Order of the Tenancy Tribunal

Residential Tenancies Act 1986 *Office of the Tenancy Tribunal*

Tenancy Tribunal at Wellington

Tenancy Address

18a Rochester Street, Wilton, Wellington 6012

Applicant

Full Name	
Benjamin Michael Knight	Tenant
Hannah Rachel Stone Salmon	Tenant
Cally Jane O'Neill	Tenant
Jenny Rowan McArthur	Tenant

Respondents

Full Name	
Exuberant Ltd trading as Quinvoic Property Management Lambton Quay	Landlord

Order of the Tribunal

The Tribunal hereby orders:

1. Exuberant Ltd trading as Quinvoic Property Management Lambton Quay to pay Benjamin Knight, Hannah Salmon, Cally O'Neill and Jenny McArthur the sum of $779.44 immediately calculated as follows:

Letting fee	$759.00
Filing fee reimbursement	$20.44
Amount payable by Tenant to Landlord	**$779.44**

(Sections 77(2)(k) and 78(1)(d) Residential Tenancies Act 1986)

Reasons:

Dated at Wellington on Thursday 22-Mar-2018 R Woodhouse, Adjudicator

1. The tenants claim that in the course of entering into a tenancy agreement with the 'landlord', that they were charged fees that the landlord did not have any legal ability to charge, in particular a letting fee of $759.00. Orders are sought including an order that the fee be refunded, and that exemplary damages be awarded, on the basis that the tenants consider they were charged key money, being a charge prohibited in the Act.

Background

2. I summarise the relevant background as follows:

    a. The owner of the property, Mark Roche, appointed Exuberant Limited, trading as Quinovic Lambton Quay (who I will refer to in this decision as Quinovic), to act as letting agent, in order to let these premises.

    b. The tenancy was advertised by both the owner, and Quinovic.

    c. The tenants confirm that acting on both advertisements, they viewed the tenancy. The viewing was facilitated by a Quinovic staff member.

    d. The tenants wanted to lease the property, and applied for the tenancy via the Quinovic website.

    e. While I am not certain of the date, the tenants say that when they contacted Quinovic, they were told verbally that they needed to pay $1,000.00, or the tenancy would be given to someone else. I record that I have not received any evidence from the Quinovic representative who was said to have made this statement.

    f. On 7 December 2017, Quinovic emailed the tenants, stating:

> *"We are happy to offer you the tenancy at 18 Rochester St Wilton.*
>
> *Please deposit $1,000 into BNZ [account number provided].This will allow us to go ahead and draw up the contract to be signed, and the balance deposited.*
>
> *Please send through a screen shot of the deposit as soon as possible."*

g. The tenants made the payment of $1,000.00 on 8 December 2017.

h. On 11 December 2018 the landlord emailed the tenants, providing a copy of the tenancy agreement. The tenancy agreement is a standard form 'Tenancy Services (MBIE)' Residential Tenancy Agreement. All details in the tenancy agreement record the landlord as Mark Roche. There is no reference to Quinovic as having any ongoing involvement in the tenancy. Importantly, the covering email with the tenancy agreement records:

> *"Attached is the tenancy documents for you to return and sign.*
>
> *2 weeks bond* *$1,320.00*
>
> *Initial rent 16th to 20th Dec* *$471.43*
>
> *Letting fee 1 weeks rent + GST* *$759.00*

Less deposit	*($1,000.00)*
Total to pay	*$1,550.43…..”*

i. The tenancy agreement (I understand) was signed and returned, the tenancy commenced, and ongoing payments and management of the property was performed by the owner, Mark Roche.

j. The tenants filed an application with the Tribunal. The Tenants state:

> *“…I am seeking the refund of a $759 letting fee paid to Quinovic Lambton Quay, with no contract, on December 8th…”*

Tenants position

3. The tenants consider that the $1,000.00 required and paid, was in fact key money. In that respect, the tenants consider that it was a payment that the landlord required to be paid before the tenancy would be confirmed. The tenants particularly refer to the email of 7 December 2017, which required the funds to be paid, before the tenancy agreement would be written up.
4. At the hearing, the tenants confirmed that when they were viewing and communicating with Quinovic about leasing the premises, they knew that Quinovic were acting as the letting agent for the owner.
5. The tenants consider that the Quinovic representative put the tenants under undue pressure to pay the money, otherwise the tenancy would be provided to other prospective tenants.
6. On the basis that the tenants do not consider there was any ability to charge the $1,000.00, the tenants consider it should be refunded.

Quinovic’s position

7. Quinovic was represented by Mr Khera.
8. The initial position of Quinovic (who is the sole respondent in this case), is that any dispute should sit with the owner as landlord, on the basis that Quinovic simply acted as letting agent.
9. The Quinovic disputes the claim that any of the $1,000.00 paid was key money. Quinovic consider that any money required to be paid, was legitimately required. Furthermore, Quinovic consider that any money paid, will be accountable by the owner of the property.
10. Mr Khera confirmed that $1,000.00 was received by Quinovic, which comprised a letting fee of $759.00, and the $241.00 balance was paid by to the owner.

Analysis

11. There are a number of particular issues to be considered in turn.

Does the Tribunal have jurisdiction to consider a claim against Quinovic?

12. The initial position taken by Quinovic was that the Tribunal did not have jurisdiction to consider a complaint against that company, as Quinovic were only acting as letting agents, and that any claim should be directed to the owner of the premise.

13. In an emailed application for adjournment of the hearing (the adjournment request was withdrawn at the hearing), Mr Khera states:

> *"We have checked our records and can confirm we do not manage this property.*
>
> *In the absence of the Rental / Tenancy agreement (which has also not been provided by the other party) I would request that our name be stuck off and or excused from the appearance."*

14. As advised at the hearing, I am satisfied that a claim can be considered against Quinovic for the following reasons.

15. The jurisdiction of the Tribunal is confirmed in section 77 of the Residential Tenancies Act 1986 ("RTA"), as relating to disputes between tenants and landlords.

16. The term 'landlord' is defined in section 2 of the RTA as follows:

> *landlord, in relation to any residential premises that are the subject of a tenancy agreement, means the grantor of a tenancy of the premises under the agreement; and, where appropriate, includes—*
>
> *(a) a prospective landlord; and*
>
> *(b) a former landlord; and*
>
> *(c) a lawful successor in title of a landlord to the premises; and*
>
> *(d) the personal representative of a deceased landlord; and*
>
> *(e) an agent of a landlord*

17. The term 'letting agent' is also defined in section 2 as follows:

> *letting agent, in relation to a tenancy, means a person who, in the ordinary course of business, acts, or who holds himself or herself out to the public as ready to act, for reward as an agent in respect of the grant or assignment of tenancies, whether or not that person carries on any other business*

18. There is no doubt that Quinovic was acting as the letting agent for the owner of the property. A letting agent will fall within the definition of a 'landlord' under the RTA, as they are firstly an agent of a landlord (Mark Roche), and furthermore, the definition of letting agent refers to that 'agent' of being involved with the grant of tenancies, which would fall within the landlord definition of being "the grantor of a tenancy." It is also important to recognise that the offer of the tenancy was made by Quinovic, meaning it was Quinovic that in my view 'granted' the tenancy to the

tenants. While Quinovic may well have been acting in the capacity of an agent, that of itself would not preclude a finding that it was Quinovic that granted the tenancy.

19. I find therefore, that Quinovic was a landlord as defined in the RTA for purpose of letting the property, and therefore the Tribunal has jurisdiction to consider a claim against Quinovic on that basis.

20. For completeness, it can be accepted that at the time the tenants signed the tenancy agreement, which recorded Mr Roche as the sole landlord, from that time the only landlord for these premises would be Mr Roche. In short, the function of the letting agent had come to an end.

Did Quinovic charge the tenants key money?

21. The term key money is also defined in section 2 of the RTA, as follows:

> *Key money means any sum of money demanded by way of fine, premium, foregift, reimbursement of expenses, administration charges, or otherwise as consideration for the grant, continuance, extension, variation, or renewal of a tenancy agreement, or for consent to the surrender or disposition of the tenant' s interest under a tenancy agreement or to a subletting by the tenant; but does not include any sum payable or paid by way of rent or bond*
>
> [Tribunals emphasis]

22. Section 17 of the RTA prohibits a landlord from requiring key money. That provision holds:

> *17 Requiring key money prohibited*
>
> *(1) Subject to subsection (4), no person shall, without the prior consent of the Tribunal, require the payment of key money in respect of—*
>
> *(a) the grant, continuance, extension, variation, or renewal of any tenancy agreement; or*
>
> *(b) the assignment of a tenant's interest under any tenancy agreement; or*
>
> *(c) the subletting of the whole or any part of the premises by a tenant.*
>
> *(2) ….*
>
> *(3) The requiring of key money in contravention of subsection (1) is hereby declared to be an unlawful act.*
>
> *(4) Subsection (1) shall not apply to any of the following:*
>
> *(a) any sum required or received for an option to enter into a tenancy agreement if the sum does not exceed 1 week's rent payable under the agreement, and, upon the option being exercised, the sum is refunded or is applied toward the rent:*
>
> *(b) any sum that the landlord is authorised by any other provision of this Act to require or receive:*

> *(c) any sum required to be paid by the tenant to or at the direction of the landlord in respect of any fee or other charge for services rendered by any solicitor or letting agent relating to the grant or assignment of the tenancy:*
>
> *(d) any payment of a prescribed class.*
>
> *[Tribunals emphasis]*

23. This case is very finely balanced, but I am not persuaded that the evidence overall, would support the $1,000.00 required 'deposit' was key money. That is for the single reason, that in the email from 7 December 2017 where that payment was required, Quinovic had confirmed that the tenancy would be granted to these tenants, where the email states that "We are happy to offer you the tenancy." In my assessment, by offering the tenancy to these tenants, the landlord was in effect granting this tenancy to the tenants.

24. Money required to be paid by the landlord after the tenancy has been granted cannot be key money, as that term is defined in section 2 of the RTA.

25. The tenant's argument was that, unless the $1,000.00 (deposit) was paid, then the landlord would not proceed to prepare the tenancy agreement. In my view, that is a separate consideration to whether the tenancy would be granted to the tenants. I consider that by offering the tenancy to the tenants (as per the 7 December 2018 email), that the landlord had agreed to grant the tenancy to the tenants. In order for there to be a legally binding agreement between the parties, then there was a further step that was required, which was that the tenants needed to accept the offer. Arguably, if the tenants replied accepting the offer of the tenancy, at that time a contract between the parties would arise, whether or not the 'deposit' was paid. If the either party breached any contractual obligations (what ever those may be), then that party could pursue a claim in the Tribunal.

26. I have considered whether the email of 7 December 2017 may be a conditional grant of the tenancy, conditional in the sense that the tenancy would only be granted if the $1,000.00 was first paid. If that was the case, then the payment would be key money, because then the tenancy would only be granted after the money was paid. However, I do not consider that is the case. The email began by stating the tenancy was offered to the tenants. The email does not say that the offer was conditional on payment of the 'deposit'.

27. For the above reasons, I find that the charge of $1,000.00 was not key money.

28. On the basis that I find the payment was not key money, I find therefore that exemplary damages cannot be awarded.

Can the $1,000.00 payment be ordered to be returned to the tenants?

29. The question then becomes whether the $1,000.00 payment can be ordered to be returned to the tenants.

30. The landlord's position is that $759.00 of that $1,000.00 fee was a letting fee, and the balance was paid to the landlord.

31. I cannot see that there is any ability for the landlord to charge the letting fee, because the landlord has produced no evidence to show it was part of the contract, and therefore the tenants were under no obligation to pay it.

Dated at Wellington on Thursday 22-Mar-2018 R Woodhouse, Adjudicator

32. On the basis of the evidence before the Tribunal, the first time a letting fee has been raised, was the email from 11 December 2017, which particularises the amounts to be paid, including a letting fee of $759.00. The landlord has produced no evidence to show that prior to the requirement that the tenants pay the $1,000.00 (the 7 December 2017 email), that part of the agreement was that the tenant would pay $759.00 for the letting fee.

33. As I have accepted above, the tenancy was offered by the landlord on 7 December 2017. It can be accepted that the tenants accepted the offer made by the landlord. Certainly, by paying the $1,000.00 fee on 8 December 2017, it can be accepted that the landlords offer was accepted, even if there was not other communication between the parties, such as the tenants saying to the effect that 'we accept your offer'.

34. Once the tenants had accepted the offer for the tenancy, the landlord cannot then later introduce further charges under the contract, such as letting fees. The situation is similar to that considered by the Tribunal in *David Martin trading as Martin Realty v Sue Schwamborn and Christian Mueller* [2011] NZTT 284WN. In that case, the landlord claimed via the Tribunal, that the tenants should pay $450 of letting fee. The Tribunal concluded that as that fee had not been agreed to as part of the contract, that there was no obligation on the tenants to pay the fee, and therefore it could not be imposed after the contract had been entered into.

35. Finding as I do that these tenants paid a letting fee, charged after the tenancy was granted and not established as part of the contract, I must conclude there was no lawful basis for that fee to be charged, and it must accordingly be refunded to the tenants.

36. With respect to the residual $241, I accept that was paid to the owner, and I accept it has been accounted for against rent (as reflected in the 11 December 2017 email, reflecting the 'deposit' as used as a credit). It is not unusual for rent payments to be required in advance, and made prior to the tenancy commencing.

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