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 Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011

Chamber Ref: FTS/HPC/PR/19/4012

Re: Property at Allanaha Cottage, Cawdor Road, Nairn, IV12 5QU ("the Property")

Parties:

Miss Violet Jane Mackay, Allanaha Cottage, Cawdor Road, Nairn, IV12 5QU ("the Applicant")

Mrs Margaret Lyle, Wester Delnies Farmhouse, Ardersier Road, Nairn ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

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

Background

This is an application received on 19th December 2019 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").

The Applicant seeks payment of compensation in respect of an alleged failure by the Respondent to pay the deposit she asserts she provided of £400.00 in relation to the tenancy agreement into an approved scheme within 30 days of receipt of that sum.

The Applicant provided with her application copies of an undated informal tenancy agreement, a subsequent formal tenancy agreement, rent books with deposit receipt and various other documents.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal, and a Case Management Discussion was set for 19th March 2020.

That Case Management Discussion had to be cancelled as a result of the coronavirus pandemic, and the lockdown imposed in the United Kingdom as a consequence thereof. The Parties' representatives were subsequently notified with the details of a Tele-Conference and provided with dial-in details.

A Case Management Discussion was held at 10.00 on 9th July 2020 by Tele-Conference. The Applicant did not participate, and nor did her representative, Ms Pierce of Nairn Citizens Advice Bureau. The Respondent participated, and was represented by Mr Swarbrick, solicitor.

The Tribunal made enquiries with Nairn Citizens Advice Bureau when Ms Pierce did not dial-in. The receptionist advised that Ms Pierce was engaged in another matter, but that an attempt would be made to let her know about the Tele-Conference Case Management Discussion. By 10.30, the Tribunal commenced the Case Management Discussion in Ms Pierce's absence, after giving her a reasonable period in which to participate.

The Tribunal explained the position to the Respondent and Mr Swarbrick. Mr Swarbrick was anxious that matters be dealt with in order to resolve the issues in this application, but he fairly accepted that in light of the ongoing difficulties caused by the coronavirus pandemic to ordinary business administration, it might be unfair not to allow Ms Pierce and the Applicant one further opportunity to participate.

Mr Swarbrick helpfully confirmed that the Respondent accepts that she was in breach of the 2011 Regulations, and that she had failed to lodge the deposit of £400.00 paid by the Applicant timeously at the start of the tenancy in June 2016. This omission was due to her ignorance of her obligations under the 2011 Regulations, and once aware of those, she had lodged the deposit amount in an approved scheme in January 2020.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative to adjourn a hearing.

The Tribunal decided that it was in the interests of justice to continue this application for one further occasion to allow the Applicant and/or her representative to participate. It did so with reluctance, but in light of the business and administrative difficulties faced by many as a result of the coronavirus pandemic, concluded that it was appropriate to do so.

The Case Management Discussion note of 9th July 2020 specifically stated that the Applicant should be aware that if she or someone on her behalf did not participate at

the continued Case Management Discussion, then the Tribunal might dismiss this application.

In these circumstances, the Tribunal set a continued Case Management Discussion to be conducted by Tele-Conference in this application, at a date and time to be confirmed to the Parties' representatives by the Tribunal in writing.

By e-mail to the Tribunal of 30th July 2020, Ms Pierce indicated that the Applicant would dial in and represent herself at the continued Case Management Discussion set for 21st August 2020, and that she was forwarding the details to the Respondent that day.

The Continued Case Management Discussion

A continued Case Management Discussion was held at 10.00 on 21st August 2020 by Tele-Conference. The Applicant did not participate, and nor did her representative, Ms Pierce of Nairn Citizens Advice Bureau. The Respondent participated, and was represented by Mr Swarbrick, solicitor.

The Tribunal was satisfied that the requirements of giving notice had been duly complied with, and proceeded with the application in terms of Rules 17 and 29 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Mr Swarbrick referred to the written response he had previously lodged with the Tribunal. He noted that the tenancy had commenced in June 2016. The Respondent's late husband had dealt with the paperwork. He sadly passed away in September 2016, leaving title to the cottage, which had been in his and the Respondent's joint names, to the Respondent.

The Respondent accepts, and has accepted from when it was first drawn to her attention, that she failed to place the deposit in a deposit scheme as she ought to have done. Her husband had passed away shortly after the start of the tenancy, and she was simply in ignorance of her obligations in that regard and was extremely apologetic for her omission.

Once aware of her obligations, the Respondent immediately arranged to pay the deposit of £400.00 into an approved scheme, and she had done so on 15th January 2020. A copy of the paperwork confirming this had been lodged with the Tribunal.

The Respondent confirmed that at the time of the commencement of the tenancy, she only acted as landlord in relation to the Property. She did not at that time own and rent out any other properties. She was aware that she required to hold the deposit, but was entirely unaware of her various legal duties and obligations in terms of the 2011 Regulations, and as a result did not lodge it with an approved scheme.

The Respondent candidly accepted from the outset that she had not made herself aware of her legal duties and responsibilities with regard to the deposit, and that she ought to have done so.

The tenancy agreement between the parties is continuing.

Reasons for Decision

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

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. She accepts that she failed to do so.

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."

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

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.

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.

In determining what a fair, proportionate and just sanction in the circumstances of this application should be, the Tribunal took account of the facts that the Respondent did not run any form of substantial commercial letting business, had no specialised knowledge of housing law or regulations, had little experience as a landlord, was unaware (as she candidly accepted that she should have been) of the need for the deposit to be placed with an approved scheme, accepted at the first opportunity before the Tribunal that she was at fault and had contravened Regulation 3 of the 2011 Regulations, and that she immediately lodged the deposit in an approved scheme once aware of her ommission.

In these circumstances, the Tribunal considers that albeit ignorance of the terms of the 2011 Regulations is no excuse or defence, the foregoing factors do represent mitigation in respect of the sum to be awarded in the exercise of its judicial discretion.

However, balanced against these mitigating factors, are the fact that the Respondent received payment of the deposit in June 2016 entirely unaware of her 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 ensure that they can obtain repayment of their deposit at the conclusion of the lease, and the fact that the period during which the deposit was not lodged in an approved scheme and during which the Applicant did not have the security provided by such lodging was lengthy (approximately three years and six months to the date when the deposit was lodged).

Balancing these various competing factors in an effort to determine a fair, proportionate and just sanction in the circumstances of this application, and in the absence of any detailed representations from the Applicant in support of the level of compensation the Tribunal should award, the Tribunal considers that the sum of £400.00 (the amount of the tenancy deposit) is an appropriate sanction to impose.

Decision

For the foregoing reasons, the Tribunal orders the Respondent in respect of her breach of Regulation 3 of the 2011 Regulations to make payment to the Applicant of the sum of £400.00 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.

Neil Kinnear

21st August 2020

Legal Member/Chair **Date**