



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy
Deposit Schemes (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/23/0019

**Re: Property at 5 Loch Ness Bungalows, Drumnadrochit, IV63 6UU (“the
Property”)**

Parties:

**Ms June Cowan, Eriskay Cottage, Kytra Lock, Fort Augustus, PH32 4BY (“the
Applicant”)**

**Miss Janet Turnbull, Coilty Leisure & Recreation Ltd, Managers House, Lower
Balmacaan, Drumnadrochit, IV63 6UW (“the Respondent”)**

Tribunal Members:

Neil Kinnear (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

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

Background

[1] This was an application dated 4th January 2023 brought in terms of Rule 103 (Application for order for payment where landlord has not paid the deposit into an approved scheme) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended. The application is made under Regulation 9 of the *Tenancy Deposit Schemes (Scotland) Regulations 2011* (“the 2011 Regulations”).

[2] The Applicant sought payment of compensation in respect of an alleged failure by the Respondent to pay the deposit she provided of £825.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

[3] The private residential tenancy agreement had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, and the procedures set out in that Act appeared to have been correctly followed and applied.

[4] The Respondent have been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 13th February 2023, and the Tribunal was provided with the execution of service.

[5] A Case Management Discussion was held at 11:30 on 15th March 2023 by Tele-Conference. The Applicant participated, and was not represented. The Respondent's Janet Turnbull participated, and was not represented.

[6] The Tribunal noted that the Respondent's correct designation is Coilty Leisure & Recreation Ltd, which was confirmed by Miss Turnbull. The Applicant asked the Tribunal to allow the Respondent's designation to be amended by adding "Ltd." At the end.

[7] Miss Turnbull did not object, and the Tribunal allowed the amendment in terms of Rule 14A (Request to amend the application in respect of matters other than new issues) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[8] The Applicant explained that she paid a deposit of £825.00 in cash to Miss Turnbull on taking entry to the Property on 1st February 2019. She then paid monthly rent in cash until moving to paying by bank transfer in August 2019. She had asked for the return of her deposit after the end of the tenancy on 30th November 2022, but the Respondent had failed to repay it and the Applicant understood that the deposit had not been paid into an approved scheme by the Respondent.

[9] Miss Turnbull explained that the Respondent denied that the Applicant had ever paid the deposit. The Applicant had made no payment of either the deposit or the monthly rent due until she commenced paying the rent by bank transfer in August 2019. Miss Turnbull queried whether the party participating and identifying herself as the Applicant was truly Ms Cowan. The Applicant confirmed that she was indeed Ms Cowan, but Miss Turnbull indicated that she wished to see the Applicant to confirm her identity.

[10] It was clear that a hearing was required to resolve the factual dispute between the parties, and parties indicated that their preference was for that to be by way of Video-Conference. Both parties confirmed that they had suitable equipment and a reliable internet connection for that purpose. The Respondent accepted that he had incurred rent arrears, but explained that this was due to his loss of income as a result of his recent.

[11] The Tribunal set a Hearing for the above-mentioned reasons, to be conducted by Video-Conference at a date and time to be identified and confirmed to the parties in writing by the Tribunal.

Hearing

[12] A Hearing was held at 10:00 on 18th July and 7th November 2023 by Video-Conference. The Applicant participated, and was not represented. The Respondent's Janet Turnbull participated, and was not represented.

[13] The Tribunal heard evidence from the Applicant and from the Miss Turnbull. That was in relatively short compass, and concerned only the question of whether or not the Applicant had paid the deposit to Miss Turnbull.

Findings in fact

[14] Evidence was led by both parties. After hearing that evidence, the Tribunal found in fact:

- 1) That the Applicant rented the Property from the Respondent from 1st February 2019 until 30th November 2022.
- 2) That the written private residential tenancy agreement provided at clause 10 that a deposit of £825.00 will be paid by the tenant to the landlord.
- 3) That the Applicant paid the deposit to Miss Turnbull at the commencement of the lease in cash.
- 4) That the Respondent did not lodge the deposit in an approved tenancy deposit scheme within 30 days of receipt.
- 5) That the Respondent did not provide the Applicant with a copy of the written private residential tenancy agreement until 28th August 2019.
- 6) That the Respondent has failed to repay the deposit to the Applicant.

The Applicant's evidence

[15] The Applicant gave evidence that she had previously rented a different property from Miss Turnbull's brother. After a previous relationship ended, she required to move to a property with a lower rental.

[16] The Applicant and Miss Turnbull were on very good terms, and the Respondent offered to lease her the Property. The Applicant accepted, and the Respondent assisted her in moving in on 1st February 2019 by providing her with assistance from two local associates of the Respondent who brought a trailer and moved all her heavy furniture and items including her bed, wardrobes and sofas into the Property on that date. The Applicant referred the Tribunal to text messages between her and Miss Turnbull dated 31st January 2019 which narrated this arrangement on that date. The Applicant also referred the Tribunal to her e-mail to the local authority advising them that she was moving to the Property on 1st February 2019 which she sent by e-mail dated 7th February 2019.

[17] The Applicant and Miss Turnbull's previously good relations deteriorated, and she subsequently decided to leave the Property. She gave the Respondent notice of her intention to leave on 30th November 2022 in terms of the lease agreement by e-mail of 1st November 2022. That e-mail was acknowledged and accepted by Miss

Turnbull on 2nd November. The Applicant referred the Tribunal to text messages in that regard.

[18] The Applicant e-mailed Miss Turnbull on 30th November 2022 requesting that she repay the tenancy deposit for the Property into her bank account, the details of which she provided. Miss Turnbull replied by e-mail later that day, in which e-mail she asked the Applicant "Could you provide me with details of the deposit you have mentioned".

[19] Since leaving the Property, the Applicant has asked the Respondent for return of her deposit. The Respondent has refused to return the deposit, asserting that payment of the deposit had been waived at the commencement of the lease.

Miss Turnbull's evidence

[20] Miss Turnbull gave evidence that the lease commenced on 1st April 2019. When questioned regarding the provision of two associates of the Respondent to assist the Applicant with moving her furniture into the Property on 1st February 2019, she accepted that this had occurred, but explained that she had allowed the Applicant to store her furniture at the Property for two months prior to the start of the lease.

[21] Miss Turnbull accepted that the written lease agreement provided for the payment of a deposit of £825.00 at the commencement of the lease. Her evidence was that despite that provision, she had waived payment of the deposit due to her friendship with the Applicant and sympathy for her situation after the end of her previous relationship.

[22] Miss Turnbull denied that she had received payment of the deposit. She explained that her father had passed away around the time of the commencement of the lease and that as a result she was just getting by, but insisted that she was not mistaken in her recollection that no deposit was paid.

[23] Miss Turnbull advised the Tribunal that she acted as letting agent of approximately twenty properties owned by her family, including the Property.

Submissions

[24] The Applicant submitted that the Tribunal should accept her account of events that she paid the deposit of £825.00 to the Respondent. That deposit should have been paid into an approved tenancy deposit scheme by the Respondent within 30 days, but it had not been. The Applicant sought compensation.

[25] Miss Turnbull submitted that no deposit payment had been made, and that accordingly there had been no failure to pay into an approved tenancy deposit scheme on the part of the Respondent.

Statement of Reasons

[26] This application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.

[27] Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:

“(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.”

The Respondent as landlord was required to pay the deposit into an approved scheme.

[28] The Tribunal accepted both parties as entirely credible. The Tribunal concluded that both the Applicant and Miss Turnbull were doing their best to recall what had taken place at the commencement of the lease.

[29] The Tribunal accepted the evidence of the Applicant as reliable. Her recollection that she paid the deposit in cash was supported by the fact that the lease provided for the deposit to be paid. Both parties lodged a number of documents containing messages between them, none of which indicated that the deposit had been waived.

[30] The Respondent lodged the e-mail from Miss Turnbull of 30th November 2022 which she had sent in response to the Applicant's to her earlier that day. In her response to the Applicant's request to repay the deposit, rather than state that the deposit had been waived and not paid, she instead replied requesting that the Applicant provide her with details of that deposit.

[31] The Tribunal noted that the Applicant had e-mailed Miss Turnbull the year before. In her e-mail to Miss Turnbull dated 1st April 2021, she asked “Can you confirm my deposit is with deposit Scotland as I don't seem to have any correspondence from them?”. The Tribunal has not been provided with any response from Miss Turnbull to that e-mail, but it is again supportive that the Applicant has been consistent in her position that she paid a deposit.

[32] The Tribunal did not accept the evidence of Miss Turnbull as reliable on this issue. She is apparently an experienced letting agent in relation to twenty properties which she manages. The Tribunal would expect her to have kept proper records in relation to those properties, and in particular, of any agreement to waive payment of the deposit. She did not provide any such records in evidence.

[33] Further, she provided no response to the Appellant's e-mail of 1st April 2021 asking her to provide details of the tenancy deposit scheme in which the deposit was lodged, and at the conclusion of the lease when asked for the return of the deposit

did not refer to it having been waived but instead asked for details of the deposit requested.

[34] Finally, she asserted just short of five years after the events, that certain that her recollection that the deposit had been waived could not be mistaken even in circumstances where she advised the Tribunal that she was only getting by around the time the deposit ought to have been paid due to the unfortunate passing of her father.

[34] For these reasons the Tribunal preferred and accepted the evidence of the Applicant that the deposit had been paid, and that accordingly that the Respondent as landlord was required to pay the deposit into an approved scheme. The Respondent failed to do so.

[35] Regulation 10 of the 2011 Regulations provides as follows:

“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.”

[36] The Tribunal was satisfied that the Respondent did not comply with its duty under regulation 3, and accordingly that it must order the Respondent to pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

[37] In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh opined in relation to regulation 10 of the 2011 Regulations that there had to be a judicial assay of the nature of the non-compliance in the circumstances of the case and a value attached thereto which sounded in sanction, and that there should be a fair, proportionate and just sanction in the circumstances of the case. With that assessment the Tribunal respectfully agrees.

[38] In 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.

[39] In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the fact that at the time the deposit was paid, the Respondent had recently suffered a substantial bereavement by the passing of her father. In these circumstances, the Tribunal considered that albeit this factor was no excuse or defence to not complying with the 2011

Regulations, it did represent mitigation in respect of the compensation to be awarded in the exercise of its judicial discretion.

[40] However, balanced against these mitigating factors, were the fact that the Respondent's Miss Turnbull was an experienced letting agent, who managed approximately twenty properties owned by her family including the Property. The Respondent received payment of the deposit in February 2019 and did not comply with its legal obligations as a landlord with respect to the 2011 Regulations, which regulations have been enacted to provide protection to tenants in respect of their deposit and to ensure that they can obtain repayment of their deposit at the conclusion of the lease, and the fact that the period during which the Applicant did not have the security provided by such lodging was lengthy, being nearly five years. The Applicant had been caused considerable stress as a result.

[41] Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, the Tribunal considered that the sum of £1,650.00 (twice the amount of the tenancy deposit) was an appropriate sanction to impose.

Decision

[42] For the foregoing reasons, the Tribunal ordered the Respondent in respect of its breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £1,650.00 in terms of Regulation 10(a) of the 2011 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.

N Kinnear

07 November 2023

Legal Member/Chair

Date