

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 Regulation 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

Chamber Ref: FTS/HPC/PR/18/2294

Re: Property at 7 The Chanonry, Aberdeen, AB24 1RN ("the Property")

Parties:

Miss Vivien Madeleine Kargoll, Miss Sophia Maria Simmill, Mr Jan Robin Hendricks, Arayicibas Sokak 3, 34710 Kadikoy, Istanbul, Turkey; 562 Kings Street, Aberdeen, AB24 5SR; Flat 9, 375 Union Street, Aberdeen, AB11 6BT ("the Applicants")

Mr Abdul aka Ed Salaam, 7A The Chanonry, Aberdeen, AB24 1RN ("the Respondent")

Tribunal Members:

Valerie Bremner (Legal Member) and Linda Robertson (Ordinary Member)

Decision

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

This Application proceeded to a hearing on 7 March 2019 and this hearing was continued until 18 April 2019 to allow for the hearing of any evidence and representations as required as there was insufficient time to conclude matters on 7 March 2019.

On 7 March the Applicants Sophie Maria Simmill and Jan Robin Hendricks were present and the Applicant Vivien Madeleine Kargoll was absent. All three were represented by Miss Meegan Anderson of the Aberdeen Law Project. On the second day of the hearing on 18th April Miss Anderson was present to represent all three Applicants but of the Applicants themselves only Mr Jan Robin Hendricks was present. The Respondent Mr Salaam was present on both days of the hearing as was his son Shahid Salaam who represented him.

Documentation

The Tribunal had sight of all of the paperwork lodged by both parties in advance of the initial case management discussion in January 2019. In addition to that the Tribunal had sight of further written representations on behalf of the Applicants in advance of the hearing together with a document said to be a statement of a previous tenant. On behalf of the Respondent the Tribunal had sight of a letter dated 7th February from the Respondent together with a number of photographs, copies of text messages, a copy of a lease and correspondence regarding utility bills. In addition to those the Respondent submitted another letter dated 9th February 2019. Prior to the second day of the hearing the Applicant's representative submitted further written representations and the Respondent submitted a letter dated 8th April 2019 together with estimates, photographs and handwritten notes regarding the payment of rent and deposits for the property.

On the first day of the Hearing the Tribunal considered the relevance of certain documentation to the Application. The Respondent had lodged photographs, letters and invoices which appeared to relate to the condition of the property and the way in which the Applicants had conducted themselves during the tenancy. It was explained to the Respondent that these issues and any money said to be outstanding were not issues that the Tribunal could consider as these did not relate to the issue of the apparent non-payment of deposits into an approved scheme in terms of the Regulations. In turn this meant that paragraph 6 of the Applicant's first written submissions lodged in advance of the first day of the Hearing which related to these issues would not be considered.

The only other document to be considered at this stage was a statement lodged by the Applicants said to be from a former tenant at the property. This was discussed and the Applicant's purpose in lodging it appeared to be to raise the issue of a deposit not being paid into a scheme during a previous tenancy at the property. After allowing parties to make representations on the issue the Tribunal was not prepared to consider that this statement was relevant to consideration of the question of the payment of deposits into an approved scheme for the applicants in this matter. At this stage the Respondent accepted that he could be described as an experienced landlord as he said he had been renting property for a few years.

The Issues in Dispute

It was clear that there was a dispute between parties on the question of the end date of Miss Simmill's tenancy, whether all parties had paid a deposit, as the Respondent did not accept that Miss Kargoll had ever paid one and what reasons should be taken into account by the Tribunal in deciding any sanction to be imposed on the Respondent for the failure to place deposit funds into an approved scheme. It was also clear that Mr Salaam was not the registered landlord for the property with the local authority and that the registered landlord was one of his sons. He described himself as a Trustee at certain times during the first day of the hearing and for this reason the Tribunal considered this issue as one which had to be considered and the

Applicant 's representative Miss Anderson was invited to make representations on this issue for the second day of the hearing.

The Tenancy of the Applicants

The Tribunal heard representations and evidence on this issue. For the Applicants it was stated that Miss Simmill had contacted the Respondent seeking that she and Miss Kargoll could take on the tenancy for the property after the flat had been viewed in May 2017. The contact by text had indicated that initially Miss Simmill and Miss Kargoll would occupy the flat with Miss Simmill leaving in January 2018 when Mr Hendricks would move into the property in her place. The Applicants' position was the lease gave a start date of 1 August 2017 with an end date of 30th May 2018. Whatever the lease said it was clear from both parties that Miss Simmill and Miss Kargoll moved in in September 2017. Miss Simmill agreed with the Respondent that she would vacate the property in December 2017 and it was not in dispute that she paid rent until the end of December 2017. It was also not in dispute that she had vacated the property on 18th December and her key had been returned to the Respondent. It was not in dispute that she paid no rent for any period after December 2017.

Whilst the facts of the timing of Miss Simmill's departure from the property were not in dispute the issue that arose from this was whether her tenancy had ended when she moved out in December 2017 or if her tenancy continued until 30th May 2018 when the tenancy of Miss Kargoll and Mr Hendricks was ended. This had a bearing in respect of whether her application for sanction under the 2011 Regulations was time barred or not.

For the Applicants Miss Anderson referred to the first written submissions of the Applicants and in particular to paragraph 2 on this point. She suggested that the application runs with the tenancy and referred to Regulation 2 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. She suggested that since all of the Applicants had signed the same lease and that Miss Simmill's name had remained on the lease until its termination at 30th May 2018 that Miss Simmill was protected by Regulation 2 and could apply to the Tribunal within three months of the 30th of May 2018 and not within 3 months of 31st December 2017 when she stopped paying rent.

The Tribunal had sight of a typed letter from Miss Simmill dated 13 February 2018 to the Respondent seeking return of her deposit and seeking clarification of whether it was protected in which she described herself as a former tenant.

The Tribunal also had sight of a typed letter from Miss Simmill to the Respondent dated 22 March 2018 again describing herself as a former tenant but giving formal notice of the end of her tenancy and indicating that she had moved out in December 2017.

For the Respondent he was very clear that Miss Simmill's tenancy had ended in December 2017 and her application was time barred not having been lodged within 3 months of that date.

Payment of Deposits

For the Applicants Miss Anderson and Miss Simmill advised how the flat was secured by the Applicants. Miss Simmill had secured the flat after viewing it and contacting the Respondent. The Tribunal had sight of a text message she had sent to the Respondent in which she set out the details of who was intended to live at the property including the fact that Mr Hendricks was to take her place in January 2018. She had paid the sum of £990 in May 2017 to secure the property and this was she said made up of the two deposits of £330 from both her and Miss Kargoll. The remaining £330 was half of the first month's rent for each of Miss Simmill and Miss Kargoll. The Tribunal had sight of a copy of a bank transfer dated 19 May 2017 in the sum of £990 to a Mr A Ali 7 the Chanonry, Old Aberdeen. This transfer was labelled "Deposit and Rent for August". Miss Simmill indicated that Miss Kargoll had reimbursed her for the payment of her deposit shortly after the transfer was made.

Miss Simmill recognised that the deposit payment, which she said came from both her and Miss Kargoll, was not from two separate bank accounts. She was of the view that she believed that the way this had been paid and the fact that the deposit payment came from both tenants had been explained to the Respondent and she said she had never been aware that the position was unclear.

The Respondent did not dispute that he had received this payment, which had been paid into an account in his family name, an account which he controlled. His position was that the payment was £660 to secure the flat and Miss Simmill had paid this for herself. He indicated that the remaining £330 was the first month's rent from Miss Simmill only. He said that he had never at any time received a deposit from Miss Kargoll.

There was no dispute between the parties that Mr Hendricks had paid a deposit in January 2018 and this was slightly less than the £330 required due to payment being made in euros. It was agreed that he later paid the small shortfall and that he had ultimately paid the full deposit of £330.

The Landlord

At the Case Management Discussion relating to this Application the Respondent had agreed that he was the Landlord for the property. On the first day of the hearing he referred to himself as a trustee and it was explained that one of his sons was the Registered landlord with the local authority. The Tribunal requested the Applicants' representative to address this issue for the second day of the Hearing and this was done by means of written representations which were sent in advance of the second day of the Hearing. Miss Anderson asked the Tribunal to have regard to these when deciding on this issue.

On the second day of the hearing the Respondent explained that he was the Trustee for a family trust, which owned the property. He and his family lived upstairs and he took responsibility for renting out the property and all matters relating to it.

The Non Payment of Deposits into an Approved Scheme

The Respondent did not dispute the fact that deposits paid by the Applicants were not paid into any of the approved schemes. He explained that he was aware of the

schemes. He said he was not aware that a landlord had 30 working days from the start of tenancy to pay deposits into one of the schemes. He explained to the Tribunal that initially he could not pay the £660 into a scheme as it was paid a number of months before the lease was due to start and it was possible that the tenants might change their minds about moving in. When the tenancy started he explained the problems he had which he said related to the behaviour of the tenants and ultimately the way in which the property had been left by them. Although these issues were not relevant to the question of sanction, on the second day of the Hearing the Respondent advised that they were relevant to his position on why the deposits were not paid into a scheme so the Tribunal allowed him to refer to these. As a result the Tribunal also allowed the Applicants' representative Miss Anderson to make reference to paragraph 6 of the Applicants' original written submissions on these issues. The Tribunal had regard to that paragraph and without repeating it here it is clear that the Applicants dispute all of the issues surrounding the conduct of the tenancy and condition of the property as set out by the Respondent. It was not necessary for the Tribunal to decide as to whether these issues had arisen as it was not making a decision on any issues in respect of the property, only the issue of sanction for failure to pay the deposits into an approved scheme.

The Respondent also advised the Tribunal that part of the reason he had not paid the deposits into a scheme was also because he believed at the time he considered this it was too late to make the payment. He also said he had no forwarding addresses for the Applicants.

He explained that he was not an experienced landlord and had been involved in renting out property for a few years. When asked to clarify this he said that it was 5 or 6 years. He also said that he didn't always take a deposit in order to help out tenants who were students.

The Applicants' Representative referred the Tribunal to the initial written submissions on the question of sanction. She said the maximum sanction available to the Tribunal was £1980. The Respondent did not give any financial information except to say that he is a pensioner.

Findings in Fact

1. The Respondent is the landlord of the property at 7 The Chanonry, Aberdeen as defined by section 194 of the Housing (Scotland) Act 2006 and was acting in that capacity in respect of the tenancy agreement signed by the three Applicants.

2. The three Applicants signed the same copy of a lease agreement for the property which started on 1 August 2017 and ended on 30th May 2018. The deposit for the flat was £660 and each tenant was to pay rent of £330 per month. The lease contained no terms imposing joint or several liability on the part of the tenants. The tenancy of each of the Applicants was a relevant tenancy as defined in regulation 3(3) of the Tenancy Deposit Schemes (Scotland) Regulations 2011.

3.The property has two bedrooms and two keys were made available in terms of the lease.

4. The Applicant Miss Sophia Maria Simmill contacted the Respondent to confirm that three students would stay in the property with two staying in the first term of academic year 2017-2018 and one of these two being replaced by a third student in the second term.

5.Miss Simmill indicated that she would stay until January 2018 in the text communication sent by her to the Respondent. The message indicated that Applicant Miss Kargoll would rent the property for the full academic year. It was stated by Miss Simmill in her message that Mr Hendricks would replace her as a tenant in the property in the second term of the academic year starting in January 2018.Miss Simmill vacated the property on 18th December 2017 and paid no rent after the end of December 2017.Mr Hendricks moved in in January 2018.

6.Miss Simmill's tenancy at the property ended by agreement at the end of December 2017.She vacated the property on 18th December 2017.

7.As the application for all three Applicants was lodged with the Tribunal on 29 August 2018 her application is lodged outwith three months of the ending of her tenancy and is therefore time barred.

8.The tenancies of Miss Kargoll and Mr Hendricks at the property ended on 30th May 2018.

9.Miss Simmill paid a deposit of £660 to the Respondent on 19th May 2018.This deposit was made up of the deposits of £330 from both her and Miss Kargoll.

10.Mr Hendricks paid a deposit of £330 early in 2018.The first payment by bank transfer was made in euros and was short of the full sum required but the sum of £330 was paid in full.

11. The Respondent Mr Salaam did not pay any deposits received from the applicants into any of the Tenancy Deposit Approved Schemes.

Reasons for Decision

The issue of whether the Respondent was the landlord of the property was ultimately not in dispute but the Tribunal considered the matter, as the Respondent was not the landlord registered with the local authority.

Regulation 3 of 2011 Regulations specifies that a landlord who has received a deposit in respect of a relevant tenancy has certain duties imposed upon him including the requirement to pay the deposit into an approved scheme within 30 working days of the start of the tenancy. In terms of Regulation 2 the term " landlord " has the meaning attributed to it within the Housing (Scotland) Act 2006.Section 194 of that Act defines landlord as someone who lets a house under a tenancy.

Although at times during the hearing the Respondent referred to himself as a trustee it is clear that the evidence he gave as to his being the person who rented the property, dealt with the tenancy and all matters arising from it, clearly bring him within the statutory definition which applies here, irrespective of whether he is registered as the landlord or not.

In respect of the issue of Miss Simmill's tenancy and when it ended the Tribunal was of the view that this ended in December 2017 and not 30th May 2018 as was stated on the tenancy agreement. The Applicants' representative submitted to the Tribunal that the reference to a tenancy in Regulation 2 of the 2011 Regulations should run with the tenancy and not with specific tenants. The Tribunal considered the factual position as to Miss Simmill's tenancy as set out in evidence and representations. It was clear from the outset that she never intended to stay at the property beyond January 2018 and this was evidenced by her text message to the Respondent on 16th May 2017 when she stated that if the Applicants leased the property that she would occupy in the first term until January 2018 and that Mr Hendricks would not be at the property until January 2018, with Miss Kargoll being there for what was described as the full year. In fact Miss Simmill left the property in December by agreement with the Respondent. Both parties regarded her tenancy as being over at the end of December 2017 and she paid no further rent after that date. In fact she had moved out on 18th December 2017. It was clear from the evidence that she was no longer a tenant at the property with effect from the end of December 2017.

The unfortunate consequence of this was that Miss Simmill failed to lodge her application within three months of the end of her tenancy as required by regulation 9 of the 2011 Regulations and as such her application is time barred. The Tribunal understood that she may have wished to join in an application with the other Applicants but the Tribunal has no discretion as to this time limit for making an application to the Tribunal.

The issue of whether the Applicant Miss Kargoll had paid a deposit was also considered by the Tribunal. The Respondent was adamant that she had not done so at any stage. The deposit for the flat was £660 and Miss Simmill paid this and gave evidence to the effect that the sum she paid was on behalf of both her and Miss Kargoll who refunded her shortly afterwards. The total sum paid at the outset was £990 and Miss Simmill said this was the two deposits from her and Miss Kargoll and half the first month's rent for both of them. The Respondent although not disputing that he received this sum, was adamant that it came from Miss Simmill alone for the whole flat deposit and her first month's rent. On the balance of probabilities the Tribunal preferred the evidence and representations of the Applicants on this point and was of the view that it was unlikely that the Respondent would have allowed Miss Kargoll to move into the property had she paid no deposit. The Tribunal was therefore of the view on the evidence that all three applicants had paid a deposit of £330 to the Respondent.

The Tribunal required to consider the question of sanction against the Respondent who accepted that he had failed to pay the deposits into an approved scheme. The

Applicants' representative asked for the maximum sanction of three times the total deposit of £660, which was £1980.

The Applicants' representative referred the Tribunal to the written representations made by her and the case law referred to within these representations.

The Respondent had given a number of explanation for failure to pay the Deposits into an approved scheme. He said that had initially kept the £660 paid by Miss Simmill as it had been paid so far in advance he believed it was possible that the tenants would change their mind and not take up the lease. He also indicated that the difficulties, which he said he had with the Applicants and their conduct of the lease together with the condition of the property when they left contributed to his failure to secure the deposits in an approved scheme. He was clearly very upset and aggrieved regarding these matters, all of which were denied by the Applicants.

The Respondent also indicated to the Tribunal that he had been unaware of the time limit for lodging the deposits within 30 working days of the start of the tenancy although he was generally aware of the schemes. He also advised that at a certain point he felt it was too late for him to do this.

Before any sanction was imposed the Respondent's attention was drawn to an application for a Time to Pay Direction in terms of the Debtors (Scotland) Act 1987 as amended by the First Tier Tribunal Housing and Property Chamber (Incidental Provisions) Regulations 2019 and the Tribunal adjourned to allow him to complete the application. This was not presented to the Tribunal, as the Respondent did not have the information with him that he required to complete the application. The Respondent's attention was drawn to the Time to Pay Order which could be applied for at a later stage if deemed appropriate.

The only financial information, which the Tribunal had when making the sanction was that the Respondent was a pensioner.

In dealing with sanction the Tribunal was considering the application as far as Miss Kargoll and Mr Hendricks were concerned having already ruled that Miss Simmill's application was time barred.

In deciding on the amount of the sanction the Tribunal had regard to the representations of both parties. In particular the Tribunal had regard to the length of time the deposits paid by Miss Kargoll and Mr Hendricks were unprotected, the fact that the Respondent had in his own words been a landlord for a number of years and the reasons why he had failed to pay these deposits into a scheme. The Tribunal decided that a significant sanction was appropriate in this matter and sanctioned the Applicant in the sum of £1100.

Decision

The Tribunal held that the application as made by Applicant Sophia Maria Simmill was time barred in terms of Regulation 9 of the 2011 Regulations and accordingly dismissed the application as far as she was concerned.

The Tribunal sanctioned the Respondent in the sum of £1100 in total, to be divided equally between applicants Vivien Madeleine Kargoll and Jan Robin Hendricks.

The decision of the Tribunal was unanimous.

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.

V Bremner

18th April 2019

Legal Member/Chair

Date