



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/20/2211

Re: Property at 2 Don Street, Woodside, Aberdeen, AB24 2RS (“the Property”)

Parties:

Mr Joshua Barrie, Mr Andrew Graham, Mr Waleed Khalaf, Mr Niall Park, Mr Jay Purves, Mr Omid Sedaghatpanah, 20A Victoria Place, Stirling, FK8 2QT; 74 Lower Crescent, Comber, County Down, BT23 5BU; 219A Oldfield Lane North, Greenford, London, UB6 8PP; Halls, Village Way, Aylesbeare, Exeter, EX5 2BX; 4B Deemount Terrace, Aberdeen, AB11 7RX; 175 Memorial Road, Hanham, Bristol, BS15 3LH (“the Applicants”)

Mr Brian Davies, Mrs Loretta Davies, 8 Meadow Place, Aberdeen, AB24 2SL; 8 Meadow Place, Aberdeen, AB24 2SL (“the Respondents”)

Tribunal Members:

Paul Doyle (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application for a payment order shall be dismissed.

Background

1. On 29 September 2020 the applicants submitted form F, together with a copy of the lease between the parties, evidence of termination of the lease and evidence of payment of £310 by each of three of the applicants to the respondents in August 2019. A copy title sheet was lodged with the Tribunal which shows that the respondents are the heritable proprietor of the property.

The Case Management Discussion

2. A Case Management Discussion took place before the Tribunal by telephone conference at 10am on 5 January 2021. Mr Purves and Mr Barrie were present for each of the applicants. The respondents were both present. None of the parties is represented. This application is already linked to FTS/HPC/PR/20/2059, which involves the same parties. Both this application and FTS/HPC/PR/20/2059 were continued to a further Case Management Discussion so that the applications could be conjoined to FTS/HPC/ CV/ 20/2545.

3. A Case Management Discussion took place before the Tribunal by telephone conference at 10am on 15 February 2021. All of the applicants apart from Andrew Graham were present. There was no appearance by or on behalf of either of the respondents. All parties were notified of this Case Management Discussion by email on 11 January 2021.

Findings in Fact

4. The Tribunal made the following findings in fact:

(i) Five of the Applicants (and one other person (Cameron Dickson) who is not a party to this application) and the Respondents entered into a Tenancy Agreement for the Property on 1 August 2017. That tenancy endured until 31 July 2019 and did not provide for a tenancy deposit. On 1 August 2019, the parties entered into a new lease for the property. The lease dated 1 August 2019 provided for payment of a tenancy deposit.

(ii) The lease dated 1 August 2017 provided for rental of £1,860 per month and offers a conditional rent rebate on termination of the lease rather than a security deposit. Clause 3 of the lease dated 1 August 2017 contains the following

...No security deposit is payable. Provided tenants are fully up to date with their rent and provided that the house is returned as described in The Letter at the end of this lease, then the Landlord will give a rebate to the tenants of £1500...

(iii) The rent in terms of the Tenancy Agreement dated 1 August 2019 was £1,860 per month. To meet that rental, each of the applicants was required to pay £310 per month. On 1 August 2019 the first, third and fifth applicant paid the respondents £310.00 each. The respondents acknowledged the payments as "rent".

(iv) On 11 March 2020 the fifth applicant emailed notice to the respondents on behalf of all of the applicants that it was their intention to terminate the lease on 7 April 2020

(v) The fifth applicant left the property in April 2020. Some of the remaining applicants continued to occupy the property until 3 August 2020.

(vi) Omid Sedaghatpanah, the sixth applicant, moved into the property for the first time on 1 August 2019. He did not pay a tenancy deposit to the respondents. Mr Sedaghatpanah was not a party to the lease agreement signed in 2017.

(vii) None of the applicants paid a tenancy deposit to the respondents. The first five applicants were parties to the tenancy agreement signed on 1 August 2017. That tenancy agreement came to an end on 31 July 2017. The tenancy agreement signed on 1 August 2019 is a separate contract to the tenancy agreement signed on 1 August 2017.

(viii) I find that the applicants did not pay a tenancy deposit to the respondents. The applicants are not entitled to an order for repayment of sums which they have not paid.

Reasons for Decision

5. The definition of a tenancy deposit is found in section 120 of the Housing (Scotland) Act 2006, which says

(1) A tenancy deposit is a sum of money held as security for—

(a) the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or

(b) the discharge of any of the occupant's liabilities which so arise.

6. In *Cordiner v Al-Shaibany* 2015 SLT(Sh Ct) 189 it was held that an advance payment of rent was not a tenancy deposit, so that the related regulatory regime did not apply in that case.

7. For the first five applicants their position is that when the 2017 lease came to an end on 31 July 2019, they were entitled to a rebate of the last months rental, and those funds should have been used by the respondents as a tenancy deposit. The respondents' position is quite simply that no tenancy deposit was taken at the commencement of the 2017 lease, and despite the provisions of the lease dated 1 August 2019, no tenancy deposit was taken when that lease started.

8. Mr Sedaghatpanah's application is the easiest to deal with. He was not a party to the 2017 lease so that, on the applicants' own argument, he could not have any entitlement to a rebate of one month's rental. No reliable evidence is produced of payment of the tenancy deposit at the start of the August 2019 lease. Even on the applicants' own argument, the respondent did not have a duty to account to Mr Sedaghatpanah for any sums due under the 2017 lease.

9. As Mr Sedaghatpanah did not pay a tenancy deposit, he is not entitled to repayment of money that he had not paid in the first place.

10. For the remaining applicants their argument is flawed. To succeed, they would have to establish that there is some contractual link between the 2017 lease and the 2019 lease. There is no reliable evidence of a contractual link between the two leases. They are two separate contracts.

11. The applicants do not produce evidence that the conditions for repayment of one month's rental under the 2017 contract are met. One of those conditions is that the house is returned to the respondents. The weight of reliable evidence is that that fundamental condition was not met as the applicants remained in the property and signed a new lease.

12. None of the applicants paid a tenancy deposit as defined by the Housing (Scotland) Act 2006. On the facts as I find them to be, each applicant paid rental. Three of the applicants produce receipts for their rental payment made in August 2019. None of the applicants produce evidence of payment of the tenancy deposit.

13. In their application the applicants say (at section 8) that they produce

a confirmation of payment of the security deposit. Some deposits could not be referenced as bank accounts have since been closed.

14. In the written submissions on 31 January 2021 the applicants' position changes. It is there that they say

All tenants signed a lease that required payment of a deposit but there was never any request whatsoever demanding a payment of said deposit. This was because the rebate from the 2017 lease was agreed to be used as the deposit.

15. What the applicants say in their written submission of 31 January 2021 is contradicted by the unambiguous terms of the lease agreement 1 August 2019, which says

A security deposit of £1860 is payable.

The lease does not say that a security deposit has been received. It says that the security deposit is payable.

16. As no tenancy deposit was paid the applicants application for repayment of sums which, on their own evidence, had not been paid cannot succeed.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application for a payment order shall be dismissed.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

**P. Doyle
Legal Member**

Date 15 February 2021