid at the start of the tenancy. However, only half of that was secured in an approved tenancy deposit scheme. The Tribunal noted that the tenancy agreement stipulates that the rent was £700 per month, payable in advance, and that a deposit of £700 was to be paid. There was a joint tenant who moved in around the same time. Two subsequent tenancy agreements were submitted. On 2 February 2021 and 2 May 2022, new joint tenancies started with different joint tenants. Mr Kiklica told the Tribunal that in addition to the payment of £700 made on 2 April 2019, he also paid the whole of the first month's rent. The joint tenant was a friend, and she was unable to pay her share at that stage. It was not a loan, and she did not re-imburse him for her share of either rent or deposit. Although he had paid the whole deposit , the Respondent only appears to have lodged half of it in a scheme. He does not believe that the joint tenant received half of the deposit back when she moved out of the property.

5. Mr Kermack said that the whole deposit paid by the tenants was lodged in the scheme, and that Mr Kiklica's share of that was only £350. He disputed that Mr Kiklica had paid £1400 but even if he had done so, he should have collected the joint tenant's share from her. When asked about the status of the joint tenant's share, he said that this would have remained in the scheme. The arrangement is that the incoming tenant will pay over their share of the deposit to the outgoing tenant, so that there is a secured deposit in the scheme for the new tenancy. It is also the practice for the outgoing tenant to identify a new tenant as it would not be appropriate for him to advertise for one. Mr Kermack told the Tribunal that the Applicant moved out of the property without giving the full notice period and left the current joint tenant on her own at the property. Through the tenancy deposit scheme, he recovered part of his £350 deposit after deduction of rent arrears which arose due to his failure to give notice. He told the Tribunal that he has 51 rental properties and is always fair to his tenants. He said that he is 56 years old and has been in the business since the age of 19.

6. During the discussion with the parties, the Respondent made several references to the Applicant's failure to give proper notice at the end of the 2022 tenancy. The Tribunal explained that the application relates only to the Respondent's obligations in terms of the Tenancy Deposit Regulations and that the circumstances relating to the end of the tenancy and the adjudication by My Deposit Scotland may not be relevant. The Tribunal asked the Respondent why the deposit certificate lodged by the Applicant says that only £350 was lodged. He denied that this was the case and stated that he could provide evidence.

7. Following discussion with the parties, the Tribunal determined that the application should proceed to a hearing. The issues to be determined at the hearing were identified as;-

(a) Did the Applicant pay the whole deposit of £700 at the start the tenancy?

(b) Did the joint tenant re-imburse the Applicant for her share of the deposit?

(c) Did the Respondent lodge the whole deposit of £700 in an approved deposit scheme? If so, why does the deposit certificate state that only £350 was lodged.

(d) What happened to the joint tenant's notional or actual share of the deposit when the 2019 tenancy ended, and she moved out of the property?

8. Following the CMD the Tribunal issued a direction to the parties for the production of further documents. The parties were notified that a hearing would take place by telephone conference call on 15 June 2023 at 10am. Prior to the hearing, both parties lodged documents in response to the direction.

The Hearing

Mr Kiklica's evidence

9. Mr Kiklica was referred to a bank statement he had lodged and said that the two entries on the statement showed that he had made two payments of £700 on 2 April 2019 to Mr Kermack. One was for the first month's rent and the second was for the deposit. The joint tenant Paulina Wasik re-imbursed him for her share of the rent but not the deposit. He then received an email from Mr Kermack's office which stated that the deposit of £700 had been transferred to My Deposit Scotland ("MDS") and that they would email him with details. He was also given the reference number. On 30 April 2019 he received an email from MDS with a password to enable him to log in to the account and a Deposit Protection Certificate. This said that a deposit of £700 had been lodged. When the last tenancy ended, he contacted MDS by phone to ask about getting his deposit back. He then logged in to the account and obtained the certificate which had been lodged with the application which shows a deposit of £350. He did not contact MDS by email or phone to query the figure. MDS then carried out an adjudication and he received the sum of £223.44. In response to questions from the Tribunal Mr Kiklica said that he had not logged in to the account during his tenancies, only at the very beginning. He said that when the new joint tenants moved into the property, he did not discuss the deposit with them or contact the landlord. He did not hear from the landlord about the deposit at the start of these subsequent tenancies and was not provided with new information. He did not hear from MDS at the start of each new tenancy. Mr Kiklica was referred to a document lodged by Mr Kermack. This provides details of his tenancy with Ms Wacik and indicates that Mr Kermack paid the sum of £700 to MDS on 30 April 2012. On 20 October 2022 £350 was paid back to Mr Kermack. On 20 January 2023, £223.44 was paid to Mr Kiklica and £126.56 to Mr Kermack. Mr Kiklica said that the figure specified was the sum he received. He could not explain why the sum of £350 had been repaid in October 2022 to Mr Kermack. However, he did not contact MDS to ask why the adjudication had only related to £350.

10. In response to questions from Mr Kermack, Mr Kiklica said that he had signed the lease at Mr Kermack's office. He had been asked to pay the whole deposit and had done so. Paulina was out of the country at the time. He denied that he has made the application because he did not recover the whole £350. He said that he could not understand why the whole deposit had not been taken into account by MDS.

Mr Kermack's evidence

11. Mr Kermack was referred to the document he had lodged from MDS and confirmed that he had paid £700 by debit card to MDS on 30 April 2019. When asked about the repayment of £350 on 20 October 2022 he told the Tribunal that he had contacted MDS when Mr Kiklica had given notice and moved out of the property at the end of September 2022. He told them what had happened. They discussed the situation and refunded £350 to him as this related to the other tenant. He assumes that they took the view that half of the deposit came from the joint tenant. However, he did not ask them why they had repaid the sum or challenge it. He also assumed that half of the deposit had come from the joint tenant as joint tenants are jointly and severally liable for the rent and deposit. In response to questions from the Tribunal about what he had done with the £350 he said that he thought it was re-deposited. He then said that he could not remember what he had done or whether it was repaid to the joint tenant.

12. The Tribunal noted that it appeared from the documents lodged by both parties that Mr Kermack had not updated MDS or re-lodged the tenancy deposit each time that a tenancy came to an end and was replaced by a new tenancy. Mr Kermack said this might happen in an ideal situation but that the deposit had remained in the scheme throughout. He said that the office was too busy to deal with constant changes of tenant and that he is not even sure that he was made aware of the changes. Mr Kermack told the Tribunal that Mr Kiklica moved out without finding a replacement and left the remaining tenant on her own at the property. He did not cover the rent for the 5 weeks it took to find a replacement although he was liable for it. Mr Kermack did not insist that the remaining tenant cover the shortfall. In response to questions from the Tribunal, Mr Kermack said that there are no circumstances under which he does not take a deposit from a tenant. He always takes a deposit and always returned it. He has a good reputation as a landlord. He has been in the business since the age of 19.

13. In response to a question from Mr Kiklica about why he had not responded to his email, Mr Kermack said that at the end of the tenancy Mr Kiklica said that he had been a good tenant and therefore the outstanding rent should have been written off.

Mr Kiklica's final submission

14. Mr Kiklica referred the Tribunal to the witness statements he had lodged which show that other tenants have moved out of the property and their deposits have not been returned.

Mr Kermack's final submission

15. Mr Kermack said that he had been out of pocket in relation to half the rent for the property as a result of Mr Kiklica moving out of the property and another tenant not moving in until 5 weeks later. He also said that he was not in control of the deposit once it had been handed over to MDS. He said that Mr Kiklica was trying the get another £350 back that he was not entitled to and that he intended to refer the matter to his solicitor.

Findings in Fact

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

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

18. The Applicant and Paulina Wasik entered into a tenancy with the Respondent on 2 April 2019. In terms of the tenancy agreement the monthly rent was £700 and deposit of £700 was also payable.

19. On the 2 April 2019, the Applicant paid a deposit of £700, and the first month's rent of £700. These payments were made by bank transfer from the Applicant's account.

20. Paulina Wasik paid the Applicant the sum of £350 which was her share of the first month's rent. She did not contribute to the deposit.

21. The joint tenant vacated the property in October 2019.

22. On 2 February 2021 a new tenancy started. The tenants were the Applicant and Jacob Curran. The monthly rent was £700, and the deposit was £700. The tenancy agreement was signed by the Applicant, the joint tenant, and the Respondent on 30 January 2021.

23. On 2 May 2022 a new tenancy started. The tenants were the Applicant and Praise Iriele. The monthly rent was £700, and the deposit was £700. The tenancy agreement was signed by the Applicant, the joint tenant, and the Respondent on 29 April 2022.

24. The tenancy which started on 2 May 2022 ended on or after 4 October 2022.

25. Following the termination of the 2022 tenancy, a new tenancy started. The former joint tenant, Praise Iriele is one of the new joint tenants.

26. In April 2019 the Applicant was given information about the lodging of the deposit in an approved scheme by the Respondent.

27. On 30 April 2019, the Applicant received a deposit protection certificate from My Deposit Scotland which named him as lead tenant and Paulina Wasik as

joint tenant. The certificate stated that a deposit of £700 had been lodged on 30 April 2019. The Applicant was also provided with a password to enable him to log in to his tenancy deposit account.

28. At the start of the new tenancies in 2021 and 2022, the Applicant was not provided with information about his deposit from the Respondent.

29. When his tenancy ended in October 2022, the Applicant logged into his account and obtained a copy of his deposit certificate. This named him as the lead tenant and Paulina Wasik as joint tenant. It stated that the tenancy started on 2 April 2019 and that the deposit was £350.

30. The Respondent lodged the sum of £700 with My Deposit Scotland on 30 April 2019. This deposit related to the tenancy which started on 2 April 2019.

31. When the Applicant vacated the property on or about 4 October 2022, the Respondent contacted My Deposit Scotland by telephone. As a result of this telephone call, My Deposit Scotland repaid the sum of £350 to the Respondent.

32. In January 2023, following adjudication by the deposit scheme, the Applicant received the sum of £223.44 from the scheme and the Respondent the sum of £126.56.

33. The Applicant did not contact My Deposit Scotland to ask why the adjudication had been based on £350 and not £700.

Reasons for Decision

34. 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.

35. Regulation 9 of the 2011 Regulations states that (i) 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 that tenancy deposit. (2) An application under paragraph (1) must

be made no later than 3 months after the tenancy has ended

36. 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."** The Tribunal therefore determines that an order must be made in favour of the Applicant.

37. The Tribunal is satisfied that the tenancies in question were relevant tenancies for the purposes of Regulation 3.

The time limit.

38. The position regarding compliance with the time limit specified in Regulation 9, is not straightforward. The deposit was paid in April 2019, in connection with a tenancy which came to an end at some point prior to January 2020, when a new tenancy apparently started with a different joint tenant. A copy of this tenancy was not provided with the application but a statement from Ms Wasik was submitted which indicates that she moved out in October 2019. It appears that the 2020 tenancy replaced the original agreement. The application to the Tribunal was not made within three months of the end of the 2019 tenancy or those which started in January 2020 and February 2021. However, the deposit paid by the Applicant was not refunded or otherwise processed by the deposit scheme at the end of each tenancy . Instead, it seems to have been accepted by both parties, that the deposit would move on to the new tenancies. As the Applicant had paid a tenancy deposit, and as the new tenancy agreement stipulated that a deposit was payable for the sum which had been paid, the Tribunal is satisfied that the relevant tenancy agreement for the purposes of the Regulations is the last tenancy, which started on 2 May 2022.

39. The application comprises documents received by the Tribunal between 13 and 20 December 2022. The application was therefore "made" on 20 December, when the last of the required documents was received. The end date of the tenancy is not clear. As the Respondent correctly pointed out, the tenancy was not terminated in accordance with the terms of the agreement or the Private Housing Tenancies (Scotland) Act 2016 Act. Joint tenants under a private residential tenancy are jointly "the tenant". This means that one tenant cannot give notice to terminate the tenancy. All tenants under the tenancy must do so or the termination is ineffective. The Applicant sent a message to the Respondent on 29 September 2022 stating he wanted to end the tenancy on 3 October 2022. He did not give the required 28 days notice and the notice only related to him, not the joint tenant. The Respondent told the Tribunal that a replacement was not found until 5 weeks later. It was not clear from the evidence whether the Respondent considered the tenancy to have ended on 3 October 2022, or otherwise. It therefore appears that the tenancy ended at some point between 3 October and five weeks after this date. The application was therefore lodged on time and the Applicant has complied with Regulation 9.

The amount of the deposit

40. At the CMD it appeared that there was a dispute about what had been lodged in the scheme. However, from the evidence provided by the parties at the hearing, and the documents lodged by the Respondent, it is evident that a deposit of £700 was paid into the scheme on 30 April 2019. However, the Respondent disputes the claim that the whole deposit belonged to the Applicant. The Tribunal noted the following:-

(a) The Applicant provided bank records which clearly show that he paid a total of £1400 to the Respondent on 2 April 2019. The two payments of £700 were made from a bank account in his sole name.

(b) As joint tenants under a PRT, the Applicant and his joint tenant were jointly and severally liable for the rent and deposit. The agreement does not stipulate that each had to pay the sum of £350.

(c) The Respondent did not provide any evidence to indicate that each of the tenants had paid half of the deposit or that the Applicant had been re-imbursed by the joint tenant for her share. He made no enquires about the source of the payment, although bank records and his office staff could have confirmed the position. Furthermore, he did not ask the tenants to clarify the position.

(d) The Applicant gave evidence that he paid the whole deposit because the joint tenant was unable to pay her share. He also provided a statement from the joint tenant that she did not give him a share of the deposit but did pay a share of the first month's rent. Later, the Applicant gave slightly contradictory evidence, stating that he paid the whole sum because the joint tenant was not present and out of the country.

41. The Tribunal found the Applicant to be generally credible and reliable. His evidence of the issue of payment of the deposit was consistent with the documents lodged. The Tribunal was less impressed by the Respondent's evidence. His argument that the Applicant's deposit was £350 appears to be based on an assumption that each tenant paid half, without any enquiries having been made to verify the position. Furthermore, he did not contact Ms Wasik to re-imburse her for her share when the first tenancy ended. Instead, he said that there was an arrangement whereby incoming tenants paid their deposit to the outgoing one. From Ms Wasik's statement, this did not happen when she moved out of the property. Furthermore, Mr Kermack confirmed to the Tribunal that he received a deposit from Ms Iriele when she moved in, as stated in her witness statement.

42. The Tribunal is therefore satisfied that the Applicant paid a deposit of £700 in 2019 which was passed on to his subsequent tenancies. The Respondent's obligations to him in terms of the 2011 Regulations therefore relate to a deposit of £700 and not £350.

Did the Respondent fail to lodge the deposit in an approved scheme and provide the Applicant with the information required under Regulation 42.

43. It is not in dispute that the sum of £700 was lodged within the prescribed time limit in relation to the 2019 tenancy. However, as the Applicant points out, this tenancy ended, and the deposit which was paid then attached to the next tenancy agreement and the others that followed. When the 2020 tenancy started, the Respondent ought to have notified the Scheme of the change in the name of the tenants, the start date of the tenancy, the amount of the tenancy deposit and the contact details for the new tenants. If the incoming tenant had also paid a deposit, this should have been accounted for. Thereafter, at the start of each subsequent tenancy, the Scheme ought to have been further updated. This clearly did not happen. The documentation lodged shows that as far as MDS was concerned, the 2019 tenancy had continued until October 2022 and the tenants listed were the Applicant and Ms Wasik. Where this leaves the current tenants, and those under the 2020 and 2021 tenancies, is not clear. However, they are not party to the present application, so it is not relevant.

44. The Respondent's evidence on the failure to notify MDS of the changes was far from satisfactory. He said that he and his staff were busy. He also stated that he may not have been told when tenants moved out and new tenants moved in, although he retracted this statement when it was pointed out that he had signed the new agreements. The consequence of his failure to update the records, or effectively re-lodge the deposit in connection with the new tenancies, is that the adjudication which took place in 2022 was based on a tenancy which had ended in 2019 or 20. Furthermore, the adjudication did not relate to the whole deposit which was paid. The Respondent's explanation for the repayment by MDS of the £350 in October 2023 was also extremely unsatisfactory. It appears that this sum was repaid without any notification to either of the 2019 tenants. It seems unlikely that it was repaid purely on the grounds that the Applicant had moved out. The scheme must have asked about the joint tenant and been given an explanation which persuaded them to release the funds without further enquiry. Even if there was an error on the part of the scheme, the Respondent must have been fully aware of it and should have returned the money. The Tribunal is also of the view that the Applicant ought to have challenged the adjudication when he had the opportunity to do so. However, by the time he became aware, it may have been too late.

45. Section 3 of the 2011 Regulations requires a landlord to lodge a deposit in an approved scheme within 30 working days of the start of a tenancy. In relation to the tenancy which started on 2 May 2022. this did not happen. MDS did not hold a tenancy deposit for the 2022 tenancy at any point between 2 May 2022 and the end of the tenancy. The Tribunal is therefore satisfied that the Respondent has failed to comply with Regulation 3(1)(a) of the 2011 Regulations.

46. The Applicant told the Tribunal that he did not receive any information from the Respondent at the start of the 2020, 2021 and 2022 tenancies. This was not disputed by the Respondent. The Tribunal is therefore also satisfied that the

Respondent has failed to comply with Regulation 3(1)(b) of the 2011 regulations.

The award.

47. In terms of Regulation 10, an award must be made where there has been a failure by a landlord to comply with the Regulations. In assessing the award, the Tribunal had regard to the following factors:-

(a) Although a deposit was not lodged in connection with the 2022 tenancy, the Applicant did recover part of his deposit through the scheme adjudication which related to the 2019 tenancy.

(b) The Applicant did not challenge the adjudication process when he became aware that it did not relate to the whole deposit paid by him.

(c) Although he demonstrated a somewhat casual attitude to his tenants and his obligations as landlord, the Respondent did lodge the deposit in an approved scheme at the start of the 2019 tenancy.

(d) The Respondents explanation for the removal of the sum of £350 from the scheme and his inability or refusal to tell the Tribunal what became of that sum is concerning. His claim that it was outwith his control is not persuasive. He knew or ought to have known that the sum should have remained in the scheme and been processed in the usual way.

(e) The Respondent is a very experienced landlord who is aware of his obligations in term of the Regulations.

48. 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."

49. In the present case, none of the aggravating factors highlighted by Sheriff Ross are present. The Respondent was certainly negligent in his management of the deposit, but not reckless. It also appeared that he thought that he had done nothing wrong, although he ought to have known. It is not clear whether the Applicant experienced financial loss, as MDS might have awarded the Respondent a further sum to cover the unpaid rent. However, having regard to the factors in paragraph 48, the Tribunal is satisfied that the breach was a relatively serious one and determines that an award of £700 should be made in favour of the Applicant.

Decision

50. The Tribunal determines that an order for payment of the sum of £700 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.

Legal Member **19 June 2023**