



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 120 of the Housing (Scotland) Act 2006 and The Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/19/2984

Re: Property at 3/2, 37 Minerva Way, Glasgow, G3 8GF (“the Property”)

Parties:

Mr Jack Radford, Willowbank, Station Road, Hatton, AB42 0RX (“the Applicant”)

Mr Kenneth White, 1/1, 16 Blantyre Street, Glasgow, G3 8AP (“the Respondent”)

Tribunal Members:

Martin McAllister (Legal Member) and Linda Reid (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that, in respect of the application before it, the Respondent had complied with the Tenancy Deposit Schemes (Scotland) Regulations 2011.

1. Background

This is an application submitted by the Applicant with regard to the Respondent’s alleged failure to comply with the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”). It is dated 22nd September 2019 and was received on 23rd September 2019.

A case management decision was held on 25th November 2019 which *inter alia* determined that the parties be allowed time to resolve their issues, failing with a Hearing would require to be held. Matters were not resolved.

2. Hearing

A Hearing was held in Glasgow Tribunals Centre on 26th February 2020. The Applicant was present. Dr Iain White was present as Attorney of the Respondent. Both gave evidence.



3. Preliminary Matters

Mr Radford said that he had no matters to raise.

Dr White said that, at the case management discussion, it had been suggested to him that he needed to take advice with regard to the particular scheme the Respondent had employed and whether or not it was legal. He said that he had taken advice and was confident that it was.

Dr White said that, at the case management discussion, parties were encouraged to arrive at the exact sum of money due by Applicant in respect of utilities accounts for the Property. Dr White said that matters had still not been resolved and that the rental deposit company was still dealing with the matter.

The tribunal confirmed that its role was to determine the application before it relating to the Respondent's obligations in respect of compliance with the 2011 Regulations and that it was not its role to determine what, if any deductions were to be made from the deposit in respect of any liabilities due by the Applicant.

4. Documents before the tribunal

1. The Application dated 22nd September 2019.
2. Copy of Applicant's Bank Statement, dated 22nd September 2019.
3. Tenancy deposit certificate confirming lodging of deposit of £400 on 12th September 2019 and stating that the deposit had been received by the Landlord on 31st July 2019.
4. Email from Iain White to Jack Radford dated 14th April 2019.
5. Tenancy Agreement together with attached document entitled "Joint Tenancy Agreement- Personal Information Sheet".
6. Representations from Dr White dated 20th February 2020.
7. Representations from Mr Radford dated 25th February 2020.
8. Copy Power of Attorney, dated 21st December 2018.

Commented [LR1]: I m very risk alert when it comes to bank information. I wouldn t wish any reference to my Bank being in the public domain, so have suggested an alternative

5. Matters agreed between the Parties

The tenancy commenced on 23rd April and ended on 31st August 2019.

The sum of £400 was paid by the Applicant to the Landlord on 15th April 2019.

The sum of £480 was paid by the Applicant to the Landlord on 28th April 2019.

A deposit of £400 was paid by the Applicant to the Respondent on 31st July 2019.

The deposit of £400 was paid to Safe Deposits Scotland on 12th September 2020.



6. Application

The application states that the Respondent lodged the deposit of £400 outwith the thirty working days required by the 2011 Regulations. It states that the Respondent refers to the last month's rent as a deposit. The application states that there is a dispute over the deposit after the end of the tenancy which the Applicant cannot dispute fairly without a deposit scheme. It states that the Applicant had notified Iain White, the Landlord's agent that it was unlawful not to place the deposit in a tenancy deposit scheme within thirty days of the commencement of the tenancy (23/4/19) and that, instead of returning the deposit in full at the end of the tenancy, it was placed in a deposit scheme on 12th September 2019. The application states that the Applicant is seeking return of at least the full deposit of £400.

7. Written Representations of the Respondent

Representations submitted with email of 14th November 2019:

The question of ownership was addressed and the matters raised are not dealt with in this Decision since they are not relevant to the application before the tribunal. The representations refer to the Applicant's bank account statement, dated 22 September 2019, as follows:

*"Thestatement correctly shows rent paid on
2019-04-15 £400 Rent for 2019 May and reserving the room
2019-04-28 £480 Rent for April (£80) and August (£400)
2019-05-31 £400 Rent for June
2019-07-01 £400 Rent for July- paid one day late
2019-07-31 £400 Deposit*

The purpose of each of these payments is clear and were specified correctly by Jack Radford to his bank when making the payment. Nothing was 'disguised.'"

The representations go on to deal with what the Respondent considers to be failings by the Applicant in fulfilling their obligations in terms of the tenancy and describe the "nub of the case" being that the Applicant expects to have full return of the deposit in spite of there being failure by him in fulfilling the obligations of the tenancy.

The representations state that the claim that the deposit should be lodged at the start of the tenancy would mean lodging it before it was paid to the Landlord. The representations state that the Respondent showed a willingness to reduce the initial burden on the Applicant by accepting the deposit before the last month rather than at the start of the tenancy and that this was to help the Applicant.

The representations of 20th February 2019 can be summarised by the Respondent submitting that the case should be dismissed since it is identical to a case previously decided where the Respondent was the same- FTS/HPC/PR/19/3251.

The representations state that the nub of that case was whether or not a rental deposit had been lodged timeously. The representations state that the deposit in this case had been paid on 31st July 2020 and that, in terms of the 2011 Regulations, it had been paid to Safe



Deposit Scotland within thirty working days when weekends and public holidays were taken into account.

8. Written Representations of the Applicant

The Applicant responded to the Respondent's representations, by email on 25th February 2020. It is stated that the law requires "a use of a deposit scheme within 30 working days of the **start date of the tenancy**" and that if a landlord wishes to reclaim reimbursement from the deposit then it should be done through the deposit scheme.

The representations state that the Applicant applied to the Tribunal because of the avoidance of the Respondent to use a deposit scheme, that the system used by the Respondent is peculiar, difficult to understand, and allows the Landlord to claim money from the deposit without having to use a deposit scheme resolution process. The representations state that, even after the Respondent had paid the money into the deposit scheme, he still tried to resolve the deposit issue outwith the scheme.

The representations acknowledge that it is not the function of the Tribunal to resolve repayment disputes but referred to documents in relation to the dispute.

The representations state that the amount paid before the start of the tenancy is an identical sum to the monthly rent and was conveyed as "last month's rent and to secure the room." The representations refer to the Applicant's previous renting experiences where the deposit is paid at the beginning of the tenancy and is placed in a deposit scheme.

The representations state "not only is the 'last month's rent' paid at the beginning of the tenancy where most expect a deposit to be paid, but Dr White states that 'Note that all rent is non-refundable' in the email of 14th April 2019." The representations state that, at the previous case management discussion, Dr White had conceded that, if the tenant moves out before the end of the tenancy, there is one month rent as security for damages etc. The representations state that if a tenant did move out early there would be no money returned to the tenant in light of Dr White's statement that no rent would be repaid. The representations state that the Respondent's treatment of the payments is to avoid use of a tenancy deposit scheme.

The representations state that, in terms of the model tenancy agreement, "At the start date of the tenancy or before, a deposit of the amount specified on the Personal Information Sheet will be paid by the Tenant to the Landlord. The Landlord will issue a receipt for the deposit to the Tenant. No interest shall be paid by the Landlord to the Tenant for the deposit." The representations go on to state that the deposit was stated to be £0.00 despite the explicit request for the deposit to be paid in place of the last month's rent as stated in the email of 14th April 2019. The representations state that the Applicant believes that the Respondent cannot both state that no deposit is to be paid in order to avoid using the deposit scheme and also explicitly request a deposit in place of the last month's rent.



The representations state that the Applicant believes that the reason for the “convoluted way” in which the Respondent has dealt with matters is unclear but is the reason the Respondent claims that he does not require to engage with a tenancy deposit scheme at the start of the tenancy.

9. Evidence

Mr Radford said that he was shown the flat a few weeks before he moved in. He said that he was given the Personal Information Sheet and that Dr White had emailed him on 14th April setting out various matters with regard to the tenancy. He said that he paid a month’s rent in advance and that this was increased to reflect that he had moved in on 23rd April and not 1st May. He said that he also paid an additional sum of £400 on commencement of the tenancy and that, in terms of the email, this was in respect of the last month’s rent. Mr Radford said that he ‘trusted’ the landlord and followed his instructions and on a cash flow sense, this was exactly the same as other flats he had taken on in the past - one month’s rent in advance and a deposit. He said that he had never before paid a deposit at the end of the lease.

It is useful here to set out the terms of the private residential tenancy agreement, the Personal Information Sheet and the email of 14th April.

The tenancy agreement used was the Model Private Residential Tenancy Agreement. In this particular case, the Tenancy Agreement refers to an ancillary document, the “Joint Tenancy Agreement- Personal Information Sheet”.

This states

“First Rental Payment: £480”

“Amount of Rent: £400”

“Deposit: £0”

“Other Advanced Rent: £400”

“I give notice that I will end the Tenancy on: 2019 August 31”

The document is signed by the Applicant and dated “2019 May”.

The email of 14th April 2019 states:

“The payment details are perhaps out of date but will be as described by the time we meet. Note that all rent is non-refundable. Just so you have them of record, here is the list of events.

Rent April 22 or 23 to May 22 or 23 £400 is payable now and reserves the room.

On or before entry, £400 rent 2019 August is payable



*On entry lease is signed
One week after entry the manifest is assumed to be accurate
Before May 22 or 23 rent to June 1 od 1/20 of monthly rent per night payable
Before end May: June rent payable
Before end June: July rent payable
Before end July: £400 deposit payable.
Departure on or by August 31
As soon as possible after August 31, return of deposit, less any deductions.”*

Mr Radford said that he had no concerns at the outset of the tenancy and that, although he found the system unusual, it did not mean that he was paying any more money at the outset than if the tenancy agreement has been similar to what he had previously. He said that he was concerned when the Landlord unilaterally made deductions from the deposit after the end of the tenancy. He said that if the deposit had been paid at the start of the tenancy someone independent would have been adjudicating any dispute rather than the matter being delayed until the Landlord lodged the deposit in the tenancy deposit scheme. Mr Radford said that, since the case management discussion, the sum of £156 has been returned to him by Safe Deposits Scotland but that there were still some matters in dispute. Mr Radford said that the deposit which he had paid on 31st July 2019 had been lodged with the tenancy deposit scheme because of representations that had been made.

Dr White said that he had lodged the deposit because the thirty working day limit had been reached, not as a result of any representations. He said that he was not aware that the method used by the Respondent in connection with rent and the deposit was unusual and he said that he did not believe that it was unique. He said that the Scottish Landlords Association had advised him that it was legal. He said that the Respondent was not trying to avoid his obligations in respect of a tenancy deposit and that the Applicant was aware that there was no deposit paid at the beginning and that the deposit was to be paid towards the end of the tenancy. He referred to the terms of the email of 14th April 2019.

He said that what was envisaged was that, at the end of the tenancy, the Landlord would propose to a tenant what deductions should be made from the deposit. He said that the negotiations were not helped by the Applicant writing to him on 6th September pointing out penalties for not lodging a deposit and referring to a possible application to the First-tier Tribunal. He said that the email was aggressive.

Dr White said that the first month's rent referred to in the email of 14th April 2019 was non-refundable and was by way of a guarantee. He said "it gives us some guarantee that people turn up"

Dr White said that he considered it appropriate for a tenant to be asked to give notice of leaving a Property before he/she enters the tenancy. He said that a tenant can give notice to leave earlier than the date indicated at the outset of the tenancy and, in those circumstances, the payment of rent paid at the beginning of the tenancy and intended to be for the last month's rent would be applied to the rent for the month immediately preceding the date of departure.



Dr White was firm in stating that it would not be possible for a tenant to withdraw the notice given at the outset of the tenancy and remain in the Property. He said that his family has other properties but that he only manages this one.

He said that normally he would make proposals to a tenant at the end of the tenancy with regard to how much, if anything, was to be retained from the deposit and that matters could usually be agreed which meant that a deposit scheme did not need to be used. He said that an agreement can usually be reached quite quickly and he said that, in the case of Mr Radford, he had been hopeful that matters could be resolved without resorting to the deposit scheme.

Dr White said that deposits paid after commencement of a tenancy were governed by the same regulation as those paid at the outset. He said that the adjudication scheme operated by tenancy deposit holders was very much the last resort. He said that he accepted that any deposit paid by a tenant belonged to that tenant. He said that the deposit had been paid on 31st July 2019 and had been paid into the tenancy deposit scheme on 12th September 2019 which was within thirty working days and taking into account weekends and public holidays.

Dr White said that the reason the last month's rent was paid at the beginning of a tenancy was that it was akin to a "letter of intent" that a tenant was going to stay in a property until the end of a tenancy. He said that the payment of rent was not securing anything.

Dr White referred to the statement in the email of 14th April 2019 relating to rent being non-refundable and he said that his understanding on that had now been clarified and that he now accepts that a tenant could give earlier notice than what was indicated on the documentation signed at the outset of the tenancy.

10. The Law

Section 120 of the Housing (Scotland) Act 2006 states

- (1) A "tenancy deposit" is a sum of money held as security for-
 - (a) The performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or
 - (b) The discharge of any of the occupant's liabilities which arise.
- (2) A "tenancy deposit scheme" is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.

The Tenancy Deposit Schemes (Scotland) Regulations 2011 state

Regulation 3



- (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.**

Regulation 9

- (1) A tenant who has paid a tenancy deposit may apply to the sheriff 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 by summary application and must be made no later than 3 months after the tenancy has ended.**

Regulation 10

If satisfied that the landlord did not comply with any duty in regulation 3 the sheriff-

- (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 sheriff 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.**

(There were some amendments to the 2011 Regulations which were effected by The Tenancy Deposit Schemes (Scotland) Amendment Regulations 2019 and which did not come into force until 11th November 2019 which post - dated the events being considered by the Tribunal in the application).

11. Findings in Fact

- 1. The Applicant and the Respondent were parties to a private residential tenancy agreement.**
- 2. The tenancy of the Property commenced on 23rd April 2019 and was terminated on 31st August 2019.**
- 3. A tenancy deposit of £400 was paid to the Respondent by the Applicant on 31st July 2019.**
- 4. The tenancy deposit of £400 was lodged with SafeDeposits Scotland on 12th September 2019.**
- 5. There were thirty working days between 31st July 2019 and 12th September 2019.**
- 6. The Applicant paid £400 on 28th April 2019 in respect of rent for August 2019.**

12. Findings in Fact and Law



- 1. The tenancy deposit of £400 was paid to an approved tenancy deposit scheme within thirty working days of receipt by the Respondent.**
- 2. The payment of rent in advance for August 2019 was not a tenancy deposit under Section 120 of the Housing (Scotland) Act 2006.**
- 3. The Respondent has not failed to comply with any obligation under regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.**

13. Reasons

The tenancy was terminated on 12th September 2019 and the application is dated 22nd September 2019. In terms of Regulation 9(2) of the 2011 Regulations, the application is timeous.

The application refers to a deposit of £400 paid by the Applicant on 31st July 2019. Both parties agreed that this sum was a deposit and that it was paid into an approved deposit scheme on 12th September 2019. Regulation 3 of the 2011 Regulations requires a landlord in receipt of a tenancy deposit to pay it into an approved deposit scheme within 30 working days of the beginning of the tenancy. The members of the tribunal considered the timeframe in relation to this application. Clearly Saturdays and Sundays are not considered working days. Bank Holidays are also not considered to be working days and, since there was one on 5th August 2019, the working days from 31st July to 12th September 2019 were 1, 2, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 August, 2, 3, 4, 5, 6, 9, 10, 11, 12 September. The tribunal determined that the deposit paid by the Applicant had been paid into a deposit scheme on the 30th working day from receipt by the Respondent. The 2011 Regulations state that any deposit has to be paid into an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. In this case the deposit was not paid at the beginning of the tenancy and the tribunal considered that the spirit of the regulations was that a deposit should be lodged with an appropriate scheme within thirty working days of receipt by a landlord.

The tribunal considered that there were three unusual features of the tenancy which is the subject matter of the application.

The first is the tenancy deposit being paid one month before the end of the tenancy. It is only possible to determine, at the commencement of the tenancy, when that date will be because of the second unusual feature which is that, prior to taking on the tenancy the Applicant had been obliged to acknowledge that the lease would end on 31st August 2019 and give notice to that effect. The tribunal was satisfied, from the evidence of Dr White, that this was the only basis on which a tenant would be allowed to take on tenancy of the Property.

The third unusual feature is that the rent for August 2019 was paid at the commencement of the tenancy. The effect of this was that, at the commencement of the tenancy, two months' rent was paid in advance - for May and August 2019. The Applicant's position was



that, in cash flow terms, the money he paid at the outset of the tenancy was the same as he had done in previous tenancies where he had paid one month's rent in advance and the equivalent of one month's rent in respect of a tenancy deposit.

The tribunal was satisfied that the Respondent's construction of the financial obligations on the Applicant was to ensure that, if agreement was reached with a tenant in respect of any deductions from the deposit within thirty days of the end of the tenancy, the deposit would not require to be lodged with a tenancy deposit company. Dr White was clear on this point. He said that he had hoped that agreement could be reached with the Applicant "without resorting to the deposit scheme." The members of the tribunal considered that such an approach is contrary to the intention of the 2006 Act and the 2011 Regulations. The Applicant put it succinctly. He said that he had become concerned when the Respondent had unilaterally made deductions from the deposit after the end of the tenancy. He said that, if the deposit had been paid and lodged at the start of the tenancy, someone independent would be adjudicating any dispute rather than the matter being delayed until the Respondent lodged the deposit in the tenancy deposit scheme. The Applicant had been denied an independent adjudication of the application of the deposit until it had been lodged by the Respondent. Notwithstanding this prejudice to the Applicant, the tribunal's role was to consider whether or not there was a failure to follow the 2011 Regulations.

Because of the unusual construction of the financial aspects of the tenancy, the tribunal considered it appropriate to examine the payments made at the commencement of the tenancy and to determine whether any payment made at that time was, in effect, a deposit to be dealt with under the 2011 Regulations.

The sum of £400 was paid on 15th April 2019 and the Respondent's representations refer to this as being rent for May "and reserving the room." The Applicant stated in evidence that he was aware that there was no deposit paid at the beginning of the tenancy and that it was paid at the end.

The sum of £480 was paid on 28th April 2020. It was a matter of agreement that £80 of this was for payment of rent for part of April. The email of 14th April which was sent to the Applicant by the Respondent stated "On or before entry, £400 rent 2019 August is payable."

Somewhat confusingly the Personal Information Sheet which is an integral part of the Residential Tenancy Agreement states "First Rental Payment: £480" and "Other Advanced Rent: £400." This also states "Deposit: £0"

The question to be determined is whether the sum stated to be rent for August 2019 was in fact a tenancy deposit.



What is helpful is what parties considered the payment to be for and whether or not, in terms of the provisions of the 2006 Act, it could be determined that any payment made at the outset of the tenancy was a sum of money held as security for the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or the discharge of any of the occupant's liabilities which arise.

In his representations, the Respondent referred the tribunal to the case FTS/HPC/PR/19/325. This is a case determined by the First-tier Tribunal and is therefore not binding on this tribunal. It was a case where the Respondent was the same as is in this case and where he was represented by Dr White. It was determined that, in a tenancy agreement with similar financial obligations, no payment made at the outset of the tenancy was considered to be a deposit in terms of the 2011 Regulations. That case also referred to the case of *Cordiner v Al-Shaibany* (2015 SCDUND51) This is a case determined by Sheriff Drummond in a case in Dundee before jurisdiction in such cases was transferred to the First-tier Tribunal. It is not binding on the tribunal. It does give an exposition of the law which is useful.

In the *Cordiner* case the pursuer paid the first and last month's rent at the outset of the tenancy and Sheriff Drummond held that the payments were in respect of rent and not payments held in security for the performance of any of the tenant's obligations. Sheriff Drummond made reference to the English case of *Johnson v Old* which she found persuasive. In that case a distinction was made between a payment discharging an obligation or liability and a payment made as security for that obligation or liability. The Court in that case concluded that a payment of rent in advance is a payment which discharges the obligation to pay rent and is not therefore a payment held in security for the discharge of any such obligation in the future.

The Respondent is clear that the payment of £400 made at the beginning of the tenancy was rent for the month of August 2019. The Applicant's Representations state that the sum paid at the beginning was "the last month's rent and to secure the room." Mr Radford described the payments to be confusing and the members of the tribunal agreed. The email of 14th April 2019 sets out the payments and what they were for. Despite the confusion caused by comparing the terms of the email of 14th April 2019 with the personal information sheet which was part of the tenancy agreement, the tribunal considered that the Applicant had notice of what the payments were for and indeed did not advance an argument that any payment paid at the outset of the tenancy was a deposit caught by the 2011 Regulations.

The tribunal considered that the Respondent constructed matters in the way that he did so that he could have as much control and bargaining power over the deposit. The email of 14th April states "As soon as possible after August 31, return of deposit, less any deductions."

The tribunal also considered that requiring the Applicant to give notice at the start of the tenancy is the Respondent's method of attempting to avoid the terms of the Private



Housing (Tenancies) (Scotland) Act 2016. Despite Dr White's assertion that it would not be possible for a tenant to withdraw such notice which is effectively given under duress, the members of the tribunal did not agree and they considered that it would be competent for a tenant to withdraw such notice given at the start of the tenancy. In determining matters the tribunal found that there were not significant differences between the parties with regard to matters of fact. It was rather a difference in interpretation of the facts. The tribunal considered that, in fairness to prospective tenants, the terms of the information sheet incorporated in the lease should explicitly reflect the terms of the tenancy and should be consistent with all other correspondence, particularly in relation to the deposit. This was lacking in this case. The "system" devised by the Respondent depends on a tenant giving his/her notice of termination prior to commencement of the tenancy which, in the view of members of the tribunal, is contrary to the security of tenure enshrined in the Private Housing (Tenancies) (Scotland) Act 2016

The tribunal determined that there had been no breach of the 2011 Regulations for the reasons given notwithstanding that it did have concerns about the fact that the Applicant was prejudiced by not having the advantage of being able to access the resolution services of a tenancy deposit scheme immediately upon the termination of the tenancy.

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.

Martin J. McAllister, Legal Member

19th March 2020