

**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 10 of the Tenancy Deposit
Regulations**

Chamber Ref: FTS/HPC/PR/22/2209

**Re: Property at Flat 1/2, 59 Raeberry Street, Kelvinside, Glasgow, G20 6EQ (“the
Property”)**

Parties:

**Miss Mary Foster-Grellis, Miss Ruby Kathleen Dunkley, Carinya, St James Road,
Netherbury, Dorset, DT6 5LL; 5 Boath Road, Auldearn, Nairn, IV12 5TB (“the
Applicant”)**

Mr Khalid Javid, 23 Springkell Avenue, Glasgow, G41 4AB (“the Respondent”)

Tribunal Members:

Jan Todd (Legal Member) and Ann Moore (Ordinary Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that the respondent received a tenancy deposit from the
applicant and that he failed to comply with his duties under Regulation 3 (1) of
the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011
regulations”). The tribunal therefore makes an order requiring the respondent
to pay to the applicant the sum of £2,580.**

Background

1. By application received on 30th June 2022, the applicant submitted an application form under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 rules”). The applicant was seeking an order for payment in respect of the respondent’s alleged failure to lodge the deposit paid by the applicant with an approved tenancy deposit scheme, as required by regulation 3 of the 2011 regulations. The

applicant sought an order for, three times the amount of the alleged tenancy deposit.

2. Attached to the application form were:
 - Copy tenancy agreement between the parties in relation to the property which commenced on 1 September 2021.
 - E-mails from the three deposit companies confirming that no deposit was lodged with them.
 - Confirmation of the end of the tenancy
 - Screenshots of what's app messages.
3. In response to a request for clarification from the Tribunal the second applicant joined the application and evidence was provided of two payments of £860 being made in September 2021 to the Landlord, the Respondent. The papers were served by Sheriff Officer on the Respondent on 5th August 2022.
4. The Respondent's representative Apex Letting responded to this application and the conjoined application under FTS/HPC/ CV/22/2207 by e-mail dated 11th August, advising that "their client does not take a deposit and takes two months advance rent. For the final month when the tenant informs the landlord that they are leaving this advance rent equivalent to one month is allocated to this period. The Tenancy agreement clearly stipulates that the deposit is nil."
5. The Tribunal sent a direction to the Respondent asking for:-
 1. Submissions as to why they consider a payment of two months' rent made at the beginning of the lease where one month is kept until the end of the lease is not a deposit.
 2. Please also provide a rent statement showing the sums paid since the beginning of the tenancy up to and including the sums paid at the end of the tenancy."
6. The Respondent replied advising
 - *"1) Regarding the 2 monthly payments taken at the start of the lease. The landlord's business practice has always been to use one monthly rental payment as the first month's rent and the second payment as the last month's rent. The reason no deposit was taken was due to the fact that the landlord knew one of the tenant's boyfriends Mr Adam Stubble who had guaranteed payments and had advised the landlord that he would take care of any damage to the property. In actual fact, all rental payments were made by Mr Stubble and neither tenant had ever paid the landlord rent directly. No deposit was ever taken and this can be shown in the lease where it says NIL deposit.*
 - *2) Please find the rental statement attached showing payments. The tenants give notice in April however do not pay the last month's rent. (See documents attached) Furthermore, as it stands the landlord has only realised now that he was not paid for January 2022 and is owed a month's rent"*

The Applicant also wrote to the Tribunal on 16th August saying "Not sure if it is too late to add any further evidence but if not I have attached a copy from Glasgow City Council confirming all of the dates they came to the property because the landlord wouldn't solve the mice/rats."

The CMD

7. At the CMD held on 16th September the first named Applicant appeared but neither the Respondent nor his Representative attended. The Tribunal heard further details from the Applicant regarding the payment of the deposit and payment of rent and why this was paid by her boyfriend as she explained he was the one who had viewed the flat for her and Ms Dunkley and it was then easier for him to keep paying the rent although she sent him the money for it. She admitted that she and Ms Dunkley had not paid the rent due in April due to the state of the Property and in particular due to an alleged infestation of mice and rats that she advised led to them having to live elsewhere from February 2022. On being asked about the missing payment in January she was not sure of that and advised she would look into it.
8. As there was a clear dispute as to whether or not there was a deposit paid the Tribunal advised a hearing would be set down where both parties could lead evidence and issued a direction for further information from the Applicant about the payment of the January rent, the state of the property and any witnesses they wished to bring. The Direction also asked the Respondent to provide any written admissions including case law he wished to refer to in support of his claim that one of the payments of £860 in September 2021 was not a deposit having regard to the definition of tenancy deposit in the Regulations. Any submission on why if the final rental payment is always expected up front this is not stated in the tenancy agreement and any other documentation they wish to rely on in support of their application as well as any witnesses they wish to bring.
9. The Applicants lodged on 26th October a 15 page submission of evidence for this case and the conjoined one FTS/HPC/CV/22/2207 which included statements and screenshots of messages as well as pictures of the flat and rodent droppings.
10. The Respondent did not respond in writing to the Direction until the morning of the Tribunal hearing when the Respondent's representative tried to lodge a production which included a screenshot of a message from the Respondent to the applicant. Due to the very late lodging of this production it was not permitted into the hearing.

The Hearing

11. Both Applicants attended the hearing and the Respondent was also in attendance along with his representative Mr Saqib Deen from Apex Services.
12. The Legal Member explained that this was a Tribunal hearing to consider evidence and submissions and that the Tribunal wished to consider and hear evidence only in relation to the first application for a penalty for failure to lodge a deposit in a tenancy deposit scheme, as the second conjoined application was for the return of the deposit and as the question in dispute was whether one of the initial payments made at the start of this tenancy was a deposit at all, the Tribunal felt it would be necessary to consider evidence relating to that application

before considering if it would be appropriate and how to proceed with the conjoined application.

The Evidence

1. Ms Foster Grellis gave evidence first and confirmed that she and her flatmate the second named respondent were urgently looking for a flat to stay in when they saw the Respondent's advert on Gumtree. She advised that Mr Javid asked for one month's rent and a deposit before they got the keys or tenancy agreement and explained that her boyfriend, Mr Adam Stobo, went to look at it for her as she wasn't living near there at the time. She confirmed that they paid £860 on 1st September and another £860 on 5th September both from her boyfriend's account as they had to move quickly to secure the flat. Ms Foster Grellis explained that as her bank account required a card reader to set up a new payee it was easier to let her boyfriend Mr Adam Stobo pay the landlord after she sent the rent money to Mr Stobo each month as his bank account did not ask for this extra procedure. This was why she advised that the payments came from Mr Stobo's account but the payments were, she confirmed, made with her money.
2. She advised that she and her flatmate both came to Glasgow to sign the tenancy agreement on 3rd September, and confirmed she had been living in Dorset with her mum just before that. She confirmed that they believed the first payment of £860 was for the deposit and the second was for the first month's rent and reiterated that the landlord had asked for both payments in advance.
3. The Tribunal then heard from Mr Javid who confirmed that he had advertised the flat on Gumtree, that it was Mr Adam Stobo not the applicants who came to view the property and check the furniture. Mr Javid advised he does not take a deposit but if a tenant wants to pay 2 months' rent in advance they can do so. Mr Javid initially advised Mr Stobo offered to pay 2 months in advance and he indicated he sometimes has tenants who pay 6 months in advance. Mr Javid confirmed and agreed that he had received 2 payments of £860 one on 1st September and one on 5th September and confirmed that one he used for the first month's rent and the other was kept in his bank account until the end of the lease. He also admitted that if he wasn't sure Mr Stobo could pay 2 months he probably wouldn't have given the flat to them. He then reiterated that it was Mr Stobo who offered to pay.
4. Mr Javid then explained that in April 2022 he did not receive any payment of rent and then received the Applicants notice to leave and he confirmed he sent a message saying he was going to take the 2nd payment of rent made in September 2021 as the rent for April 2022. He confirmed the tenants then moved out on 3rd May and mentioned there were 2 broken doors so between that and the rent due for April no money was due back.
5. Mr Deen also added on behalf of the Respondent that as per the rent statement lodged no rent had been made for January 2022, that no payments were made by the tenants but that the payments had been made by Mr Stobo. Under questions from the Tribunal Mr Deen confirmed the Respondent rents out 8 residential tenancies.
6. The Applicant then called Mr Adam Stobo as a witness and Mr Stobo joined the call after being invited to by the clerk.

7. Mr Stobo confirmed that he was the first Applicants boyfriend and worked as an electrician. He advised under questions from Ms Foster Grellis that he visited the property for the two Applicants and in response to being asked “what was said to you” advised that he was told that he needed to pay one month’s rent to secure the flat. He also confirmed that although he paid it Ms Foster Grellis paid him first and he paid it on her behalf.
8. Under questions from the Tribunal Mr Stobo confirmed that he and the two applicants had been looking for flats, at this time Ms Foster Grellis had been living temporarily with her mother in Dorset and that he was sure she called the landlord initially but he went to view the property as he was available and could go there as he could get time off work. Mr Stobo went on to say he met Mr Javid at the flat, he looked around and knew the Applicants would want it. He advised that Mr Javid mentioned paying a month’s rent up front as a deposit to secure the flat. He thought the 2nd payment made in September was for the 1st months’ rent. Mr Stobo when asked advised that Mr Javid had not asked for 2 months up front, but neither had he offered to pay 2 months up front. He said there was no suggestion of that. Mr Stobo indicated that Mr Javid had advised that there were a few further viewings scheduled for the property and Mr Stobo thought by making payment he was securing it. Under questions from Mr Deen he advised that he was sure it was a deposit and not advance rent.
9. When asked by Mr Deen why there was no payment in April he advised he believed it was because the flat was uninhabitable. He could not explain why a payment was missed in January.
10. The Tribunal then asked Mr Javid to look at the productions from the Applicant and in particular the second page of the Applicant’s written evidence that was lodged on 26th October where the Applicants state “To reiterate the applicants had to send Mr Javid the deposit he required before they had even seen the tenancy agreement else he would not reserve the flat for them. It was in the middle of a housing crisis which is still prevalent so the applicants did not have a choice –they needed somewhere to live. Figure 2 explicitly shows Mr Javid referring to the money the applicants had to send him in September as a deposit in order to receive keys to the flat.” Figure 2 is a screenshot of a what’s app message from the Respondent “deposit is 1 months’ rent n 1 months deposit £860 x2 when you take the keys.” There is no date on the screenshot but it has the Respondents name “Khalid” at the top of the message. A short break was then taken to allow Mr Deen to find this submission and evidence and when the parties returned Mr Javid advised that the Applicant had sent a text message saying “what was the deposit” and his reply was that it is 2 months’ rent upfront. He went on to say he explained that he was holding one month’s rent to the end of the lease, that the last month’s rent they don’t pay and confirmed that he also explained that to Mr Stobo. He explained that in the message he refers to the word “deposit” because that is the word the Applicant used. He then advised that Mr Stobo asked what was required and he replied to Mr Stobo “I need 2 months’ rent in advance”. Mr Javid was emphatic that he required 2 months’ rent and went on to say a couple of times, “I am not going to give keys on 1 months’ rent – people can run off with the furniture” although he admitted that if the second payment hadn’t been made he might not have done anything. He also

- advised he has a lot of international students and this is not an issue usually. He also repeated that the lease makes it clear there is no deposit taken.
11. Finally the Tribunal heard from Ms Dunkley. She confirmed that she had not spoken directly to the Respondent before signing the lease; that she agreed Adam Stobo should visit the property and when her flatmate asked her to send over half the rent she did so. She confirmed that she believed the first payment in September was for a deposit and that she signed the lease and was then asked to pay the second payment.
 12. The parties then summarised their positions and Ms Foster Grellis advised that as they had entered into a tenancy with Mr Javid, that a deposit was paid and had not been lodged she and her co-applicant were seeking compensation. She confirmed that they were desperate to get the flat, that she asked the landlord and he had advised her that she was to pay one month's deposit and one month's rent. Mr Stobo paid the first payment to secure the property and then we got the keys and were asked to pay the second payment as the first month's rent. She thought this might have been over the phone. She also advised that it was quite far into the tenancy before she realised they had not been given information about the tenancy deposit and asked the landlord where it was. She could not remember if that was in a message or on the phone.
 13. Mr Deen summarised the Respondents position submitting there was no deposit; that the landlord only took 2 months' rent and one month was applied to the last month's rent which was not paid. He advised that although he does not represent the landlord in his residential tenancies his own letting agency has a similar practice where they ask for advance rent payments and one month is sometimes kept to the end of the tenancy but Mr Deen advised he always tells the tenants that and also lodges a separate amount which he asks for as a deposit in a scheme. He said this may be a misunderstanding of the Respondent's practice because a 3rd party was involved, namely Mr Stobo.

Findings in Fact and Law

1. Mr Adam Stobo paid the sum of £860 on 1st September 2022 to secure the property for the Applicants, and a further £860 on 5th September for the first month's rent.
2. The Applicants sent money to Mr Stobo and asked him to pay the rental as he had paid the initial payment and it was easier for him to carry on doing so.
3. The tenancy was signed and entered into between the Applicants as tenants and the Respondent as landlord on 3rd September 2021.
4. The rent due in the tenancy agreement is £860 per month. Only one month is asked for from 1st September in the lease.
5. The Respondent asked for 2 months' rent to be paid up front. The Respondent took one month as payment for rent and kept one month for payment at the end of the tenancy.
6. The Respondent does this as part of his business practice.
7. The payment was made to secure the property and also to protect against the failure of the tenants to meet their obligations.
8. One of the payments of rent was a deposit as defined in the Regulations.

9. The deposit has not been lodged in a tenancy deposit scheme.
10. The deposit has not been repaid to the Applicants.
11. 2 months' rent have not been paid in January 2022 and April 2022 respectively.
12. The Tenancy ended on 3rd May 2022 after the Applicants gave notice and returned the keys.
13. The reason for the non-payment of rent is in dispute.

14. Reasons for Decision

15. The parties in their written submissions and oral evidence both agreed that the lease was entered into between the Respondent as Landlord and the two Applicants. It was clear again from all parties that 2 payments of £860 were made on 1st September and 5th September and that the lease was signed on 3rd September 2021 and commenced on 1st September.
16. The parties also agreed that Mr Stobo made all the payments of rent to the Respondent but the Tribunal accepted the clear evidence of the Applicants that this was arranged as a matter of convenience and did not alter the fact the Applicants were the tenants.
17. The lease contains a clause saying "nil deposit". The lease also only mentions one month's rent being due on 1st September 2021 with subsequent months being due on the 1st of each month starting on 1st October.
18. The Respondent has lodged a rent statement showing that rent paid in September 2021 had been paid for September 2021 and that a second payment had also been credited for the last month's rent payment. Thereafter the statement shows one payment for October 2021, November 2021, and December 2021, none for January 2022 and one for February 2022 and March 2022, with no payment being made for April 2022. The Applicants have agreed in their written submissions that they deliberately did not pay April because of the condition of the property, namely an infestation of rodents which they claim made the property uninhabitable and for which they withheld the rent. The Applicants also acknowledge in their written submissions that on checking they note January's payment has not been made but are not sure why. They however do allege that as they were not living there from February payment should not be due for 2 months.
19. The matter for the Tribunal to consider in this application is whether or not a sum of money which constitutes a deposit has been paid which should then have been lodged in a tenancy deposit scheme. The matter of whether the rent was due and owing for January or April is not a matter for this application but may be relevant for the conjoined application which will be considered separately after this decision is issued.
20. Both parties agree no money has been lodged in a tenancy deposit scheme but the Respondent's argument is that there was no deposit paid which meant there is no obligation to lodge it in a tenancy deposit scheme.

21. In S. 2 of the Tenancy Deposit Schemes (Scotland) Regulations a tenancy deposit has the meaning given by Section 120(2) of the Housing Scotland Act 2006. The definition of tenancy deposit in the Housing (Scotland) Act 2006 S.120 is :-
22. 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 so arise.
23. (2) A tenancy deposit scheme is a scheme for safeguarding tenancy deposits paid in connection with the occupation of any living accommodation.
24. The parties both agreed that two payments of a sum of money, namely £860 had been made at the start of the lease. Both agreed that one of those payments was for the first month's rent the question for the Tribunal is was the other payment a deposit as described above.
25. The Respondent argued that it was not. He claimed that it was his normal practice in some tenancies to take two or more months' rent and that it was in order for him to keep that payment until the end of the tenancy and apply it to the last month's rent. His representative indicated that this was not a deposit but merely an advance payment of rent. The evidence on whether this had been advised to the Applicants or Mr Stobo on their behalf was not clear. Mr Javid in his evidence was not clear and contradicted himself about what was actually said first of all indicating it was Mr Stobo who volunteered to pay 2 months' rent and then denying that and saying that he made it clear he required 2 months' rent in advance. He did not however indicate that he had made it clear that one payment would be held until the end of the lease. The lease itself does not refer to paying the last month's rent in advance nor does it indicate a deposit or second payment is required.
26. What is clear however is that a second payment of money of £860 was paid. The Applicants were clear as was Mr Stobo that they all believed the first payment was for a deposit or to secure the tenancy. The Applicants clearly then paid a second payment believing it to be the first month's rent. Rent was then paid monthly thereafter (apart from January which the Applicants did not appreciate was missing at first) until April when they indicated they had an issue with paying the rent due to the condition of the Property.
27. The Tribunal prefers the evidence of the Applicants and Mr Stobo as to what they understood the payment to be for. They were all consistent in confirming that the payment was for one months' rent in advance and a payment to secure the property. Mr Javid however was not clear nor consistent about how he asked for this but did make it clear that it is his view that a second payment required to be taken as he did not know the applicants; that he would not normally just ask for one month's payment because he did not know what a tenant might do "such as run off with the furniture". In addition the text

message he sent confirms that 2 months requires to be paid and he refers in that message to it being a deposit.

28. However regardless of what the payment is called the Tribunal is satisfied that having regard to the meaning of tenancy deposit, and in particular the definition stating that *“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 so arise” this payment is a deposit.

29. One of the payments taken in September 2021, as the Respondent admits, was deliberately held precisely to be applied to the last month's rent payment. As a matter of law this is a deposit as it is a sum of money **held by the landlord as security for obligations arising under the tenancy**. The Respondent has openly admitted he was keeping it for the last payment of rent. He did not know when that would be as again he admitted PRTs do not have a specific end date that is up to the tenant or the landlord if there are grounds to end the tenancy. He was therefore keeping that payment of money as security until the lease ended and was then going to use it to pay the last month's rent. If this was genuinely a payment of 2 months' rent up front it should be used to pay the first two months' rent. It was not used for that purpose and the landlord admits this is his business practice to wait until the end of the tenancy and then use it. Payment of rent is an occupant's liability and so keeping it to discharge the liability when it arises later in the lease meets the definition of a deposit. In coming to this view the Tribunal had regard to 2 other decisions, namely *Michelle Brandt v Maura Ewing* FTS/HPC/PR/22/1214 and FTS/HPC/PR/22/317 by the First Tier Tribunal for Scotland where the Tribunal came to the same view that in law a payment made in advance but kept to the end of the tenancy was a deposit.

30. The Tribunal having unanimously agreed that the payment of £860 on 1st September was a deposit within the meaning of the 2016 Act and the Tenancy deposit regulations, has to consider if there is a breach of the regulations. The Respondent has admitted he kept it and has not returned it. This is substantiated by the letters from the tenancy deposit schemes lodged by the Applicant. The Respondent has therefore breached Regulation 3 of the Regulations by failing to lodge the deposit into an approved scheme within 30 days of the commencement of the tenancy. If the Tribunal is satisfied the

Landlord has not complied with the duty in regulation 3 the Tribunal must order the landlord to pay the tenant an amount not exceeding 3 times the deposit.

31. The tribunal notes that the case of *Tenzin v Russell* 2015 Hous. L.R.11, an Extra Division of the Inner House of the Court of Session confirmed that the amount of any award in respect of regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case. The Tribunal has, carefully considered all the circumstances of this case and exercised their discretion taking account of the full circumstances.
32. The Tribunal also took some guidance on the amount of any sanction from the decision by Sheriff Ross ([2019] UT 45 which sets out: " Cases at the most serious end of the scale might involve repeated breaches against a number of tenants; fraudulent intention; deliberate or reckless failure to observe responsibilities; denial of fault; very high financial sums involved; actual losses caused to the tenant, or other hypotheticals."
33. Taking those comments into account and considering the facts of the case, including the fact the Respondent is an experienced landlord who has openly admitted to using the practice of taking at least one month's rent in advance and holding it to the end of the tenancy to apply to the last months' rent; that he vigorously defended this action denying categorically any liability and that this is a serious matter where the Landlord has evaded the purpose of the legislation which is to provide the protection of placing the deposit in an approved scheme so that the tenant can benefit from an independent adjudication of whether or not the deposit should be returned. The Respondent has denied the Applicant that ability and the deposit in question is now in dispute. Taking all these factors into account the Tribunal determined that this is one of the most serious breaches, that the landlord runs his business in a manner that breaches deliberately or at least recklessly the regulations and so a fair and proportionate penalty would be 3 times the deposit, namely the sum of £2,580.

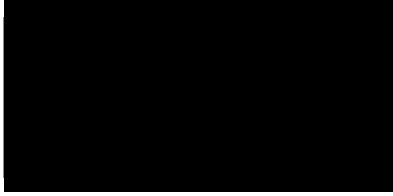
Decision

The Tribunal grants an order against the Respondent for payment to the applicants of the sum of £2,580 being three times the deposit in terms of Regulation 10(a) of the Regulations.

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/Chair

30th November 2022
Date