

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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**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**

**Case Reference Number: FTS/HPC/PR/18/1435**

**The Property: 0/2 5 Belsyde Avenue, Drumchapel, Glasgow G15 6AN**

**Miss Louise Weir, c/o 292 Braidcroft Road, Glasgow G53 5LT (the applicant)**

**Mr Finlay Campbell, 15 Henwick Road, Spennymoor, Durham DL16 6PE (the respondent)**

### **Decision**

**The tribunal determines that 1) the applicant and her co-tenant paid the sum of £550 to the respondent as a deposit in respect of a tenancy agreement with the respondent and 2) the respondent failed to comply with the duty in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to lodge that deposit with an approved tenancy deposit scheme. The tribunal therefore makes an order requiring the respondent to pay to the applicant the sum of £1100.**

**The tribunal's decision is unanimous.**

### **Background**

1. By application received on 8 June 2018, the applicant submitted an application under rule 103 of Schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. The applicant was seeking an order for payment of:
  - 1) the sum of £1650 in respect of the respondent's alleged failure to lodge the deposit paid to the respondent in terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ('the 2011 regulations').
  - 2) the sum of £550 in respect of the return of the deposit alleged to have been paid by the applicant to the respondent at the beginning of the tenancy.
2. A case management discussion took place on 29 August 2018. At that case management discussion, the respondent's representative, Mrs Norma Cook, stated that the respondent's position was that no deposit had in fact been paid to him by the applicant and her co-tenant Christopher O'Reilly.

3. At the case management discussion, the tribunal determined that the issues to be resolved were as follows:
  - Whether any money was paid by the applicant and/or Mr O'Reilly to the respondent in respect of a deposit.
  - If a deposit was paid by the applicant and/or Mr O'Reilly, when that was paid, to whom and in what sum.
  - If a deposit was paid by the applicant and/or Mr O'Reilly, what sum should the respondent pay to the applicant.
4. While Mrs Cook had produced a copy of a second tenancy agreement between the parties at the case management discussion, the present tribunal had not received a copy of this. The tribunal therefore issued a direction to the respondent on 23 October 2018, requiring him to provide a further copy of the second tenancy agreement referred to in the note of the case management discussion dated 29 August 2018. A copy of a further tenancy agreement was received by the tribunal on 25 October 2018.
5. In terms of the tenancy agreement in relation to which the application arose, the applicant and Christopher O'Reilly, her former partner, were named as joint tenants. The applicant's application was in her sole name. A letter dated 12 August 2018, signed by both the applicant and Mr O'Reilly, was produced by the applicant's solicitor prior to the case management hearing, confirming that Mr O'Reilly gave full permission for the applicant to proceed with all matters relating to the deposit, and to take full responsibility for it.

### **The hearing**

6. A hearing was held on 29 October 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT. The applicant was present and was represented by Ms Rona Macleod, solicitor, Legal Services Agency. The applicant gave evidence on her own behalf. Christopher O'Reilly, the applicant's former partner and co-tenant under the tenancy, also gave oral evidence on her behalf. The respondent was not present, but was represented by his mother, Mrs Norma Cook.

### **Preliminary issue**

7. The chairperson had explained the purpose of the hearing, and the process which would be followed, at the start of the hearing. The parties indicated that they understood all of this. It later became apparent, however, when Mrs Cook began to give evidence, that she was under the impression that the hearing was only an intermediate hearing following the case management discussion, and that there would be a further hearing about the application. She appeared to have thought that the hearing was a 'first-tier' hearing, and that the case would then go to another higher tribunal. She said that it had

been the respondent's intention to be present to give evidence at that later hearing, and that he would have been legally represented.

8. The chairperson explained that while the tribunal was called the First-tier Tribunal for Scotland, the present hearing was a final hearing in the case, and that an application would only go to the Upper Tribunal if permission to appeal was granted. The chairperson asked Mrs Cook whether given this, she wished to go ahead with the hearing, and she indicated that she did. The chairperson again asked if she would like an adjournment to think this over further. Mrs Cook again indicated that she wished to go ahead.
9. The tribunal was mindful of the fact that the applicant was legally represented, and that Mrs Cook was not a solicitor. It was clear, however, that Mrs Cook had taken legal advice on the application: she made reference on a number of occasions to the advice provided by her solicitor, and she appeared to have a copy of this in front of her during the hearing. The tribunal also noted that the letter sent to the respondent notifying him of the hearing was accompanied by a guidance leaflet explaining the tribunal procedure, and that these had been served on him personally by an English process server (who had been instructed by sheriff officers) on 11 October 2018. The respondent had therefore been made aware of the nature and purpose of the hearing. The tribunal was also mindful that the applicant, her solicitor and their witness were all in attendance at the hearing.
10. In all the circumstances, while bearing in mind the overriding objective in terms of rule 2 of the 2017 Regulations to deal with the proceedings justly, and in particular the need to deal with the proceedings in a proportionate manner and the need to avoid delay, the tribunal therefore decided to proceed with the hearing.

### **Summary of the issues to be determined**

11. The primary issue before the tribunal was whether a deposit had been paid by the applicant and Mr O'Reilly to the respondent at the start of the tenancy. The tenancy between the parties began after the duty on landlords under regulation 3 of the 2011 Regulations came into force in 2012. In terms of regulation 3(1), any 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 of the 2011 Regulations.
12. The duty under regulation 3 arises only where a tenancy deposit has been paid by a tenant to a landlord. The tribunal was therefore required first to establish whether a tenancy deposit was paid; if it was not, the duty under regulation 3 did not arise. If the tribunal did determine that a deposit had been

paid, it would then need to consider whether the respondent had complied with the duty under regulation 3. If the tribunal considered that the respondent had failed to comply with that duty, it would then need to determine what amount should be paid by the respondent to the applicant in respect of that failure to comply, in terms of regulation 10 of the 2011 regulations.

13. The applicant's position was that a deposit had been paid to the respondent at the start of the tenancy. The respondent's position was that while he had initially expected to receive a deposit from the applicant and Mr O'Reilly, they had told him on the date the tenancy agreement was signed that they could not afford to pay a deposit. The tenancy agreement had then been altered on the same date to say that no deposit was to be paid by the applicant and Mr O'Reilly to the respondent, and it had been signed by all the parties.

14. The tenancy agreement (TA1) submitted by the applicant, which was dated 24 August 2015 and bore only Mr O'Reilly's signature, stated at Clause 6:

*'The Tenant shall pay the sum of Five Hundred and Fifty pounds (£550) as a deposit to be held by Finlay Campbell and Christopher O'Reilly and Louise Weir against any claim in respect of damages or compensation as provided herein which may have been found to have accrued or against any claim for amounts outstanding (including rent due) at the Termination of the tenancy. Such sums shall be held by Finlay Campbell as Stakeholder and any balance remaining after satisfaction of such claim shall be paid to the Tenant as soon as practicable after the termination of the tenancy. Interest will not be paid on this deposit.'*

15. At the case management discussion, Mrs Cook had produced a copy of a second tenancy agreement (TA2) between the parties

16. It became clear during the course of the hearing that the tenancy agreement produced by the respondent on 25 October (TA3) differed from TA2. Ms Macleod produced a copy of TA2, which did not include a photocopied deletion and handwritten notes at clause 3, which were present on TA3. Other than this, TA2 and TA3 appeared to be copies of the same document. This was dated 24 August 2015 and appeared to be signed by both the applicant and Mr O'Reilly. This agreement stated at Clause 6: *'The Tenants have not paid a deposit to the Landlord Finlay Campbell'*.

### **Facts agreed between the parties**

17. The parties agreed the following facts at the hearing:

- There was a short assured tenancy in place between the applicant and Mr O'Reilly and the respondent from 24 August 2015, relating to a property at 0/2,5 Belsyde Avenue, Drumchapel, Glasgow G15 6AN.

- The applicant and Mr O'Reilly left the property on 12 March 2018.
- No receipt or other proof of payment was provided by the respondent to the applicant and Mr O'Reilly in respect of a tenancy deposit.
- No deposit was paid by the respondent into an approved tenancy deposit scheme in relation to the tenancy.

### **The applicant's evidence**

18. The applicant's representative led the applicant through her evidence. The applicant told the tribunal that she and Mr O'Reilly had been desperate to find a home to rent together, as he was living in homeless accommodation prior to their tenancy. Mr O'Reilly had received a back payment of Employment Support Allowance, which meant that they were in a position to find a flat to rent and pay a deposit. The advertisement for the flat said there was a £550 deposit, and they would not have gone to view the flat if they had not had the money to pay the deposit.
19. She and Mr O'Reilly had gone to view the property on or around 24 August 2015, and the respondent and Mrs Cook were both present. They were shown around the property, and discussed the rent and the deposit, but she and Mr O'Reilly had at no time said that they would have any difficulty in paying the deposit. It was her recollection that the tenancy agreement was not signed until after the money for the first month's rent and the deposit (£550 for each, totalling £1100) had been paid to the respondent in cash.
20. She told the tribunal that she and Mr O'Reilly were unsure about how the private renting process worked, as neither of them had rented privately before. She said that she had trusted Mrs Cook, as she seemed to be very experienced. Mrs Cook had brought all the paperwork, and she had not read through it all, but had just signed what she was told to sign. The keys had then been handed over to Mr O'Reilly and herself. They had not asked for, or received, a receipt for the deposit.
21. She said she had only signed her name once, and could not recall having signed anything else. When shown the last page of TA3, she agreed that the signature on it appeared to be hers. She said however that her recollection was that there was printed text over around three-quarters of the page which she had signed; whereas the signature on TA2 and TA3 was less than halfway down the page.
22. She also said that the copy of the agreement which had been submitted to the tribunal with her application (TA1) was the only one she had been aware of prior to the case management hearing. She stated that this was the agreement which she and Mr O'Reilly had used for their housing benefit claims and for other purposes.

23. The tribunal had before it a statement relating to Mr O'Reilly's bank account, which clearly showed an incoming payment of £3423.71 dated 21 August 2015 from the DWP in respect of Employment Support Allowance (ESA). The statement also showed sizeable amounts of cash having been withdrawn from the account between 21 August and 28 August 2015, including four payments of £600 each withdrawn on 21, 22, 24 and 25 August. The applicant said that the reason for taking out £600 at a time was that this was the maximum that could be withdrawn at any one time. She said that this money had been used to pay the first month's rent and the deposit, and to buy other items such as furniture and clothes, and that Mr O' Reilly also had debts to pay.
24. When asked by the tribunal what she understood to be the purpose of the tenancy deposit, the applicant said that she thought it was to cover the cost of any rent arrears outstanding at the end of the tenancy. She said she was not aware that it should have been paid into a tenancy deposit scheme. She had later got into rent arrears of around £1400, as Mr O'Reilly had moved out of the property, and his benefits had been stopped. She said she had a meeting with Mrs Cook shortly before she left the property. There had been a discussion at that meeting about the tenancy deposit, and Mrs Cook had confirmed that the deposit would go towards paying off the arrears. The applicant said that she had agreed to move out on the basis that the outstanding arrears totalled £1400 minus the £550 deposit.

### **The respondent's evidence**

25. The applicant's version of events was entirely contradicted by Mrs Cook. She told the tribunal that she was an experienced landlord, and herself let out around half a dozen properties. This had been the respondent's first experience of letting a property, so she had agreed to help him with it.
26. She said that on or around 24 August 2015, she and the respondent had met the applicant and Mr O'Reilly at the flat, and they said they would be claiming housing benefit. She said that Mr O'Reilly only had signed the tenancy agreement which had been produced by the applicant (TA1). They had then said that they were unable to pay the deposit money. She said that she knew from experience that many tenants do not have enough money to pay a deposit of a month's rent upfront. She had therefore on some occasions agreed that tenants could pay their deposit in instalments. She said that the applicant and Mr O'Reilly had not paid either the first month's rent or the deposit on the date the agreement was signed.
27. She asked why, if they had paid the first month's rent upfront, they had not claimed this back from the respondent, as this money had later been paid through housing benefit. The applicant and Mr O'Reilly had verbally agreed to pay the deposit up at £50 per month. Three letters were later sent to them to sign, but they had never signed these or sent them back.

28. She said that she and the respondent then went back home to amend the tenancy agreement. They had met the applicant and Mr O'Reilly at the flat around two hours later to sign it. They had both signed the second tenancy agreement, which stated that there was no deposit to be paid. She said that there had been two copies of TA1, one for each party. The respondent had destroyed his copy. He had not asked the applicant and Mr O'Reilly to return their copy; she was not aware they had kept this original version. She told the tribunal that it was clear that TA1 was signed only by Mr O' Reilly, and that as a professional landlord, she would not have accepted this. She also expressed the opinion that this would not be accepted for housing benefit purposes, although she did not produce any evidence to support this assertion.
29. The tribunal asked Mrs Cook why the respondent had not produced a letter for the tenants to sign there and then saying that they would pay the deposit in instalments, at the same time as amending clause 6 of the agreement. She said it was agreed that this would be dealt with later, as the most important thing was to get the agreement signed so that the applicant and Mr O'Reilly could lodge their housing benefit claim.
30. When asked by the tribunal why there were several different versions of the tenancy agreement, Mrs Cook was unclear as to the reason for this. When asked why clause 6 of the original tenancy agreement did not state that the deposit would be paid into a tenancy deposit scheme, as required by law, she said that this had been an oversight.
31. Mrs Cook denied that she had told the applicant that the deposit would go towards her rent arrears. She said that the rent arrears had never been paid, and that £1400 in arrears were due, because no deposit had been paid.
32. She said that the applicant and Mr O'Reilly had lied throughout their tenancy, saying they were not a couple and claiming housing benefit separately. They had also accrued rent arrears, brought a dog into the property in breach of the tenancy agreement, and caused a nuisance to neighbours at the property.

### **Mr O'Reilly's evidence**

33. Following Mrs Cook's evidence, the tribunal called Mr O'Reilly, the applicant's witness. He confirmed that he and the applicant were keen to find their own place. He said he had considered private renting previously, but he had not then been able to afford it. When he received the backdated ESA payment, he was in a position to pay a deposit and a month's rent upfront.
34. He had seen the advertisement for the flat, which said there was a deposit to be paid, and he and the applicant had gone to view it. As he had not previously rented privately, he was unsure of the process. He had spent the

money withdrawn from his account on furniture, paying off debts to family members, and on the first month's rent and deposit for the property.

35. He could not recall the order in which things happened, but said that he had signed the tenancy agreement, received the keys and paid £1100 in cash to cover the first month's rent and the deposit. He told the tribunal that it was his understanding that, while future rent payments would be covered by housing benefit, it was the tenant's responsibility to pay the first month's rent. He said there was no discussion with the respondent and Mrs Cook about the deposit. He had, however, queried the rent of £550 which he thought was too high, and thought there had been an oral agreement to reduce it to £500 per month. The tenancy agreement was signed, and he and the applicant did not return to the property later that evening.

36. He said he did not recall exactly what he had signed, but he said that TA1 was the only agreement had been aware of, and was the agreement used for housing benefit purposes. He said that the signature on TA2 and TA3 was not his.

### **Further procedure**

37. The tribunal issued another direction to the respondent immediately following the hearing, asking him to produce to the tribunal his bank statements for the period from 1 August 2015 - 31 January 2016. A response was received on 19 November 2018.

### **Reasons for decision**

38. The key issue for the tribunal to determine was whether a tenancy deposit had in fact been paid to the respondent by the applicant. The applicant had produced a signed tenancy agreement (TA1) which clearly stated that a deposit was to be paid. The explanations given by the applicant and Mr O'Reilly as to the events leading up to the signature of the tenancy agreement, supported by Mr O'Reilly's bank statements, which showed that he had the money required to pay the deposit, and had made withdrawals consistent with the sums required for the first month's rent and deposit, formed a logical and coherent story. The tribunal found them to be honest and credible in their evidence.

39. The tribunal found Mrs Cook's explanations of the existence of several versions of the tenancy agreement to be unreliable and unconvincing. She was unable to explain why the applicant still had the original agreement, and there were clearly at least two versions of what she said was the amended agreement. It was also clear to the tribunal that the amendment to Clause 6 relating to the deposit was not the only discrepancy between TA1 and the other documents. Both TA2 and TA3 appeared to be in a different font to TA1, with different spacing and text layout. There were also a number of other



differences in the content of the text. There was wording in TA1 which did not appear in TA2 and TA3 – in clauses 4, 7.1 and 7.2, for example. The tribunal found Mrs Cook to be evasive in answering some of its questions, and it did not find her to be credible in some of her evidence on behalf of the respondent.

40. The bank statements provided by the respondent also showed that a payment of £1000 had been made into his account on 24 August 2015. While this does not of itself prove that a deposit (and the first month's rent) was paid to him, it is consistent with the version of events given by the applicant and Mr O'Reilly, and the other evidence submitted by the applicant. Mrs Cook also appeared to say at one point during the hearing that the arrears due were only £250 before correcting herself. Ms Macleod pointed out that this figure was very close to that left by deducting £1100 (in respect of the deposit plus the first month's rent) from £1400.
41. The tribunal therefore determines on the basis of all the evidence before it that, on the balance of probabilities, a deposit of £550 was paid by the applicant and Mr O'Reilly to the respondent at the start of their tenancy.
42. It was a matter of agreement between the parties that no deposit had been paid by the respondent into an approved tenancy deposit scheme in relation to the tenancy. The tribunal therefore determines that the respondent failed to comply with his duty under regulation 3(1) of the 2011 regulations.
43. The tribunal then considered the amount which it should order the respondent to pay to the applicant in respect of his failure to comply with regulation 3 (1). Regulation 10 of the 2011 regulations provides that if it finds that the landlord has failed to comply with any duty in regulation 3, the tribunal **must** order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit.
44. In considering what sum to award, the tribunal considered the need to proceed in a manner that is fair, proportionate and just, having regard to the seriousness of the breach (Sheriff Welsh in *Jenson v Fappiano* 2015 GWD 4-89). The applicant's solicitor submitted that it was reasonable to award three times the deposit, the maximum amount available, in the circumstances.
45. The tribunal noted that, while the respondent was an inexperienced landlord, the 2011 regulations do not distinguish between 'professional' and 'non-professional' landlords. As Sheriff Welsh noted in *Cooper v Marriott* [2016] SC EDIN 25, all landlords who rent to members of the public are bound by the duties under the regulations, regardless of their size or nature. In any case, the respondent had clearly been guided by Mrs Cook, who said that she was an experienced landlord.

46. Likewise, the alleged behaviour of the tenants has no relevance to a landlord's duty to comply with the regulations. The regulations are intended to provide a sanction on landlord who fail to comply with their duties under the regulations.
47. The tribunal notes that it was clear from the terms of Clause 6 in TA1 that the respondent had never intended to put the deposit into an approved scheme. Moreover, the respondent had claimed that no deposit had been paid. The deposit was unprotected throughout the applicant's tenancy, from 25 August 2015 until she left the property on 12 March 2018. The tribunal therefore considers that this was a serious breach of the regulations by the respondent.
48. The tribunal therefore considers that an award of £1100, representing twice the amount of the deposit, is fair, proportionate and just in the circumstances.
49. Finally, the tribunal considered the applicant's claim for the sum of £550 in respect of the deposit paid at the start of the tenancy. Given that the applicant admitted that there were outstanding rent arrears of £1400 (less the deposit paid) at the time she left the property, and that the respondent has not raised proceedings to recover the outstanding arrears, the tribunal does not consider that it would be reasonable to order the respondent to make payment to the applicant for this sum.

## Decision

50. The tribunal determines that 1) the applicant and her co-tenant paid the sum of £550 to the respondent as a deposit in respect of a tenancy agreement with the respondent and 2) the respondent failed to comply with the duty in terms of Regulation 3 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 to lodge that deposit with an approved tenancy deposit scheme. The tribunal therefore makes an order requiring the respondent to pay to the applicant the sum of £1100.

## 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.**

S'ONeill

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**Legal Member/Chair**

22/11/18  

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**Date**