



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/21/0419

Re: Property at 22/6 Gillespie Crescent, Edinburgh, EH10 4HU (“the Property”)

Parties:

Miss Jelena Sofronijevic, Fleming House, 134 Renfrew Street, Glasgow, G3 6ST (“the Applicant”)

Mr Mark Fortune, whose current whereabouts are unknown (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member) and Frances Wood (Ordinary Member)

Decision

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

Background

[1] This was an application for a payment order dated 23rd February 2021 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant originally sought in her application repayment of a deposit of £300.00, which she paid to Edinburgh Rent Limited in respect of a proposed tenancy of the Property.

[3] The Applicant provided with her application copies of correspondence on the website Gumtree, various text, e-mail and whatsapp correspondence, photographs of the interior of the Property and screenshots.

[4] Various unsuccessful attempts had been made to serve the application, ultimately resulting in the Applicant substituting the Respondent in place of the original Respondent named in her application, Edinburgh Rent Limited, and a request for service by advertisement which was granted by the Tribunal.

[5] That substitution of the Respondent in place of the original Respondent, Edinburgh Rent Limited, was made in terms of Rule 32 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended by the Applicant on 22nd April 2021, at which time the Applicant also amended the application in terms of Rule 14A of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended to substitute the address of the Property for that originally stated in the application of 22/5 Gillespie Crescent, Edinburgh.

[6] Case Management Discussions took place with differently constituted Tribunals on 16th April and 29th November 2021, and the Tribunal also issued a number of directions. The Tribunal noted the terms of the detailed Case Management Discussion notes and directions, which it does not repeat in this decision.

The continued Case Management Discussion

[7] A continued Case Management Discussion was held at 10.00 on 21st March 2022 by Tele-Conference. The Applicant did not participate, but was represented by Mr Christman, solicitor. The Respondent participated, and was not represented.

[8] The Tribunal confirmed with Mr Christman that the Applicant's position was as follows. She had noted an advert on the Gumtree website advertising a room for let in a flat which shared facilities with other tenants. The advert gave contact details for interested parties for someone called George.

[9] The Applicant contacted George, and after some dialogue conducted remotely by text and e-mail, viewed and agreed to let the Property. George advised the Applicant that she required to pay a £300.00 deposit to Edinburgh Rent Limited, and she duly did so. The Applicant provided evidence of that payment to Edinburgh Rent Limited.

[10] When the Applicant arrived to take entry to the Property on 5th October 2020, she found that the Property was in an unsatisfactory condition. It had not been cleaned, was filthy, and unfit for habitation. She complained in phone calls and texts to George, and the exchange became extremely heated before the Applicant left the Property advising that she was not prepared to accept the Property in its current condition.

[11] The Tribunal queried with Mr Christman the basis upon which the Applicant now sought repayment from the Respondent, as opposed to Edinburgh Rent Limited, to whom she had paid the deposit. Mr Christman explained that the application was now against the Respondent, upon the sole basis that he was the heritable proprietor of the Property in terms of the title deeds for the Property.

[12] The Respondent raised a number of challenges to the competence of this application, but the first of these was that as it was not to him that the deposit was paid, nor was he the Applicant's landlord, the application should be dismissed.

[13] The Respondent candidly explained to the Tribunal that he owned a number of properties in Edinburgh which he rented out. As a result of previous legal difficulties which he had suffered after being prosecuted and subjected to an unsuccessful proceeds of crime application by the Crown, he had quite deliberately arranged his personal business affairs in such a way that he took a "hands off" approach to the properties, and had no direct involvement in renting them out or in relation to their management.

[14] The Respondent advised the Tribunal that he resided in France, and that the Property, of which he was heritable proprietor, had been rented by him to Edinburgh Rent Limited, a private limited company of which he readily acknowledged he was a director. However, Edinburgh Rent Limited were not his letting agent, but rather his tenant. The company paid him a rental for the Property, and it then sub-let the Property and managed the sub-lease of the Property with the tenants of the Property.

[15] The Tribunal noted the terms of a letter sent by Edinburgh Rent Limited to the Tribunal dated 29th November 2021, which noted that the original Respondent in this application had been changed to the Respondent. The letter explained that "the contractual obligations are in law between Edinburgh Rent Ltd a company registered in Scotland SC570941 and Ms Jelena Sofronijevic. We understand from previous papers received Ms Sofronijevic confirmed payment was made to Edinburgh Rent Ltd and that accommodation was arranged via our company and with our company. All monies paid from Ms Sofronijevic were paid to the company Edinburgh Rent Ltd, no monies were or have been paid to Mr Fortune. We are not an agent for Mr Fortune, leases and licences are issued by Edinburgh Rent Ltd as its own legal identity and as such Edinburgh Rent Ltd are the landlord."

[16] The letter goes on to further explain that "Edinburgh Rent Ltd have a contract with Mr Fortune to lease from him on a commercial licence the property at Gillespie Crescent and others... We do not operate as a letting agent or other in relation to Mr Fortune and rent collected is not passed to Mr Fortune, indeed should the property remain empty Edinburgh Rent Ltd are still under contract to pay Mr Fortune."

[17] Mr Christman's primary position was that Mr Fortune was the correct Respondent in this application, as he was the heritable proprietor of the property and therefore the landlord. In response to the Tribunal's enquiry, Mr Christman conceded that he was not familiar with the principles of the law of agency relating to a third party contracting with an agent of an undisclosed and unidentified principal.

[18] Mr Christman invited the Tribunal to direct the Respondent to produce any contracts which he had with Edinburgh Rent Limited, upon the basis that it was for Mr Fortune to prove that he was not the landlord in relation to this matter.

[19] Mr Christman indicated that if the Tribunal did not accept his submission, and was minded to dismiss the application, then his secondary position was that the Tribunal should allow the Applicant to amend the application by either adding or substituting

Edinburgh Rent Limited as a Respondent in terms of Rule 32 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Statement of Reasons

[20] The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

“First-tier Tribunal's jurisdiction

- (1) In relation to civil proceedings arising from a private residential tenancy—
- (a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
 - (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
- (a) the prosecution of a criminal offence,
 - (b) any proceedings related to such a prosecution.”

[21] The Tribunal accordingly has jurisdiction to hear civil proceedings arising from a private residential tenancy such as that *prima facie* between the parties in this application on the basis of the Applicant's submissions. The Tribunal would note that the Respondent in one of his subsidiary submissions did not accept that a private residential tenancy had been entered into, but rather a short-term holiday let.

[22] The Applicant asserts that the Respondent is liable to repay her the tenancy deposit which she paid in respect of the Property. As no lease agreement was entered into, no first payment of rent was made by her, and she did not enter into possession of the Property but rather refused to do so, it is arguable that her claim in relation to the deposit paid is truly one of *repetition* which would not fall within the jurisdiction of the Tribunal. However, the Tribunal did not hear submissions on that point, and did not require to reach a conclusion on it standing its decision on whether the Respondent is under any legal duty to repay the money.

[23] The Tribunal concluded that the Respondent is under no such duty for the following reasons. The Applicant proceeded upon the basis set out in paragraphs 8 to 10 above. She does not suggest that she ever had any discussions with the Respondent, nor that she entered into any agreement with him. Critically, it was her position that the payment which she made in respect of the Property was to Edinburgh Rent Limited, which is a private limited company and accordingly has its own legal identity separate from those who work for it, manage it, or own it (see, for example, *Glog & Henderson – The Law of Scotland (14th Ed.)* at paragraph 46.01).

[24] The Tribunal did not accept Mr Christman's submission that it was for the Respondent to prove that he was not the landlord of the Property with respect to the Applicant. Rather, the onus of proof is upon the Applicant to prove that the Respondent was her landlord. That she did not offer to do.

[25] The party from whom the Applicant might seek the return of the deposit, is *prima facie* the party to which she paid that, being Edinburgh Rent Limited. The fact that the Respondent is the heritable proprietor of the Property is only of assistance to the Applicant if Edinburgh Rent Limited in entering negotiations regarding the lease of the Property to the Applicant was acting as the Respondent's agent.

[26] There are two difficulties with that proposition. Firstly, the Tribunal has received a letter from Edinburgh Rent Limited referred to, and the critical terms of which are repeated, in paragraphs 15 and 16 above. That letter clearly confirms that Edinburgh Rent Limited was not acting as the Respondent's agent when it received payment from the Applicant, but rather was acting as principal in relation to the proposed let of the Property.

[27] Even if Edinburgh Rent Limited were the Respondent's agent (which both it and the Respondent state it was not), then where an agent contracts ostensibly as principal, the agent will be bound in a contract with the third party. The third party, when he becomes aware of the existence of the principal, may opt to sue either the principal or the agent (see, for example, *Gloag & Henderson – The Law of Scotland (14th Ed.)* at paragraph 18-31). In this application, therefore, even upon the Applicant's hypothesis that Edinburgh Rent Limited was the Respondent's agent, it clearly on her own submission contracted ostensibly as principal in circumstances where she only found out about the Respondent's ownership of the Property after bringing this application. That being so, Edinburgh Rent Limited remains potentially liable for repayment of the deposit. The Applicant, however, would require to prove that Edinburgh Rent Limited was acting as the Respondent's agent, which she does not offer to do, in order to opt to sue the Respondent.

[28] Secondly, the fact that the Respondent is the heritable proprietor of the Property does not of itself automatically mean that he was her landlord, as was submitted on her behalf. Where sub-letting takes place, there is the original relationship between the head landlord and the principal tenant, the relationship between the principal tenant or mid-landlord and the subtenant and the relationship between the head landlord and the subtenant. The head lease and the sublease are, of course, two distinct contracts. There is no contract between the head landlord and the sub-tenant (see, for example, *Rennie – Leases (SULI)* at paragraphs 18-40 to 18-43), and as a general rule no right of action lies between them arising out of the sub-lease (see, for example, *Stair Memorial Encyclopedia – Landlord and Tenant (2nd Reissue)* at para 308).

[29] The Applicant is not in a position to prove that the Respondent was her landlord, nor that he is responsible for repayment of the money which was paid to Edinburgh Rent Limited. For those reasons, this application must be dismissed.

[30] The Tribunal does not consider it would be consistent with the overriding objective to deal with proceedings justly in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, to allow the Applicant to add or substitute Edinburgh Rent Limited to this application as a Respondent at this point. This application relates to events on 5th October 2020, and the application was dated 23rd February 2021. It has been before the Tribunal for thirteen months, and the Tribunal has held three Case Management Discussions and

issued a number of directions. The application was originally brought against Edinburgh Rent Limited as Respondent. The Applicant, acting under legal advice, requested to substitute the Respondent for the original Respondent by letter to the Tribunal dated 22nd April 2021, which request was granted. The Tribunal considered it would not be just at this late stage to allow the Applicant to reverse what she had previously done. If so advised, the Applicant is not prohibited from raising a fresh application for return of the money which she paid to Edinburgh Rent Limited.

[32] As earlier noted, the Respondent made a number of other submissions regarding the competency of the application, which the Tribunal did not require to address in light of its decision to dismiss the application for the above reasons.

Decision

[33] For the above reasons, the Tribunal dismissed this 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.

Neil Kinnear

21st March 2022

Legal Member/Chair

Date