

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**

Chamber Ref: FTS/HPC/PR/21/1201

Re: Property at 4F2, 43 Barclay Place, Edinburgh EH10 4HW (“the Property”)

Parties:

**Wanda Meister, Flat 3, 4 Mayfield Road, Manchester M16 8FT and Mengran Hu,
1/1 Lord Russell Place, Edinburgh EH9 1NQ (“the Applicants”)**

Vijay Baryah, 17 Fleurs Avenue, Glasgow G41 5AR (“the Respondent”)

Tribunal Members:

John McHugh (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) determined that:**

**The Respondent has failed to comply with his duty under Regulation 3 of the
Tenancy Deposit Schemes (Scotland) Regulations 2011 and should be ordered
to pay the Applicants the sum of £1600.**

Background

The Applicants were the tenant and the Respondent the landlord under a tenancy agreement dated 10 May 2020.

The Applicants complain that the Respondent failed to place their deposit in an approved scheme in accordance with his obligations under Regulation 3 of the 2011 Regulations.

The Case Management Discussion

A Case Management Discussion ("CMD") took place by telephone conference on 24 August 2021. Ms Meister was present on behalf of both Applicants. The Respondent was present.

Findings in Fact

The Applicants were the tenant and the Respondent the landlord in terms of a lease of the Property.

The parties had signed what bore to be a short assured tenancy agreement dated 10 May 2020.

The creation of new short assured tenancies had ended in December 2017 and the tenancy automatically falls to be regarded as a private residential tenancy.

The tenancy agreement signed by the parties makes reference to a deposit.

Neither the tenancy agreement nor any other document makes reference to an advance payment of rent other than the monthly rent.

The Applicants paid to the Respondent a deposit of £800 on 11 May 2020.

The tenancy ended on 4 May 2021.

The Respondent has retained £300 of the deposit and returned the remaining £500.

The deposit should have been placed by the Respondent into an approved scheme.

The deposit was not placed into an approved scheme.

Reasons for Decision

The parties agree that at the beginning of the tenancy, the Applicants paid to the Respondent the sum of £1600. Parties agree that £800 of that was payment of the first month's rent in advance.

Parties differ as to the balance of £800. The Applicant claims that the £800 paid was a deposit. The Respondent claims that it was not a deposit but an advance payment of rent.

Parties agree that the Respondent repaid £500 of the disputed £800 on 6 May 2021.

At the CMD, the Respondent spoke of his normal practice of taking one month's rent as a deposit which he would place in an approved scheme. He would then take a further sum made up of the first month's rent and a second amount which he regarded as an advance payment of rent and not as a deposit. The sum would be retained by him as, in his words, "security" against the tenants removing items from the flat being rented. The sum would not be allocated as rent for a particular future month. The tenants would pay the rent monthly in advance for each month of the tenancy.

It is that approach which the Respondent says he adopted here other than that as the Applicants could only afford to pay a total of £1600, he allocated this to being the first month's rent and used the balance as the security described above. He retained the money throughout the duration of the lease and the Applicants paid rent every month. At the end of the tenancy he had given back part of the security amount having deducted what he thought was a fair amount to reflect cleaning costs etc.

Section 120(1) of the Housing (Scotland) Act 2006 defines a tenancy deposit as:

"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".*

That appears to cover the situation in the current case where the Respondent's position is that the payment was retained by him as security against the non-performance of the Applicant's obligations. The Tribunal notes that the £800 payment was in fact used by him as a security against non-performance of a tenancy obligation since he used it to meet repair costs in relation to the Property and refunded the balance. There is no evidence that the disputed £800 payment was treated as an advance payment of rent. The Applicants paid rent in advance for each month of their occupation.

The Tribunal observed that the Respondent had provided the Applicants with a form of tenancy agreement which had been replaced by the private residential tenancy (PRT) some years previously on 1 December 2017. The PRT standard form agreement specifically draws parties' attention to the legal requirements relating to deposits including a landlord's obligation to place any tenancy deposit into an approved scheme. The Respondent explained that he was aware of PRTs but was waiting for his son, who is more IT literate, to provide him with an up to date style

We find that the disputed £800 payment made to the Respondent was a deposit and not an advance rental payment.

Parties have presented submissions and evidence regarding the condition of the Property and the behaviour of the Applicants. That evidence is irrelevant to the questions before the Tribunal which are concerned only with whether a deposit was paid and whether it was paid into an approved scheme.

There is no dispute that the deposit was not placed in an approved scheme and we make a formal finding to that effect.

The Tribunal is obliged in terms of Regulation 10 to make an order requiring the Respondent to make a payment to the Applicants. An aggravating factor is that the deposit remained unprotected for the whole (approximately one year) duration of the tenancy and the unreturned portion remains so today. A further aggravating factor is that the Respondent has misrepresented the deposit as an advance payment of rent and maintained that position before the Tribunal. The Tribunal regards this case as being at the more serious end of the scale and finds an award of £1600 to be appropriate.

Decision

The Respondent should be ordered to pay to the Applicants the sum of £1600 in terms of Regulation 10 of the 2011 Regulations in respect of the failure to place the deposit in an approved scheme.

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.

John McHugh _____	24 August 2021 _____
Legal Member/Chair	Date