

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 Section Regulation 10 of the Tenancy
Deposit Schemes (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/19/3340

**Re: Property at Flat 4, 16 Dunaskin Street, Western Gate, Partick Cross,
Glasgow, G11 6PG (“the Property”)**

Parties:

Miss Xuan Xie, Flat 1-2, 10 Thorbank Street, Glasgow, G3 8SU (“the Applicant”)

**Mr John Wright, 45A Roman Road, Bearsden, Glasgow, G61 2PQ (“the
Respondent”)**

Tribunal Members:

Fiona Watson (Legal Member)

Decision (in absence of the Respondent)

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the
Tribunal”) refused the application.**

- Background
- 1. An application was submitted to the Tribunal under Rule 103 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. Said application sought an order be made against the Respondent on the basis that the Respondent had failed to comply with his duties to lodge a deposit in a tenancy deposit scheme within 30 days of the start of the tenancy in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”).

- The Case Management Discussion

2. A Case Management Discussion ("CMD") took place on 18 February 2020. The Respondent was personally present. The Applicant was neither present nor represented. The Applicant had indicated to the Tribunal administration by way of email of 4 February 2020 that they were resident in China and unable to participate either by way of personal attendance or by conference call, however they were happy for the CMD to proceed in their absence.
3. A Case Management Discussion had previously taken place on 9 January 2020 where the Respondent had been personally present and the Applicant had attended by conference call. At the said prior CMD, the Respondent's position was that no deposit had been taken. He instead took payment of two months' rent in advance, to discharge the obligation for payment of rent in the first month and last month of the tenancy. No payment was taken in security for any other future obligation. He made reference to the case of *Cordiner v Al-Shaibany* 9 June 2015. The Applicant was not aware of said case. The Applicant's position was that the payment made by her at the start of the tenancy was a deposit. The said CMD was adjourned and continued to allow parties to consider the case of *Cordiner v Al-Shaibany*. The issues to be resolved were noted by the Legal Member as follows:
 - (a) The nature of the payment made by the Applicant to the Respondent at the commencement of the tenancy and whether it should properly be characterised as rent in advance or a deposit.
 - (b) If the payment made at the commencement of the tenancy should properly be characterised as a deposit, whether there had been a failure on the part of the Respondent to comply with the 2011 Regulations and, if so, the amount payable in terms of Regulation 10 of the 2011 Regulations.
4. At the continued CMD on 18 February 2020, responding to questioning by the Tribunal, the Respondent confirmed that he had used the term "deposit" in text correspondence with the Applicant. However, this was due to the Applicant being unable to understand the nature of the terms of the lease and the fact that no deposit was being taken, and in fact payment was being made in respect of payment of rent in advance. The Respondent considered that the terms of the lease between the parties, and the back letter referred to, were entirely clear on this point.
5. The Respondent confirmed that the Applicant and her joint-tenants had made an overpayment of rent at the end of the lease. They had failed to take into account that they had already paid their last month's rent at the start of the lease and effectively paid it again. Part of this had been returned to the tenants. The Respondent submitted that the property had been left in an unacceptable state and costs had been incurred by him in rectifying same.

6. Clause 8 of the lease between the parties states as follows:

"The rent is £1050 a calendar month payable in advance, and your first payment will be your first months rent and your last months rent, that is an initial payment of two months rent. Therefore, your obligation to pay your first months rent and your last months rent has been discharged when this payment is made. The first payment will be paid on 01 September 2018 and will be for the sum of £1050 in respect of the period 01 September 2018 to 01 September 2019. (The maximum amount of rent which can be paid in advance is 6 months' rent). Thereafter payments of £1050 must be received on 1 September 2018 and then subsequently on or before the same date of each calendar month thereafter."

7. Clause 11 of the lease between the parties states as follows:

"Deposit – No Deposit Received.

The Landlord must lodge any deposit they receive with a tenancy deposit scheme within 30 days of the start date of the tenancy. A tenancy deposit scheme is an independent third-party scheme approved by the Scottish Ministers to hold and protect a deposit until it is due to be repaid. At the start date of the tenancy or before, a deposit of £0.00 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."

8. A Back Letter issued by the Respondent to the Applicant stated as follows:

"Back Letter

Subject – One Month's Advance Rent

In order to confirm our agreement, and avoid any doubt, I am clarifying the intentions of the above. This letter is designed to make clear any misunderstandings you may have with your initial payment of two month's rent.

Your initial payment represents your first month's rent and your last month's rent, in advance. Monthly rent is payable on the due date of each and every month of your tenancy. Your obligation to pay your final month's rent has been discharged at the point where you made your initial payment."

9. The Respondent confirmed that he had handwritten figures on the front of the lease, to which some were referred to as "rent" and some as "deposit". He explained that this was done as this was the only way he could get the Applicant to understand what was to be paid. The Applicant did not understand the concept of paying the last month's rent in advance and kept referring to that payment as a deposit. However the lease and the back letter quite clearly stated that no deposit was being taken.

10. The Applicant's position was that a deposit had been paid and therefore the Respondent was in breach of his obligations under Regulation 3 of the 2011 Regulations, which states as follows:

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.

(2) The landlord must ensure that any tenancy deposit paid in connection with a relevant tenancy is held by an approved scheme from the date it is first paid to a tenancy deposit scheme under paragraph (1)(a) until it is repaid in accordance with these Regulations following the end of the tenancy.

(3) A "relevant tenancy" for the purposes of paragraphs (1) and (2) 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 an unconnected person,

unless the use of the house is of a type described in section 83(6) (application for registration) of the 2004 Act.

(4) In this regulation, the expressions "relevant person" and "unconnected person" have the meanings conferred by section 83(8) of the 2004 Act.

- Findings in Fact

11. The Tribunal made the following findings in fact:

- (a) The parties entered into a tenancy which commenced 1 September 2018 and ended on or about 1 September 2019;
- (b) The Applicant and her fellow tenants paid 2 months rent at the commencement of the tenancy;
- (c) The Applicant and her fellow tenants paid a final rent payment on or about 31 July 2019;
- (d) No deposit was taken by the Respondent in terms of the definition of a deposit as contained within section 120 of the Housing (Scotland) Act 2006;
- (e) No deposit was taken which would require to be lodged in terms of Regulation 3 of the 2011 Regulations.
- (f) There had been no breach by the Respondent of Regulation 3 of the 2011 Regulations.

- Reasons for Decision

12. A tenancy deposit is defined in section 120 of the Housing (Scotland) Act 2006 as follows:

(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 so arise.

13. The Tribunal was satisfied that Clause 8 of the lease and the back letter make it clear that payment taken at the commencement of the lease is payment of the first and last month's rent of the tenancy. Furthermore, Clause 10 of the said Agreement makes it clear that no deposit is payable.

14. It is unfortunate that the Respondent has used the language that he has in his handwritten notes on the front of the lease and also in text message exchanges with the tenant, where he refers to a "deposit". This has only served to create confusion to the Applicant. The Tribunal has accepted the Respondent's explanation of his use of the word "deposit" as being used to try and aid the Applicant in understanding the payment of the last month's rent in advance. Whilst the contractual terms are clear in this regard, the communications between the parties are not given the nature of the language used by the Respondent.

15. The Tribunal has considered the case of *Cordiner v Al-Shaibany* and is satisfied that on the basis of the contractual agreement between the parties forming the subject matter of this application, that no deposit was taken by the Respondent in security of future obligations, and that the payment taken at the start of the lease was in payment of the obligation for the first month's and last month's rent. The Tribunal is satisfied that payment of rent in advance is a payment which discharges that obligation to pay rent and is not therefore a payment held in security for a future obligation. Accordingly, no deposit was taken in security of any future obligation and therefore no payment required to be lodged within a scheme under Regulation 3 of the 2011 Regulations.

16. The Tribunal has considered the issue of the overpayment of rent by the Applicant and her joint tenants in the last month of the tenancy. It would appear that the Applicant and her joint tenants made payment of rent in the last month of the lease in error, which they did not require to do given they had already paid the last month's rent in advance at the start of the lease. That overpayment would fall to be refunded. The Respondent submitted that he had incurred costs which should be deducted from any such overpayment. That may be a matter of dispute between the parties. It was unclear to the Tribunal what had and hadn't been refunded between the Applicant and her joint tenants. However, repayment of such an overpayment is not something that the Tribunal could consider as part of this application and is out with the scope of any

determination as to whether or not the Respondent had breached his obligations in terms of Regulation 3 of the 2011 Regulations.

- Decision

17. The First-tier Tribunal for Scotland (Housing and Property Chamber) 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.

F Watson

Legal Member/Chair

Date

18/2/2020