



**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**

Chamber Ref: FTS/HPC/PR/21/0947

Re: Property at 14 Morningside Street, Glasgow, G33 2LX (“the Property”)

Parties:

**Miss Ruth Wilson, Mr Dylan Sherman, 17 Well Street, West Kilbride, KA23 9EJ;
17 Well Street, West Kilbride, North Ayrshire, KA23 9EJ (“the Applicant”)**

**Ivrask Limited, company number SC411851, having its registered offices at 5
The Beeches, Ayr Road, Newton Mearns, Glasgow, G77 6AZ (“the
Respondent”)**

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
tribunal”) determined to grant an order against the Respondents for
payment to the Applicant of the sum of £862.50 in terms of Regulation 10
(a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011.**

A: BACKGROUND:

- 1. This is an application under Rule 103 of the Procedural Rules and Regulations 9 and 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations). The application was made by the Applicant on 20 April 2021 and further amended on 28 April 2021.**
- 2. A Case Management Discussion (CMD) was scheduled for 18 June 2021. Written representations were lodged by the Respondent on 1 June 2021.**
- 3. The following documents were lodged in respect of this case by the Applicant:**

- a) Scottish Private Residential Tenancy Agreement for tenancy commencing 1 May 2018 between the parties
- b) Deposit Protection Certificate from My Deposits Scotland (MDS)
- c) Email correspondence between the Applicant and Looking to Rent dated 27 and 28 April 2021 confirming payment of the deposit
- d) Email correspondence between parties re checkout on 1 April 2021
- e) Email correspondence between Applicant and Looking to Rent confirming end date 1 April 2021 with photographs from check in report
- f) Letter to HPC dated 1 June 2021 by Respondent
- g) End of tenancy notice by Applicant to Respondent 3 March 2021
- h) Landlord registration details for Respondent
- i) Text message exchange between the parties regarding repairs to property

B: EVIDENCE

- 4. At the CMD on 18 June 2021 the legal member explained the purpose and process of the CMD.
- 5. Both parties agreed the following: The parties to the Private Residential Tenancy commencing 1 May 2018 were the Applicant and the Respondent Ivrisk Ltd with Mr Ismail Ghita, who is a company director, having acted on behalf of Ivrisk Ltd when entering the lease. Ivrisk Ltd is a registered company under the company house registration number SC411851 and is the owner and registered landlord for the property.
- 6. The deposit of £575 had been paid on 28 April 2018 by the Applicant to the letting agency Looking to Rent prior to the start of the tenancy and the tenancy ended on 1 April 2021 when the keys were returned. The parties used the dispute resolution service of MDS after the tenancy had ended and this had now concluded., The deposit funds were paid to MDS on 16 April 2021 by the Respondent, who had completed the tenancy details on the MDS records at a previous stage as shown on the certificate.
- 7. Mr Sherman and Ms Wilson stated that they had reached out to the agency Looking to Rent on 12 April 2021 to enquire how to go about getting the deposit released. The agency told them to contact the landlord. They did so by contacting Mr Ghita. He stated he would provide them with the information. On 16 April 2021 the Applicants received the deposit protection certificate from MDS with the relevant details, which confirmed the deposit had not been lodged until 16 April 2021 and which contained other inaccuracies, such as a wrong start date of the tenancy (1 August 2018) and a wrong end date (30 April 2019). The dispute resolution process before MDS had now been concluded.
- 8. The former tenants expressed their view that there was no onus on them to chase up the tenancy deposit and that the deposit should have been lodged on time and they should have been provided with all the relevant information as to do so was the duty of the landlord. The Respondent should have known what he had agreed with the letting agent and, as he was managing the

property himself, should have promptly dealt with the deposit. The tenancy agreement explicitly states that the landlord must lodge the deposit and Clause 11 also states that for this purpose MDS would be used.

9. Mr Ghita advised that the property is owned by a company for which he is a director and he is dealing with the property management. In total he deals with 4 properties and has been acting as a landlord for about 10 years. This is the only property owned by the company.
10. He had entered the relevant information as shown on the certificate at the start of the tenancy and had thought he had done all he needed to do. He thought that there had been a misunderstanding between him and the letting agent. Although he could not recollect the details, he thought the letting agent, to whom the deposit was paid by the tenants, would then transfer the funds to MDS directly. Rather they had transferred the funds to the Ivrasak Ltd account as part of a larger payment. The deposit had not been explicitly identified as a separate payment. He thought the matter had been dealt with. When the tenants approached him he went to the MDS website and tried to release the deposit. This did not work. He telephoned MDS and they told him how to access and check the account. He then realised that the funds in the account at MDS were £0 and immediately located and lodged the deposit funds at that stage on 16 April 2021. He did not mean to deprive the tenants of the deposit funds and had genuinely believed the MDS deposit matter had been dealt with at the start of the tenancy.
11. Although he had dealt with other properties, it had always been the letting agencies who had dealt with the transfer into the deposit scheme account even when he was managing the tenancy himself. The tenants in other properties had stayed for years, so this was not something he had to do often or regularly.
12. It was an oversight that the deposit had not been lodged. The funds had been sitting in the property account for Ivrasak Ltd during the time of the tenancy and had not been taken out.
13. He could not recall why he would have entered incorrect details into the MDS account when he set this up. He thinks the start date of 1 August 2018 was an error as he thought by then the deposit had to be lodged and the end date of 30 April 2019 was entered as an estimate as he had expected that this would be the earliest date when the lease might end.
14. He repeatedly stated that all was done in good faith and he was a good landlord and had no intention of not following the rules. He had thought he had done all he had to do. When he realised there was a problem he immediately rectified it. Nobody had ever asked him about this before or prompted him to act or investigate.

C THE LEGAL TEST:

1. In terms of Rule 18 (1) of the Procedure Rules the First-tier Tribunal—(a) may make a decision without a hearing if the First-tier Tribunal considers that—
(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and (ii) to do so will not be contrary to the interests of the parties;
2. In terms of Regulation 9 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 (the Regulations) an application under that Regulation must be made within 3 months of the end of the tenancy.
3. In terms of Regulation 10 “if satisfied that the landlord did not comply with any duty in Regulation 3 the First tier Tribunal
 - (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 First tier Tribunal 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.”
4. In terms of Regulation 3 “(1) A landlord who had received a tenancy deposit in connection with a relevant tenancy must, within 30 days of the beginning of the tenancy (a) pay the deposit to the scheme administrator of an approved scheme;

D: FINDINGS IN FACT

Based on the documents and the discussion at the CMDS the Tribunal makes the following findings in facts, which were matters not in dispute between the parties:

1. The deposit of £575 was paid by the Applicant to the Respondent's Letting Agent Looking to Rent on or around 28 April 2018.
2. The parties entered into a Private Residential Tenancy over the property which commenced on 1 May 2018.
3. In terms of Clause 11 the landlord is obliged to lodge the deposit with a registered scheme. The deposit is £575. The scheme identified for this tenancy was MDS.
4. The tenancy ended on 1 April 2021.
5. On or around 12 April 2021 the Applicant contacted the Respondent's agent to request return of the deposit.
6. On or around 12 April 2021 the Applicant was advised by the letting agent to contact the Respondent to request from the Respondent information about the deposit scheme and the deposit account. The Applicant did so.
7. The deposit was lodged on 16 April 2021 with MDS into an account that had been created for that tenancy with MDS at the start of the start of the tenancy. The start and end date of the tenancy were wrongly stated on the MDS account.
8. The Respondent's director Mr Ghita deals with 4 properties as a landlord and has been acting as a landlord for about 10 years. Mr Ghita acted as agent for

the Respondent in managing the property. The property is the only let property the Respondent owns.

9. The Respondent is aware of the duty to lodge a deposit under the Regulations but the director, Mr Ghita, had never done this himself before.
10. Until the start of this tenancy all deposits had been dealt with by the Letting Agents used.
11. The agreement with the letting agent in this case was that the landlord would manage the property and the letting agent would find the tenant and set up the lease.
12. The deposit funds were transferred from the letting agent to the Ivyrask Ltd property account at the start of the tenancy in a lump sum payment with other funds.
13. The deposit was unprotected for the whole duration of the tenancy.
14. There was a dispute over the tenancy deposit which is now resolved and had been dealt with through the dispute resolution mechanism of MDS.

E: REASONS FOR DECISION:

1. The facts of the case are not in dispute. There is no need for a hearing. The tribunal was accordingly able to make a decision after the CMD and without a full hearing on the basis of the information provided by both parties.
2. Regulation 10 of The Tenancy Deposit Schemes (Scotland) Regulations 2011 is a regulatory sanction to punish the landlord for non-compliance with the regulations. The non-compliance with the Regulations is not disputed by the landlord.
3. In terms of Regulation 10 (a) if satisfied that the landlord did not comply with any duty in regulation 3 the Tribunal must make a payment order between £0.01 and three times the deposit. The maximum amount in this case with a deposit amount of £575 would thus be £1,725
4. Ultimately the Regulations were put in place to ensure compliance with the Scheme and the benefits of dispute resolution in cases of disputed deposit cases, which the Schemes provide.
5. The Tribunal considers that the discretion of the tribunal requires to be exercised in the manner set out in the case *Jenson v Fappiano* (Sheriff Court (Lothian and Borders) (Edinburgh) 28 January 2015) by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case. The Tribunal has a discretion in the matter and must consider the facts of each case appropriately. In that case the Sheriff set out some of the relevant considerations and stated that the case was not one of "*repeated and flagrant non participation in , on non-compliance with the regulations, by a large professional commercial letting undertaking, which would warrant severe sanction at the top end of the scale*". It was held that "*Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgement. The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in*

maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances..."

6. In the case before the Tribunal there is a clear breach of the Regulations. The deposit was not lodged within 30 working days as required by Regulation 3 and the information in terms of Regulation 42 had not been provided to the Applicant. The Tribunal is satisfied that the deposit had been unprotected for the duration of the tenancy.
7. The Respondent's director is engaged in letting out property for a considerable time and knew about the Regulations. He had engaged letting agents to deal with the lodging of the deposit for the other properties and had overlooked that on this occasion the agreement with the letting agent did not extend to the lodging of the deposit. The Respondent should have been clear in the management of the property which duties were delegated and which the company had to ensure were dealt with in-house.
8. The Respondent should have realised that the deposit had been paid into the company account but had overlooked that also. The Respondent had not become aware of this until after the tenancy had come to an end. As experienced landlords they should have put mechanisms in place to ensure that the incoming funds are properly dealt with and that funds which were not rent but deposit payments would be lodged with a registered scheme in the time frame prescribed. Mr Ghita also made some significant and unnecessary errors in setting up the MDS account and should have known how to complete the form with MDS correctly and to then pass all the relevant information on to the Applicant rather than wait for this to be done by MDS or the Letting Agent. It is the responsibility of the landlord to provide the information as required in Regulation 42 and to lodge the deposit within 30 working days as per Regulation 3. If the landlord does not wish to deal with these matters, these duties have to be explicitly and reliably delegated and checks should be in place to ensure these obligations have been properly discharged.
9. Whilst the tribunal accepts that nobody asked about the deposit until April 2021, it should be clear to the Respondent that there is no onus on tenants to request such information. It is information the landlord has to provide unprompted.
10. The deposit was unprotected for the entire duration of the tenancy.
11. All the above requires a meaningful sanction and places the penalty firmly outwith the low end of the range of possible disposals
12. On the other hand, the tribunal accepts that the failure to lodge the deposit has not been evidenced to be a case of deliberate defiance of the Regulations. Rather the tribunal concluded that the Respondent overlooked that they had to deal with the deposit in this case and allowed to let the funds remain in their account through oversight rather than an intentional non compliance with the obligations of a landlord.

13. A further important mitigating factor in this case was that the purpose of the Regulations, to have the deposit protected at the end of the tenancy so that disputes can be adjudicated on by the registered scheme, has been fulfilled. The situation the Regulations were created to avoid, namely that the deposit has been unprotected for the duration of the tenancy and remained with the landlord at the end of the tenancy and the tenants have to then negotiate with the landlord rather than a registered deposit scheme has been avoided and the dispute resolution mechanism had been successfully used in this case.
14. The Respondent had correctly started the process of opening an account with MDS at the start of the tenancy. The deposit had remained untouched in their account and remained available to be paid out. The funds were held in a separate account for Ivras Ltd and not mixed with Mr Ghita's, the director's, own day to day funds.
15. Once the Respondent had fully realised the situation, the funds were transferred almost immediately into the MDS account. The Respondent did not dispute the failure to lodge the deposit and accepted this immediately at the CMD.
16. Applying the considerations in the approach to exercising discretion as set out above, the Tribunal also does not consider that the failure to comply with the Regulations in this case warrants a penalty at the highest end of the scale.
17. In all the circumstances the tribunal considered it fair, proportionate and just to make a payment order for the sum of £ 862.50 which is 1 1/2 x the deposit amount, which reflects the seriousness of the breach, the duration of the breach and constitutes a meaningful sanction for non-compliance of the Regulations.
18. The tribunal would remind the parties that it was agreed at the CMD that payment of any amount ordered would be made into the account of Ms Wilson. Mr Sherman and Ms Wilson requested this. It was agreed that Ms Wilson would provide the account details to Mr Ghita by email after the conclusion of the CMD.

Decision:

- 19. The First-tier Tribunal for Scotland (Housing and Property Chamber) grants an order against the Respondents for payment to the Applicant of the sum of £862.50 in terms of Regulation 10 (a) of The Tenancy Deposit Schemes (Scotland) Regulations 2011**

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.

P. H

Petra Hennig McFatridge 18 June 2021
Legal Member Date