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 ("the 2011 regulations")

Chamber Ref: FTS/HPC/PR/21/0523

Re: Property at 3F1 101 East Claremont Street, Edinburgh, EH7 4JA ("the Property")

Parties:

Mr Matthew Watts, 13/3 Nightingale Way, Edinburgh, EH3 9EG ("the Applicant")

Mr Boran Li, 3F1 101 East Claremont Street, Edinburgh, EH7 4JA ("the Respondent")

Tribunal Members:

Sarah O'Neill (Legal Member)

Decision (in absence of the parties)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be refused as the tenancy between the parties was not a 'relevant tenancy' in terms of the 2011 regulations.

Background

1. An application was received from the applicant on 4 March 2021 under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ('the 2017 rules') in respect of the respondent's alleged failure to comply with the duties under regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. Attached to the application form was a copy of the tenancy agreement between the parties dated 27 October 2020.

2. In response to a request from the tribunal administration, the applicant later sent an email on 8 April 2021 stating that he had called every tenancy deposit scheme in Scotland and that none of them had a record of his

deposit. Attached to the email were copies of undated WhatsApp messages between the parties, and a screenshot showing that he had paid £450 to the respondent on 27 October 2020 and a further £450 to the respondent on 7 November 2020. On 23 April 2021, the applicant also provided a copy of a WhatsApp message which he had sent to the respondent dated 4 March 2021 providing 28 days' notice, and a copy of another WhatsApp message which he had sent to the respondent on 20 March 2020, saying that he had moved out of the property and left the keys behind.

3. The application was accepted on 4 May 2021. The question of whether the respondent was a resident landlord, and whether the 2011 regulations therefore applied to the tenancy between the parties, was raised with the applicant several times prior to the first case management discussion (CMD). This was raised in both a letter from the tribunal administration dated 23 March 2021 and a later email from the tribunal administration dated 7 May 2021. The tribunal issued a direction prior to the first CMD directing the applicant to submit written representations setting out the reasons why he considered that the duty under the 2011 regulations to pay his tenancy deposit into an approved scheme applied. No response was received from the applicant.

The first CMD

4. A CMD was held by remote teleconference call on 15 June 2021. The applicant was present on the teleconference call and represented himself. The respondent was not present and was not represented. The tribunal proceeded with the CMD in the absence of the respondent, in terms of rule 29 of the 2017 rules.

5. The tribunal noted that the tenancy agreement between the parties stated that it commenced on 15 November 2020 and which would end on 30 August 2021. The applicant confirmed to the tribunal that he had moved into the property on 15 November 2020 and had moved out on 20 March 2021

6. The tenancy agreement stated in its introduction that the respondent (named as both Boran Li and Samuel Lee) was the owner of the property and that *"the tenant acknowledges that this tenancy is an assured or an assured shorthold tenancy by reason of being a tenancy granted by a resident landlord."*

7. The tenancy agreement stated (at paragraph 1) that the respondent agreed to let to the applicant one bedroom within the property, together with shared use of the communal rooms such as the kitchen, living room and bathroom (paragraph 2). The applicant told the tribunal that the property was a shared flat with five bedrooms. At the start of his tenancy, there had been three other tenants living in the flat, and when he left there were three different tenants in the property in addition to himself. On the basis of the applicant's evidence, it appeared to the tribunal that the fifth bedroom was used by the respondent on occasion.

8. The applicant had paid the respondent a tenancy deposit of £900 in two instalments of £450 paid on 27 October 2020 and 7 November 2020 respectively, as provided for at paragraph 17 of the tenancy agreement. The tenancy agreement made no mention of a tenancy deposit scheme, and stated that the landlord would return the deposit at the end of the tenancy, less any deductions as provided for in the tenancy agreement.

9. At paragraph 11, the tenancy agreement stated that if the applicant was to terminate the tenancy before the end date stated, he would need to pay a *'re-let charge fee'* of £900 to the landlord *"as shown on term 17."* It went on: *"The tenant is allowed to find a replacement if s/he decides to move out instead of terminate this tenancy. If the tenant find [sic] a replacement to cover the rest of the rent term successfully, there is only a replacement charge of £450 will be made to the landlord. The landlord should refund the rest [sic] deposit of £450 when [sic] move out."*

10. The applicant told the tribunal that he had lost his job as a result of covid-19 and had decided to move back in with his parents. He had informed the respondent of this via an undated WhatsApp message. The respondent had replied to say that the applicant was allowed to move out but needed to find another tenant to take his room, and that his deposit would be returned once his replacement had paid a deposit. He had however been unable to find someone to take his place and the respondent had not returned his deposit. has not been returned. He had given the respondent notice in writing (by WhatsApp message) on 4 March 2021.

11. The tribunal noted that the address provided for the respondent on both the tenancy agreement and the application form was the property address. The tenancy agreement stated that the respondent was a resident landlord. The applicant said that he did not believe that the respondent lived at the property most of the time. He said that he believed the respondent owned another property in England where he spent most of his time. He said that to his knowledge the respondent had only spent around four days in the flat during his tenancy, and that the other tenants had told him that the respondent only rarely stayed in the property. He had communicated with the respondent via WhatsApp messages, as he had no other postal address for him and no email address.

12. The applicant confirmed that his main aim in bringing the application was to have his tenancy deposit refunded to him. The tribunal chair pointed out that the current application was for an order for payment in respect of the respondent's alleged failure to place his tenancy deposit in an approved tenancy deposit scheme. The applicant may therefore wish to consider taking advice as to the possibility of taking separate action in relation to the return of his deposit.

13. The tribunal did not consider that it had sufficient evidence to make a decision on the basis of the evidence before it, and therefore postponed the CMD to allow further time to gather this information. The tribunal issued a direction to

the applicant on 15 June 2021, directing him to provide confirmation in writing from each of the three approved tenancy deposit schemes as to whether or not the tenancy deposit which he had paid to the respondent was registered with them.

14. The tribunal also issued a direction to the respondent on 23 June 2021, directing him to provide evidence about 1) whether the property was his only or main residence during the period of the applicant's tenancy and 2) whether he is the registered landlord of the property.

15. No response to the direction issued to the applicant was received from him prior to the postponed CMD. The letter to the respondent enclosing the direction, which had been sent by recorded delivery to the property address, was returned to the tribunal administration on 5 July 2021 as undelivered with a handwritten note on the envelope stating: *"This person is no longer within this address."*

The second CMD

16. A second CMD was arranged by remote teleconference call at 2pm on 27 July 2021. Neither party was present or represented. The tribunal delayed the start of the CMD, in case either or both parties had been detained. The tribunal kept the conference line open until 2.30pm but neither party appeared, and no telephone calls, messages or emails had been received from either of them.

17. The tribunal noted that the applicant had been sent a notification of the CMD date and time to the email address provided on his application form on 22 June 2021. There was no indication that this had not been received. The respondent had signed for the letter containing the CMD notification on 23 June 2021. The tribunal was therefore satisfied that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date, time and place of a CMD to both parties had been duly complied with. It therefore proceeded with to make a decision on the application in the absence of the parties, on the basis of all of the material before it, in terms of rule 29 of the 2017 rules.

Findings in fact

18. The tribunal made the following findings in fact:

- The parties entered into a tenancy agreement dated 27 October 2020. The agreement commenced on 15 November 2020 and stated that it was due to end on 30 August 2021.
- Under the tenancy agreement, the applicant was given exclusive occupation of one bedroom within the property and shared with other occupiers of the property the use of the common facilities i.e. the kitchen, living room and bathroom.
- The address given for the landlord on the tenancy agreement was the property address.

- The tenancy agreement stated that the tenancy was granted by a resident landlord.
- The applicant paid the respondent a tenancy deposit of £900, paid in two instalments of £450 on 27 October 2020 and 7 November 2020 respectively.
- The applicant moved out of the property on or around 20 March 2021.
- The papers for the first CMD were successfully served on the respondent by sheriff officer at the property address on 18 May 2021.
- The letter from the tribunal administration enclosing the note of the first CMD was signed for by 'Li' at the property address on 19 June 2021.
- The letter from the tribunal administration enclosing the notification of the second CMD was signed for by 'Li' at the property address on 23 June 2021.
- The registered landlord of 101/7 East Claremont Street, Edinburgh, which it is understood is an alternative designation for the property, is City Trust Properties Limited.

Statement of reasons

19. The tribunal considered that, having given both parties the opportunity to provide further information and to attend both the first and second CMD, it was in a position to make a decision as to whether the application related to a 'relevant tenancy' under the 2011 regulations on the basis of the information before it.

20. The duty to pay a tenancy deposit into an approved scheme in terms of regulation 3 of the 2011 regulations applies only in connection with a "relevant tenancy". in terms of regulation 3 (3), a 'relevant tenancy' 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 any unconnected person,

    unless the house is of a type described in section 83 (6) of the Antisocial Behaviour etc. (Scotland) Act 2004 ('the 2004 Act').

21. In terms of regulation 3 (4), the expressions 'relevant person' and 'unconnected person have the meanings conferred by section s83(8) of the 2004 Act. The tribunal was satisfied that the respondent was a relevant person, not being a) a local authority, b) a registered social landlord or c) Scottish Homes. It was also satisfied that the applicant was an' unconnected person', not being a member of the family of the relevant person.

22. While the term 'house' is not defined in the regulations, it is defined in section 101 (1) of the 2004 Act as *"a building or part of a building occupied or intended to be occupied as a dwelling*". This is qualified by section 101 (2) which states that *"if two or more dwellings in a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part."* In this case, the applicant only had exclusive use of one room in the flat, together with shared use of the shared facilities, under the tenancy agreement. The 'house' occupied by the applicant was therefore the entire flat.

23. One of the types of house listed in section 83(6) of the 2004 Act is “a house which is the only or main residence of the relevant person” (s 83(6) 2004 Act). Therefore, in terms of regulation 3(3) of the 2011 regulations, there would be no duty on the respondent to place the tenancy deposit into an approved scheme if the flat was his only or main residence.

24. While it would have been helpful to the tribunal in determining whether this was the case to have heard evidence from the respondent on this point, the respondent had not appeared or provided any written evidence to the tribunal. It therefore proceeded to decide whether the property was his only or main residence on the basis of the information which was before it.

25. While the tribunal accepted the applicant’s evidence that the respondent was only resident at the property for four days during his tenancy, it noted that the applicant was only resident at the property for just over four months. While it also accepted that other tenants had told the applicant that the respondent rarely stayed at the property, it appeared on the basis of his evidence that most of the other tenants were also only living there for a relatively short time. While the applicant’s evidence suggested that the property was not the respondent’s *only* residence, it did not necessarily prove that it was not his *main* residence. The applicant has been unable to provide any further evidence on this point at the first CMD, or in response to the tribunal’s first direction. The tribunal notes that it is possible that the respondent was away for extended periods during the four months of the applicant’s tenancy but was otherwise resident there for much of the time.

26. There were a number of factors which tended to indicate that the property was the landlord’s main residence. Firstly, the address provided for the respondent on the tenancy agreement was the property address, and the tenancy agreement stated that the tenancy was being granted by a resident landlord. The applicant had confirmed that the respondent stayed in the property on occasion, and it appeared that the fifth bedroom was used by him. The applicant was also unable to provide another address for the respondent. Secondly, the papers for the first CMD were successfully served on the respondent by sheriff officer at the property address on 18 May 2021. In his certificate of service, the sheriff officer stated that he had deposited the papers by means of letter box *“as after due enquiry I had reasonable grounds for believing that the said Mr Boran Li, respondent, was resident as the aforementioned address”.*

27. Thirdly, the letter from the tribunal administration enclosing the note of the first CMD was signed for by ‘Li’ at the property address on 19 June 2021, as was the letter enclosing the notification of the second CMD on 23 June 2021. The fact that mail sent to the respondent at the property was returned to the tribunal administration as undelivered on 5 July 2021 suggests that the respondent may no longer be resident at the property. This post-dated the applicant’s tenancy, however.

28. The tribunal also noted that there was no evidence that the respondent was the registered landlord of the property. No entry was found on the register for 3F1, 107 East Claremont Street, which was the address stated on the tenancy agreement. The registered landlord of 101/7 East Claremont Street, Edinburgh, which was the address provided by the applicant on his application form, is City Trust Properties Limited. Without having had sight of the title deed for the property, the tribunal is unable to determine whether the respondent is the owner of the property, as stated on the tenancy agreement. The tribunal notes, however, that in terms of sections 83 (1) (b) and 83 (60 of the 2004 Act, a landlord is not required to register as a landlord in relation to a property which is the 'only or main residence' of the landlord. While the lack of any landlord registration could therefore be due to the fact that the property is the respondent's only or main residence, the tribunal was unable to make a finding on this question.

29. Having taken into account all of the evidence before it, as outlined above, the tribunal therefore determines that on the balance of probabilities, the property was the respondent's 'only or main residence' during the applicant's tenancy. The applicant's tenancy was not a 'relevant tenancy' under the 2011 regulations. The respondent was not therefore under a duty to pay the applicant's tenancy deposit into an approved scheme in terms of regulation 3 of the 2011 regulations. The tribunal accordingly refuses the application.

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.

S O'Neill

27 July 2021

Legal Member/Chair **Date**