



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

**Chamber Ref: FTS/HPC/PR/22/0358**

**Re: Property at 167 Lanark Road West, Currie, Edinburgh, EH14 5NZ (“the  
Property”)**

**Parties:**

**Miss Destiny Ogbeni, 19 Father Finn Park, Louth Village, Dundalk, County Louth,  
Ireland (“the Applicant”)**

**Mr John Maclellan, Mrs Reta Maclellan, 167 Lanark Road West, Currie,  
Edinburgh, EH14 5NZ (“the Respondents”)**

**Tribunal Members:**

**Ms H Forbes (Legal Member) and Mrs E Williams (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the  
Tribunal”) determined that an order for payment should be granted against the  
Respondents and in favour of the Applicant in the sum of £65 and orders the  
Respondents to lodge the tenancy deposit with an approved tenancy deposit  
scheme.**

**Background**

1. By application dated 5<sup>th</sup> February 2022 and made under Rule 103 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (“the Rules”), the Applicant applied for an order for payment in the sum of 10% of the deposit of £650 paid in respect of a tenancy agreement between the parties that commenced on 27<sup>th</sup> September and ended on 18<sup>th</sup> December 2021. The Applicant lodged an invoice relating to faulty appliances, and evidence of rent paid.
2. By letter dated 24<sup>th</sup> March 2022, the Respondents made written representations and lodged productions including final invoice, copy emails and text message printouts, and a copy of the accommodation contract. It was the Respondents’ position that the Property was let under the Room to Rent scheme, and the

Applicant was a lodger, therefore the Property was exempt from the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”).

3. A Case Management Discussion (“CMD”) took place by telephone conference on 29<sup>th</sup> April 2022. The case was continued to a hearing on whether or not the Regulations apply, the crucial point being whether the house was the only or main residence of the Respondents as landlords.
4. By letter dated 13<sup>th</sup> June 2022, the Respondents lodged written representations and productions, including plans of the larger subjects, photographs and Government guidance.

### **The Hearing**

5. A hearing took place by telephone conference on 4<sup>th</sup> July 2022. All parties were in attendance. The Applicant was represented by Mrs Juliet Ogbeni, who also gave evidence.
6. The Tribunal had regard to the original case file, and the productions and representations lodged by the Respondents and identified as follows:

Inventory 1 – 9 pages  
Inventory 2 – 28 pages  
Inventory 3 – 22 pages

### **The Applicant’s position**

7. Mrs Ogbeni said the Property was not rented as shared accommodation. She would not have agreed to pay £650 per month for shared accommodation. She had signed the agreement on behalf of her daughter. It was her position that the Respondents had overcharged for decoration of the Property, which was very small, and that they never intended to return the tenancy deposit. It was her position that they ‘kicked’ the Applicant out so that they could keep the deposit and over-exaggerated issues at the end of the tenancy.
8. The Applicant said she had not seen the advert for the Property on Gumtree. Her mother, Mrs Ogbeni, had seen it and had told her she would have her own place, with a bathroom and cooking facilities and that she could do everything in the room. The only shared facility as far as she was aware was the laundry. The Applicant said she was not told she could use other parts of the house. Even when her oven/microwave was not working, she was not offered access to the Respondents’ kitchen. Responding to questions from the Tribunal regarding the room described in the Respondents’ representations and plan as a ‘study’, the Applicant said she had never been in it. She did not remember being told she could use the study. She remembered being told she could use the garden. She would not have needed to use the study as she had everything in her room. The Applicant explained there was a cupboard, desk, chair, bed, hob, sink, television and bathroom in the Property. She used her own fridge.

9. Responding to questions from the Tribunal, the Applicant said she was normally the only other person living in the larger subjects with the Respondents, with the exception of a couple who stayed for around two weeks in the bedroom below the Property. Asked about the cleaning of the Property, the Applicant said she'd been told a cleaner would come every week. She wasn't comfortable with that but her mother assured her it would be all right. It was actually the Respondents that cleaned the room, and they complained it was dirty. Referred to a message (Inventory 2 p16) that mentioned the Applicant sitting in the Respondents' lounge rather than her car while the room was being cleaned, the Applicant said she would normally be out when the cleaning was being done, but she was in that day and had offered to sit in her car. She sat in the lounge, as offered. The Applicant said she had not been told she could use the Respondents' lounge at any other time. The only shared area was the laundry. When her en-suite was not in operation, the Applicant had sole use of a downstairs bathroom.
10. Mrs Ogbeni said she was not accepting the offer by the Respondents to waive the sum of £324. She wished to have the tenancy deposit returned to her.

### **The Respondents' position**

11. The Respondents referred to their written submissions. They explained that Mrs Ogbeni had asked for a video tour of the Property as the Applicant was not in a position to view it before renting. The video showed the Property, and the Respondents also showed their lounge and the study. It has always been the Respondents' position that if the tenant of the Property wants a change of scene they can use the study, which the Respondents sometimes use. The Applicant's boyfriend had used the Respondents' lounge when he stayed. The door had been open, and he had come in, not knowing that this was unusual. It was the Respondents' position that even if the Applicant did not use the study, it was available for her use.
12. Responding to questions from the Tribunal, the Respondents agreed the advert on Gumtree did not include the study. They were limited by the number of words that could be used in the advert. On reflection, they could see it might have been wise to have included the study. They always told tenants about the study. This was the only time that a tenant had rented without seeing the Property in advance. The vacuum cleaner was kept in the study and the applicant used the vacuum cleaner. The Respondent, Mrs MacLennan, took over the cleaning of the Property as the cleaner found it too messy. There was one occasion when the Respondents had to access the Property in the Applicant's absence due to a leak from the en-suite above. They required to get into the roof void. They told the Applicant afterwards and apologised.
13. The Respondents referred to the accommodation contract (Inventory 1 page 6) where they had stated that the let rooms were part of their home and they wanted people to feel at home in them. There is a main entrance and an inner door. The key to the inner door also opens the door of the Property. The Respondents do not have a self-contained area within the larger subjects, and

consider it to be their home in its entirety. The main door is their front door. The Respondents' lounge door is not locked, and tenants would normally knock and come in, if necessary. The Respondents' bedroom is up a set of stairs which open off the same hallway as the stair to the Property.

14. The Respondents said that Mrs Ogbeni's cousin had viewed the Property before the rental was agreed. Mrs Ogbeni had said that the Applicant had not enjoyed sharing with others due to their mess. She had seemed happy that the Applicant was to stay with the Respondents.
15. Responding to questions from the Tribunal, the Respondents said there was no shared bathroom or kitchen. They share the laundry facilities with the tenant of the Property. The Respondents said they took guidance from the Government guidelines for the Rent a Room scheme which state that resident landlords do not have to lodge a tenancy deposit. There was never a refusal to lodge the deposit. The Respondents believed they did not have to do this. They did not believe the Property constituted a flat. It was a room in their home. They and the occupant of the Property would meet every day. They shared the same hall and access. They shared the study.
16. It was the Respondents' position that it would not be appropriate to make a payment order to the Applicant in the circumstances. The Respondents had made an offer in their written representations to waive the sum of £324, which was shown in an invoice dated 18<sup>th</sup> January 2022 as a sum due by the Applicant to the Respondents (Inventory 1 page 7) over and above the tenancy deposit, which had been used for various items listed in the invoice.

### **Findings in Fact and Law**

17.
  - (i) A common law tenancy between the parties commenced on 27<sup>th</sup> September and ended on 18<sup>th</sup> December 2021. The rent was £650 per month.
  - (ii) The Respondents, as landlords, were relevant persons in terms of the Antisocial Behaviour (Scotland) Act 2004.
  - (iii) The Applicant, as tenant, was an unconnected person in terms of the Antisocial Behaviour (Scotland) Act 2004.
  - (iv) The Applicant paid a deposit of £650 at the start of the tenancy.
  - (v) The deposit was not placed in an approved tenancy deposit scheme.
  - (vi) The deposit was not returned at the end of the tenancy.
  - (vii) The Applicant was not responsible for paying council tax or utility bills.

- (viii) The Property comprises a self-contained bed-sit within the larger subjects, with its own locked door.
- (ix) The parties shared a common entrance.
- (x) The parties shared laundry facilities.
- (xi) The study was not referred to in the agreement between the parties and did not form part of the Property.
- (xii) The parties did not share any living areas.
- (xiii) The tenancy was a relevant tenancy for the purposes of the Regulations.
- (xiv) The deposit was not lodged with an approved tenancy deposit scheme and remained unprotected throughout the duration of the tenancy.
- (xv) The Respondents have breached Regulation 3 by failing to pay the deposit into an approved tenancy deposit scheme timeously.

### **Reasons for Decision**

18. Regulation 3(b) provides for exemptions to the requirement to lodge a deposit, as set out within Section 83(6) of the Antisocial Behaviour Etc. (Scotland) Act 2004 ("the 2004 Act"). In terms of Section 83(6)(e) such an exemption is created where *'the house is the only or main residence of the relevant person'*.
19. Section 101(1) of the 2004 Act defines a house as *'a building or part of a building occupied or intended to be occupied as a dwelling'*. Section 101(2) states, *'if two or more dwellings within a building share the same toilet, washing or cooking facilities, then those dwellings shall be deemed to be a single house for the purposes of this Part.'*
20. For the purposes of the Regulations, the Tribunal found that 'the house' was the Property, which comprised the self-contained bed-sit. The Tribunal found that 'the house' was not the only or main residence of the Respondents.
21. The parties did not share the same toilet, washing or cooking facilities, so the larger subjects did not meet the definition of a single house for the purposes of the legislation.
22. The Tribunal did not consider that the parties shared any living accommodation as, in terms of the agreement between the parties, the study was not included in the Property. The Tribunal noted further that the study was not included in the Gumtree advert.

23. The Applicants' deposit was not lodged with an approved tenancy deposit scheme within 30 days of the commencement of the tenancy as required by Regulation 3. The deposit remained unprotected throughout the duration of the tenancy.
24. The Regulations were put in place to ensure compliance with the tenancy deposit scheme, and to provide the benefit of dispute resolution for parties. The Tribunal considers that its discretion in making an award requires to be exercised by ensuring that it is fair and just, proportionate and informed by taking into account the particular circumstances of the case.
25. The Tribunal took guidance from the decision of the Upper Tribunal UTS/AP/19/0020 which states: *'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.'*
26. The Tribunal considered this to be a serious matter, with the deposit unprotected throughout the duration of the tenancy; however, the Tribunal did not consider it to be a case at the most serious end of the scale.
27. The Tribunal took into account the fact that the tenancy was relatively short, with the deposit unprotected for a period of just over seven weeks beyond the thirty day period allowed for in the Regulations.
28. The Tribunal considered the Respondents' strongly held belief that they were resident landlords, and their reliance on the Government guidance, which states that resident landlords are not required to lodge a tenancy deposit, to be major factors in mitigation. The Rent a Room scheme is a UK wide scheme, and the terminology used in the guidance, such as 'excluded occupier' and 'basic protection' are not terms that are used in Scots law, which has perhaps contributed to the problem.
29. The Tribunal considered that there was no malice or fraudulent intent on the part of the Respondents. However, the Tribunal felt that there had been a failure by the Respondents to recognise their responsibilities as landlords.
30. Taking all the circumstances into account, the Tribunal decided it would be fair and just to award a sum of £65 to the Applicant, which is one tenth of the tenancy deposit.
31. The Tribunal had discussed at the Case Management Discussion the possibility of ordering the Respondents to lodge the tenancy deposit with an approved tenancy deposit scheme retrospectively, so that the scheme can adjudicate on the amount of deposit, if any, to be returned. The Tribunal decided to make a Direction ordering the Respondents to do so, particularly as the Tribunal has found in the conjoined Rule 111 case FTS/HPC/CV/22/0361 that the tenancy

agreement between the parties was not a Private Residential Tenancy, therefore the Tribunal does not have jurisdiction to hear that case.

## **Decision**

32. An order for payment is granted against the Respondents and in favour of the Applicant in the sum of £65. The Respondents are ordered to lodge the tenancy deposit with an approved tenancy deposit 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.**

Helen Forbes  
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**Legal Member/Chair**

**4<sup>th</sup> July 2022**  
**Date**