

Private Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0314-000595 / Case Ref No: 0513-05751

Appellant Landlord:	Catherine O'Neill
Respondent Tenants:	Pamela Smith, John Corcoran
Address of Rented Dwelling:	1 Rockmount Terrace, Mallow , County Cork
Tribunal:	Patricia Sheehy Skeffington (Chairperson) Thomas Reilly, Finian Matthews
Venue:	Committee Room 1, Cork City Council, City Hall, Anglesea Street, Cork
Date & time of Hearing:	28 July 2014 at 2:30
Attendees:	For the Appellant: Catherine O'Neill (Appellant Landlord) James O'Sullivan (Appellant Landlord's witness and brother) Don Gore (Builder, Appellant Landlord's witness) For the Respondent: Pamela Smith (First Named Respondent Tenant) Arlene O'Neill (Respondent Tenants' witness)
In Attendance:	Gwen Malone Stenographers

1. Background:

On 9 May 2013 the Tenants made an application to the Private Residential Tenancies Board ("the PRTB") pursuant to Section 78 of the Act. The matter was referred to an Adjudication which took place on 26 February 2014. The Adjudicator determined that the Respondent Landlord should pay the total sum of €770.00 to the Applicant Tenants being the unjustifiably retained security deposit of €520.00, plus damages for retaining it of €250.00.

Subsequently the Appellant Landlord applied to appeal against the Adjudicator's decision on 14 March 2014, having not been able to attend the adjudication hearing. The application for the appeal was approved the Board on 21 March 2014.

The PRTB constituted a Tenancy Tribunal and appointed Patricia Sheehy Skeffington, Finian Matthews and Thomas Reilly as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Patricia Sheehy Skeffington to be the chairperson of the Tribunal ("the Chairperson").

The Parties were notified of the constitution of the Tribunal and provided with details of the date, time and venue set for the hearing.

On 28/07/2014 the Tribunal convened a hearing at Committee Room 1, Cork City Council, City Hall, Anglesea Street, Cork.

2. Documents Submitted Prior to the Hearing Included:

1. PRTB File

3. Documents Submitted at the Hearing Included:

Two photographs of a fireplace submitted by the Appellant Landlord with the consent of the Respondent Tenants.

4. Procedure:

The Chairperson asked the Parties to identify themselves and to identify in what capacity they were attending the Tribunal. The Chairperson asked the Parties to confirm that they had received the relevant papers from the PRTB in relation to the case and that they had received the PRTB document entitled "Tribunal Procedures". As the First Named Respondent Tenant (who attended on both Respondent Tenants' behalf and shall hereafter be referred to as 'the Respondent Tenant') could not recall receiving this document, a copy of it was supplied to her and time was given to read it.

The Chairperson explained the procedure which would be followed; that the Tribunal was a formal procedure but that it would be held in as informal a manner as was possible; that the person who appealed (the Appellant Landlord in this case) would be invited to present her case first; that there would be an opportunity for cross-examination by the Respondent Tenant; that the Respondent Tenant would then be invited to present their case, and that there would be an opportunity for cross-examination by the Appellant Landlord. The Chairperson explained that following this, both parties would be given an opportunity to make a final submission. She clarified that albeit the Tribunal could have regard to the Adjudicator's report, it was not bound by it and that the Tribunal was a full re-hearing of the matter.

The Chairperson stressed that all evidence would be taken on oath and be recorded by the official stenographer present and she reminded the Parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of €4,000 or up to 6 months imprisonment or both.

The Chairperson also reminded the Parties that as a result of the Hearing that day, the Board would make a Determination Order which would be issued to the parties and could be appealed to the High Court on a point of law only (pursuant to section 123(3) of the Residential Tenancies Act, 2004, hereafter referred to as the Act).

The Chairperson also informed the parties that if it seemed that they might be able to resolve their dispute by agreement, the Tribunal would facilitate any such negotiations.

The Parties were then sworn in.

5. Submissions of the Parties:

The parties agreed that the main issues in dispute were: (a) Whether the Respondent Tenants caused damage in excess of normal wear and tear such as to warrant the retention of the deposit; and (b) Whether the Appellant Landlord was in breach of her obligations in respect of the standard and maintenance of the dwelling during the course of the tenancy. Ancillary issues in respect of the validity of the method of termination of the tenancy and on whose behalf an agent acted also arose during the course of the hearing.

STANDARD AND MAINTENANCE OF THE DWELLING DURING THE TENANCY The Appellant Landlord said that a letting agent named Denis O'Brien contacted her to enquire as to whether the dwelling was available to let. She said that this agent was aware that the dwelling had been adapted for persons with disabilities, as it had most recently been occupied by her recently deceased father. The Appellant Landlord said that she had told the agent that the dwelling needed some tidying up prior to being let, but she said that she was amenable to help the people for whom the agent was enquiring as they seemed to be in need of a dwelling. She said that the agent had informed her that the Second Named Respondent Tenant was due to leave hospital shortly and required a suitable place to live as a matter of urgency. She said that she thought that it was lovely that the dwelling, which had been her family home, would be used in this way and that her family had cared for her father there. She recounted that she and her brother had attended the dwelling to remove personal effects and prepare it for a tenancy. She described it as spotless when the Respondent Tenants moved in, stating that it had been passed by the health board when her father was alive.

She said that the bathroom had a walk-in shower. She said that there were some issues that needed to be attended to, such as wallpaper that needed to be replaced after the dry-lining of an upstairs bedroom. However she said that she was informed by the agent that the downstairs was of more interest to the Respondent Tenants and that they used this room for storage only. She said that paper had peeled a little from the stairs but given the circumstances of the new tenancy she was told that this was not a problem. She said that the under stairs needed to be painted and she had supplied paint to the Respondent Tenants for this as they said that they would undertake this work. In respect of a table which was allegedly dirty, the Appellant Landlord stated that its Formica top may have been stained because it was old but it was not dirty: it was simply not a modern table. The Appellant Landlord said that the main issue that arose was in respect of the fire in the front room. She said she was initially asked to replace a grate, which was a particularly small one and as such she needed to engage an engineer's firm to construct it. She said that she was first told that the fire was emitting smoke by a neighbour. She said that she had arranged (through the agent) for a chimney sweep to attend who found no problem with the chimney.

She said that builders were asked to look at this problem. Her witness, the builder in question, said that he had attended the dwelling to inspect the fire which he said was too large as it was not contained by the grate but overflowed on to the fender. He said that as the fire was set he could not attend to it on that day, for which he said he was called a cowboy by the Second Named Respondent Tenant. He said that he returned the next day to undertake the work, which entailed removing the steel backing from the fireplace and replacing it with fire cement. He said that he told the Respondent Tenants not to use the fire for several days to allow the cement to dry; that the fires they were setting were

too large for the grate, and to use the damper in order to prevent the smoke from entering into the room. The Appellant Landlord's brother said that while he was attending the hearing in a mainly supportive capacity, he had visited the dwelling during the tenancy and no issues in respect of the standard and maintenance of the dwelling had been raised with him. The Appellant Landlord said that on 9 January 2013 she had received a request from the agent on the Respondent Tenants' behalf seeking a rent reduction without mention of any deficiencies in standards. She queried why such matters had not been raised at that point if they were of concern. She said that this letter also referenced that a job to a washing machine in the dwelling had been completed, that she had paid €50 for the spare part required.

The Respondent Tenant recounted the stressful circumstances of having to move from her former accommodation which had become unsuitable due to the altered needs of her partner, the Second Named Respondent Tenant. Immediately prior to moving into the dwelling he had had an operation that rendered him wheelchair bound. She said that she had approached the agent seeking suitable accommodation and related that he had told her that there were two potential options, one being quite a distance from the town and the other, the dwelling subject of the dispute, which she said was described to her as being "dirty". She said that the agent had told her that it would be cleaned prior to the Respondent Tenants taking up possession. However the Respondent Tenant and her witness said that the dwelling was not clean when they moved in and that they spent time cleaning it. Upon questioning from the Tribunal they agreed that the dirt could be described as superficial and that they had attended to its cleaning. They said the table was not simply stained but dirty and said that when a fridge was moved there was a large amount of dust and cobwebs behind it.

The Respondent Tenant said that the fire in the living room was the main problem because it emitted smoke into the room, which was sometimes so dense that they needed to open the windows and doors. The Respondent Tenant said that she had used the damper and the Respondent Tenants had refrained from using the fire in the days after the fire cement was applied to the back of its wall, but that these measures had not succeeded in preventing the smoke billowing into the room. The Respondent Tenant said that she had bleached the walls on a number of occasions to clean them.

The Tribunal asked the Respondent Tenant what other heat sources there were in the dwelling. She said that there was a plug-in oil heater and central heating, but that she did not turn the central heating on because she did not know how the system worked and she was afraid of it. She said that she did not ask how the system worked. She said that the fire was needed because the Second Named Respondent Tenant was just out of hospital and needed heat and he liked an open fire.

WHETHER THERE WAS DAMAGE IN EXCESS OF NORMAL WEAR AND TEAR JUSTIFYING RETENTION OF DEPOSIT

The Appellant Landlord said that the main issue was the smoke damage from the fire in the front room, which she said was persistently used for fires too large for the grate despite requests for smaller fires and the damper to be used. She described damage to all of the walls, the curtains and going out into the hall and up the stairs.

The builder said that the use of the large fires before the cement dried had impacted on that work, requiring the work to be done again. He described the inside walls and ceilings of the house as jet black (amending this to smoky black under questioning) and said that

the walls could not simply be painted, they were so stained that the wall paper had to be taken down and the room had to be re-lined. He said that to do otherwise would have allowed the black smoky stain to bleed through any new paint or wallpaper and re-emerge.

The Appellant Landlord said that the Agent, who she held partially responsible for the issues pertaining to the dwelling, had organised for decorators to affect the work which was eventually done. She said that she had asked these painters to do extra work which she paid them for directly. She said that she had never received the deposit from this agent but considered that it was spent on doing this repainting. She said in respect of the fireplace that further work was also done on this both to remedy the damage done to it by setting fires too big for the space and also to improve the fabric of it. She said that after the tenancy she spent between €2,000 to €3,000 to remediate the damage and make improvements.

The Appellant Landlord said that a multi-fuel stove which had been bought six months prior to the commencement of the tenancy had been broken and highlighted photographs which showed what she said were parts from the inner workings of the stove lying outside it. She said it had rusty spots on it as if it had been cooked on and something had spilled, but that it did not have the correct coating on to be used as a hob top. The Appellant Landlord's witness estimated this cost €100 to remedy.

The Appellant Landlord stated that some further items arose, such as shopping trolleys being left in the garden at the end of the tenancy. However she said that she was not looking for damages. She said she was looking for an order stating that the deposit did not have to be paid to the Respondent Tenants. She said that she also sought the appeal fee of €100 returned to her.

The Respondent Tenant attributed the blackening of the walls and the damage to the fireplace to the defect inherent in the fireplace itself. She said that she had used it in the way directed. She denied leaving trolleys in the garden: she said she needed trolleys to get her shopping home. She said that she had cleaned the house and had hoped to get her deposit back and that the agent had told her that she would get it back. She could not recall exactly when this exchange took place but said that it was upon her enquiring when the deposit would be returned. She said that the deposit was important to her because she had needed it for her next tenancy and being without it caused difficulty and stress.

POSITION OF THE AGENT

The Appellant Landlord stated that she had been approached by the agent on behalf of the Respondent Tenants and in her view he was as much working for them as for her. She said that she had left it up to the agent what rent, fee and deposit to charge. She confirmed that she knew he was a letting agent and she had paid him a fee, being a sum withheld by the agent from the first month's rent and deposit that he had collected.

The Respondent Tenant said that she addressed many of her concerns in respect of tenancy to this agent who said he would return the deposit. Both parties were critical of him.

TERMINATION OF THE TENANCY

The parties confirmed that the tenancy was of a fixed term and which had not endured its full term. The Appellant Landlord in her written submissions pointed out that only a week's notice had been given and that she thought she was entitled to a month. However she

conceded that she had no problem with the Respondent Tenants leaving and was happy enough for them to go.

The Respondent Tenant said that she had given the notice to terminate the tenancy to the agent's secretary and had heard nothing further so presumed it was in order.

6. Matters Agreed Between the Parties

1. The tenancy commenced on 27 July 2012 and terminated on 1 February 2013;
2. The Rent was €130 per week;
3. The Respondent Tenants paid a deposit of €520 at the commencement of the tenancy.

7. Findings and Reasons:

Finding One:

The tenancy was validly terminated on 1 February 2013 by agreement.

Reasons:

1. While a fixed term tenancy is an agreement for both parties, subject to their obligations, to remain in the tenancy until, at the earliest, its expiry date, parties may agree to shorten any notice periods (section 69 of the Act) or amend their agreement during its course.
2. The evidence in this case was that the Respondent Tenants proposed the termination of the tenancy and the Appellant Landlords were also happy to terminate the tenancy. There was no evidence of complaint of the shorter notice period at the time of the tenancy's termination. As such, on the balance of probabilities, the tenancy was terminated lawfully and with agreement of the parties.

Finding Two:

The Agent, Mr O'Brien, was acting on behalf of the Appellant Landlord and the deposit given to him was at law given to the Appellant Landlord.

Reasons:

1. The normal course of trading with a letting agent is that they are agents of the landlord, not the tenant. The evidence in this case, of complaints and communications to the landlord being conducted through the agent, and the Appellant Landlord paying him a fee, supports this.
2. As such any deposit paid to him by the Respondent Tenants was held in his capacity as agent for the Appellant Landlord.

Finding Three:

The Appellant Landlord was not in default of her obligations in respect of the standard and maintenance of the dwelling.

Reasons:

1. The Tribunal accepts the evidence that when alerted to problems, the Appellant Landlord dealt with them expeditiously. It notes that the fireplace issue was responded to and a chimney sweep and builders attended to remedy the problem. It further notes that

the fire was not the only heat source and at all times the Respondent Tenants could avail of the central heating system.

2. It further notes that a part for a washing machine was supplied and fixed during the tenancy and that a Hoover and lawn mower were supplied on request.

3. The Tribunal accepts the Appellant Landlord's evidence that the dwelling was cleaned prior to the tenancy. While it does not doubt that further cleaning work was done by the Respondent Tenants upon gaining entry, it does not accept that the degree of cleaning undertaken renders the Appellant Landlord in default in the circumstances of this case.

Finding Four:

The Respondent Tenants caused damage in excess of normal wear and tear which justified the retention of the deposit of €520.

Reasons:

1. A landlord may only retain a deposit for rent arrears or damage in excess of normal wear and tear: section 12(4) of the Act.

2. In this case, damages to the house were claimed to the stove in the kitchen and as a consequence of the smoke damage caused by the fire in the front room.

3. The Tribunal finds that inadequate evidence of the damage to the stove in the kitchen was adduced: it is not clear at what point the damage occurred and whether it was a problem that stemmed prior to the commencement of the tenancy. No clear evidence of the work required to remediate any damage was adduced.

4. The Tribunal however is satisfied that in circumstances whereby a tenant has an option to use a central heating system but continues to use a fire which is emitting smoke into the room, they are liable for the damage caused by the smoke by that continued use.

5. The Tribunal notes that the Appellant Landlord frankly admitted that she spent greater sums than was required to solely remedy the damage caused, in that she undertook improvements at the same time. However the Tribunal accepts on the balance of probabilities that the cost of repainting a badly smoke-damaged room, which requires treatment/re-skimming to repaint, plus damage to the curtains and damage to the fireplace itself would have cost at least the amount covered by the deposit of €520. The Tribunal therefore considers that the Appellant Landlord was justified in retaining the deposit.

6. The Tribunal does not however consider that the appeal fee should comprise part of its order, given that it comprises an administrative fee to enable the appeal which the Appellant Landlord was entitled to avail of, but that it was clear that two sides of the story had to be heard for the determination to be properly made. It does not consider in the circumstances that the cost of the appeal is one which can be attributed to the Respondent Tenants.

8. Determination:

Tribunal Reference TR0314-000595

In the matter of Catherine O'Neill (Landlord) and Pamela Smith, John Corcoran (Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

The Appellant Landlord was justified in retaining the entire of the deposit of €520 on the grounds of damage in excess of normal wear and tear in respect of the dwelling at 1 Rockmount Terrace, Mallow, County Cork.

The Tribunal hereby notifies the Private Residential Tenancies Board of this Determination made on 05/08/2014.

Signed:

A handwritten signature in black ink, reading "Patricia Sheehy Skeffington". The signature is written in a cursive, flowing style.

Patricia Sheehy Skeffington Chairperson

For and on behalf of the Tribunal.