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 Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/23/3368

Re: Property at 46A Blacket Place, Edinburgh, EH9 1RJ ("the Property")

Parties:

Miss Ileana Lucia Selejan and Mr Michael Asbury, 25 Preston Cross Cottages, Prestonpans, EH32 9EJ ("the Applicants")

Mr Martin Gill and Mrs Patricia Cacho, Ensenada 7,, Urbanizacion Alfamar puerta 25, 04149, Agua Amarga, Nijar., Almería, Spain. ("the Respondents")

Tribunal Members:

Shirley Evans (Legal Member)

Decision

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

Background

1. This is an application originally dated 30 August 2023 brought in terms of Rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations") for the return of a tenancy deposit.

2. The application was accompanied by a letter dated 30 August 2023 addressed to the Tribunal, a Private Residential Tenancy agreement between the parties commencing 1 October 2022, numerous emails between the parties from 30 August 2022 to 1 June 2023, various undated text messages, an email and letter dated 31 May 2023 from Living Rent to the Respondents and an email dated 6 June 2023 from Gilston Gray solicitors to Living Rent.

3. The letter dated 30 August 2023 contained a Description of Dispute which stated that the Applicants' understanding and the "original agreement" with the Respondents was that utilities would be paid as averaged out on a yearly basis.

The dispute arose as the Respondents were claiming the Applicants had to clear the balance on the utility account for their usage of gas and electricity at the end of the tenancy.

4. On 25 October 2023 the Applicants forwarded an amended application specifying that they sought payment of £1071.17 from the £1400 deposit as they had only received £328.83. The application stated the Respondents retained their deposit. They also lodged an adjudication decision from Safe Deposits Scotland awarding the return of £1071.17 to the Respondents from the £1400 deposit being the total of utility charges outstanding at the end of the tenancy.

5. The Respondents lodged written representations on 19 January 2024 with reference to firstly Clause 26 of the tenancy agreement that the Applicants were liable to pay for utilities and secondly to the adjudicator's decision. Various Whats App messages, photographs and an advert for let of the Property were attached.

6. In response to those representations, on 22 January 2024, the Applicants lodged further submissions in support of their application to the effect that Clause 26 of the tenancy agreement contradicted a previous statement that an "*estimated average consumption over a twelve month period with the intention that payments made during the summer months when consumption is lower will offset periods of peak usage during winter months".*

Case Management Discussion

7. A Case Management Discussion proceeded by teleconference call on 1 February 2024. Both Applicants appeared. Miss Selejan advised she would make submissions on Mr Asbury's behalf also. The Respondents were represented by David Gray from Gilston Gray, solicitors. Both Respondents were in attendance.

8. The Tribunal had before it the application, the letter dated 30 August 2023 addressed to the Tribunal with the Description of Dispute, the Private Residential Tenancy agreement between the parties commencing 1 October 2022, numerous emails between the parties from 30 August 2022 to 1 June 2023, various undated text messages, the email and letter dated 31 May 2023 from Living Rent to the Respondents, the email dated 6 June 2023 from Gilston Gray solicitors to Living Rent, the adjudicator's decision from Safe Deposits Scotland, various Whats App messages, photographs, letting advert, the Respondents' submissions dated 19 January 2024 and the Applicants' submissions in response dated 22 January 2024. The Tribunal considered these documents.

9. The Tribunal asked Miss Selejan to confirm that its understanding of the application was correct, namely that the Applicants were seeking the return of £1071.17 from their £1400 deposit. Miss Selejan confirmed that understanding

was correct. She explained the original agreement with the Landlords was that the utility bills would be averaged out over a twelve month period. The Tribunal referred Miss Selajan to Clause 26 of the tenancy agreement which provided that "*The Tenant undertakes to ensure that the accounts for the Let Property of approximately [gas/electricity; £162.25 per month] all sums that become due for these supplies relative to the period of the tenancy are paid promptly. The Tenant agrees to make the necessary arrangements with the suppliers to settle all accounts for these services at the end of the tenancy."* Miss Selejan submitted the clause was not clear and contradicted the original agreement with the Respondents. She explained that they had understood the utility charges would be averaged out over twelve months. The tenancy lasted only from 1 October 2022 – 1 June 2023 as they were under financial stress to meet the utility charges. The Tribunal explained it could only consider the tenancy agreement between the parties and that it had no jurisdiction to look at any prior agreement which may have been made with the Respondents in relation to the payment of utility charges.

10. The Tribunal noted that Clause 10 of the tenancy agreement provided that a £1400 deposit be paid. Further Clause 10 provided that "*Where it is provided in this Agreement that the Tenant is responsible for a particular cost …… and the Tenant fails to meet that cost, the Landlord can apply for reasonable costs to be deducted from any deposit paid by the Tenant* ". The Tribunal referred Miss Selejan to the adjudicator's decision from Safe Deposits Scotland. It appeared to the Tribunal that the Respondents had done just that, namely applied for costs for the utilities of £1081.16, which was the sum in dispute, to be deducted from the deposit through the adjudication process under the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 Regulations"). It also appeared to the Tribunal that the adjudicator had already determined the matter before the Tribunal and had decided that in terms of Clause 26 of the tenancy agreement the Applicants were obliged to pay for utilities to the end of the tenancy amounting to £1071.17. With reference to the adjudicator's decision, the Tribunal pointed out that the adjudicator had determined that £1071.17 of the £1081.16 of the disputed amount be returned to the Respondents with £9.99 returned to the Applicants under the 2011 Regulations. When questioned by the Tribunal as to whether the Applicants had sought a review of the adjudicator's decision in terms of the 2011 Regulations if they were of the opinion that the adjudicator's decision was wrong based on an error of fact, Miss Selejan advised they had not asked for such a review. The Tribunal questioned what power it had to interfere with or overturn the adjudicator's decision which was binding on both parties.

11. Mr Asbury submitted they had asked the Respondents for clarification of how the utilities would be paid. He submitted they had been misled by the Respondents. Miss Selejan submitted they had misunderstood the contract which contradicted the previous agreement. This matter had had consequences for her health. She felt the Respondents had not been forthcoming and that they had been treated unfairly. Despite taking advice from Living Rent and the Citizens' Advice Bureau, they would not sign any tenancy again without taking advice from a solicitor.

12. In response, Mr Gray for the Respondents submitted that an adjudicator had already determined how the tenancy deposit was to be distributed at the end of the tenancy in terms of the 2011 Regulations. Clause 26 of the tenancy agreement was clear and unequivocal and provided that the Applicants had to pay for the utilities they had used up to the date of termination. The Applicants may have misunderstood the position. However, there was no merit to the application. The adjudicator's decision was binding on the Applicants and the Tribunal had no power to overturn that decision.

Reasons for Decision

13. It is not unusual for tenants to apply to the Tribunal for the return of a tenancy deposit where the landlord has not placed the deposit in one of the three approved schemes in terms of the 2011 Regulations. In those circumstances the Tribunal has power to determine whether some or all of a tenancy deposit be returned to the tenant. However in this case the Respondents had placed the tenancy deposit with Safe Deposits Scotland and that deposit had been protected under the 2011 Regulations. It was clear to the Tribunal with reference to the adjudicator's decision lodged by the Applicants that there had been a dispute between the parties relating to £1081.16 of the £1400 deposit at the end of the tenancy. That dispute related to the amount of utility costs the Applicants were liable to pay at the end of the tenancy agreement. That was the same dispute that was before the Tribunal. The adjudicator had already determined after consideration of the correspondence provided by the parties and the tenancy agreement that the Applicants would be liable to pay for the outstanding balance for utility bills at the end of the tenancy and awarded the Respondents £1071.17 to cover these.

14. The application before the Tribunal erroneously refers to the Landlord retaining the deposit. That is not the case. The deposit was distributed by Safe Deposits Scotland after adjudication under the 2011 Regulations. That is different from a Landlord retaining a deposit which is not protected. The application also states *"The Landlord has acted in an unfair and dishonest manner not observing our agreement".* The Tribunal only has jurisdiction to consider what has been agreed under a tenancy agreement. Clause 26 of the tenancy agreement is clear that the Applicants have to settle all utilities at the end of the tenancy. Regardless, the matter before the Tribunal has already been determined by an adjudicator under the 2011 Regulations. Although the Applicants feel they have been treated unfairly, they did not seek a review of the adjudicator's decision. They had a right to do so under the 2011 Regulations if they felt the adjudicator had made an error in fact or an error in law or both. The Applicants state in the application that "*We have received £328.83 out of a £1400 deposit. We ask for the remaining £1071.17 from the deposit be returned in full".* That however is exactly how the adjudicator determined the deposit be distributed. That decision was unchallenged by the Applicants, although they clearly feel aggrieved by it. They are bound by that decision. The Tribunal has no power to interfere with or overturn the adjudicator's decision.

Decision

15. The Tribunal accordingly determined to dismiss the application.

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.

Shirley Evans

A Test Member

Legal Member **Date**