



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Housing (Scotland) 2014

Chamber Ref: FTS/HPC/CV/23/0990

Re: Property at 22 2F3 Leith Walk, Edinburgh, EH6 5AA (“the Property”)

Parties:

Mr Mark Stubbs, 99 Tuddenham Avenue, Ipswich, Suffolk, IP4 2HG (“the Applicant”)

Ms Trinity Patel, 22 2F3 Leith Walk, Edinburgh, EH6 5AA (“the Respondent”)

Tribunal Members:

Gillian Buchanan (Legal Member) and Angus Lamont (Ordinary Member)

Decision (in absence of the Respondent)

At the Case Management Discussion (“CMD”), which took place by telephone conference on 13 March 2024, the Applicant was present (supported by his wife) and was represented by Mr Scott Stevenson of Clarity Simplicity Limited. The Respondent was neither present nor represented. A trainee of Mr Stevenson’s firm also observed.

The CMD was in respect of this matter and the related case bearing reference FTS/HPC/EV/23/0989.

The tribunal was satisfied that the requirements of Rule 24(1) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”) had been complied with relative to the Respondent having received notice of the CMD and determined to proceed in the absence of the Respondent in terms of Rule 29.

The Tribunal also had regard to emails from the Respondent’s representative (her father) Mr Pankaj Patel dated 6 February and 4 March 2024, both of which made it clear that he was aware of the CMD scheduled for 13 March 2024 and had elected not to participate beyond his written submissions.

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

Background

A CMD had previously taken place on 18 September 2023 in respect of this application and the related case bearing reference FTS/HPC/EV/23/0989. Orders were then granted in favour of the Applicant in respect of both applications. The Respondent, per her representative, subsequently applied to the Tribunal to recall both orders in terms of Rule 30 of the Rules, which applications were granted by the Tribunal. The Tribunal also ordered that a fresh CMD be assigned in both applications. The CMD was therefore assigned for 13 March 2024.

Written Submissions

Prior to the CMD on 18 September 2023 the Tribunal had received the following from the Applicant's representative:-

- i. Email dated 5 September 2023 with attachments; and
- ii. Email dated 8 September 2023 with attachments.

The Tribunal had also received from the Respondent's representative the following:-

- i. Email dated 7 September 2023;
- ii. Email dated 9 September 2023 with attachment; and
- iii. Email dated 11 September 2023 with attachment.

Subsequent to the previous orders being recalled and prior to the CMD on 13 March 2024 the Tribunal received the following additional submissions:-

- i. From the Respondent's representative – emails dated 6 February and 4 March 2024; and
- ii. From the Applicant's representative – email dated 20 February 2024.

The Tribunal had regard to all of these submissions in reaching decisions on both applications.

The Case Management Discussion

At the CMD Mr Stevenson and the Applicant made the following oral submissions:-

Mr Stevenson stated that the Respondent is still in occupation of the Property and has made no payment of rent to the Applicant since July 2022.

The "Lodger Agreement"

With regard to the Lodger Agreement dated 1 March 2022, Mr Stevenson stated that the document is unconventional in its terms and not as the Tribunal would ordinarily expect to see. The Property is the only Scottish property which the Applicant rents out and at the time of entering into the Lodger Agreement he was unaware of the applicable legislation. The Applicant first consulted Mr Stevenson's firm in June 2022 to take steps to end the arrangement with the Respondent.

Mr Stevenson explained that prior to entering into the Lodger Agreement with the Respondent the Applicant used the Property for work purposes. The Property was not his permanent place of residence. The Applicant said he would reside there from time to time on a temporary basis when working freelance in the Edinburgh area. He previously had long-term roles within the area. He would live in the Property for two

weeks and would then go back down south to England for a few weeks before returning again, and so on.

The Property was purchased by the Applicant in June 2015 for the purpose already described and the Applicant stated that his daughter was also to be applying to attend Edinburgh University so she could also live there during her studies.

When COVID took hold the Applicant dealt with his business affairs remotely from Suffolk.

By March 2022 the Applicant had no role in Scotland and the Property was not required for work purposes at that time. The Property was still used for personal reasons and his family used it too. For example, the Applicant's sister used the Property prior to the Respondent moving in.

Subsequent to entering into the Lodger Agreement with the Respondent neither the Applicant nor his family lived in the Property. The Respondent had started to bring friends into the Property and the situation became uncomfortable. Accordingly, the Property could not be used by the Applicant or his family.

At the outset of the Lodger Agreement the Applicant anticipated that he would still be able to use the Property along with his family. At that time another person was living within the Property in another room. However, as the room generally occupied by the Applicant was empty this person asked if the Respondent could use it until she sorted herself out. The Respondent had stated that she would only be resident there on a short-term basis to enable her to register with the local doctor. The Applicant believed the arrangement to be a casual one. The Applicant told the Respondent that the room she was being given was his room and he would need it back shortly.

The Property comprises three bedrooms together with a living room, kitchen, hallway and one bathroom.

Feedback from neighbours was that they did not know who was living in the Property. There were so many people going in and out. The Respondent moved her boyfriend in as soon as she moved into the Property and another person moved into the living room. By that time the original girl occupying the Property had long since moved out as she had fallen out with the Respondent and could no longer live there.

Status of the Lodger Agreement/Jurisdiction

Mr Stevenson referred to section 1(1) of the Private Housing (Tenancies)(Scotland) Act 2016 ("the 2016 Act") which sets out the requirements for the creation of a private residential tenancy.

Section 1(1) states:-

"(1) A tenancy is a private residential tenancy where—

(a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,

(b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and

(c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy.

(2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied."

In Mr Stevenson's submission the Lodger Agreement meets the requirements of a private residential tenancy in terms of Section 1(1).

Mr Stevenson also referred to section 2(4) of the 2016 Act which he maintained applied in the present case.

Section 2 of the 2016 Act states:-

"(1) This section makes provision about the interpretation of section 1.

(2) A tenancy is to be regarded as one under which a property is let to an individual notwithstanding that it is let jointly to an individual, or individuals, and another person.

(3) A tenancy is to be regarded as one under which a property is let as a separate dwelling, despite the let property including other land, where the main purpose for letting the property is to provide the tenant with a home.

(4) A tenancy is to be regarded as one under which a property is let as a separate dwelling if, despite the let property lacking certain features or facilities—

(a) the terms of the tenancy entitle the tenant to use property in common with another person ("shared accommodation"), and

(b) the let property would be regarded as a separate dwelling were it to include some or all of the shared accommodation.

(5) In a case where two or more persons jointly are the tenant under a tenancy, references to the tenant in section 1(1)(b) and in subsection (3) are to any one of those persons."

Mr Stevenson said as long as some accommodation within a flat or house is exclusively used by a tenant then that is sufficient to constitute a separate dwelling. Mr Stevenson referred to the Upper Tribunal case of *Affleck v Bronsdon* (2021 SLT (Tr) 30) but did not direct the Tribunal to any particular supporting passage within the judgement.

Mr Stevenson said there is no evidence that the Respondent is not occupying full-time.

The Tribunal considered with Mr Stevenson each paragraph of Schedule 1 of the 2016 Act. He submitted that none of those paragraphs applied in the circumstances therefore the Lodger Agreement is a private residential tenancy. That being the case the Tribunal has jurisdiction.

The Tribunal noted the Lodger Agreement was not signed by the Respondent. The Applicant stated that he signed the Lodger Agreement. He confirmed that the utility costs are included in the rent and have been paid by him throughout the Respondent's occupation of the Property. He made reference to an email from the Respondent dated 8 March 2022 in which she stated "*I accept everything in the attached contract*".

The Respondent paid the deposit required in terms of the Lodger Agreement which is still held with Safe Deposit Scotland.

In response to questions from the Tribunal the Applicant confirmed that whenever he had anyone staying in another room within the Property he gave a contract to them. However, the room that was his room was always left empty. It was the nicest room. He simply allowed the Respondent to use that room whilst she sorted herself out.

The Applicant had not been in the Property himself since March 2022 prior to the Respondent moving in.

Landlord Registration

With regard to landlord registration, Mr Stevenson confirmed that at the point of creation of the Lodger Agreement the Applicant was not registered as a landlord. At the point of entering into the Lodger Agreement he did not consider himself to be a landlord. After seeking Mr Stevenson's firm's advice the Applicant submitted an application for registration as a landlord which was granted with effect from 16 September 2022. He was unregistered for a period of around six months. The Applicant's registration as a landlord remains in place now.

Rental Payments

With regard to the cessation of rental payments the Applicant said to the Respondent that he required her to leave the Property. He did not give formal notice at that time. His daughter had been accepted into Edinburgh University. The Respondent said that moving was not a problem. The Applicant then received an email from the Respondent's father and payment of rent stopped.

The last rental payment made by the Respondent was in June 2022.

House in Multiple Occupation

The Property is not a house in multiple occupation. There was not the required number of people living in the Property to reach the status of an HMO. The Respondent's father reported the Applicant to Edinburgh City Council alleging that the Property was being used as an HMO. Edinburgh City Council investigated and subsequently responded by email on 30 May 2023 saying that they did not recognise the Property as an HMO. A representative of the Council, Rosalind Laidlaw, a PRS Enforcement Officer visited the Property and based on the information provided to her determined that an HMO licence was not required.

Order Sought

By email dated 8 September 2023 the Applicant sought to amend the application to increase the sum claimed against the Respondent to £7,700 being the rent arrears due as at that date all in terms of Rule 14A of the Rules. Intimation of the proposed amendment was made to the Respondent by email also of 8 September 2023.

The Applicant seeks to have the sum claimed in the application amended to £7,700 and thereafter seeks a payment order against the Respondent in that amount.

Findings in Fact

The Tribunal makes the following findings in fact:-

- i. The Applicant is the heritable proprietor of the Property.
- ii. The Applicant leased the Property to the Respondent from 5 March 2022.

- iii. The terms of the lease between the parties are set forth in a document entitled "Lodger Agreement" dated and signed by the Applicant on 1 March 2022.
- iv. The Respondent accepted the terms of the "Lodger Agreement" by her email to the Applicant dated 8 March 2022 and by her actions, namely by taking occupation of the Property, by paying the deposit required and by paying rent up to and including June 2022.
- v. In terms of the "Lodger Agreement" the Respondent is entitled to the exclusive use of the larger bedroom to the rear of the Property and shared use of all other areas of the Property excluding the other bedrooms.
- vi. The Respondent occupies the Property as a separate dwelling.
- vii. The Respondent continues to occupy the Property as her only or principal home.
- viii. The lease between the parties is not one which Schedule 1 of the 2016 Act states cannot be a private residential tenancy.
- ix. The status of the lease between the parties is a private residential tenancy under and in terms of the 2016 Act.
- x. The Tribunal has jurisdiction.
- xi. The rent payable in terms of the private residential tenancy is agreed to be £550 per calendar month payable in advance on the seventh day of each month.
- xii. The Respondent paid to the Applicant a deposit of £550 in terms of the lease.
- xiii. The Applicant believed the Respondent's occupation of the Property would be short-term in nature.
- xiv. The Applicant registered as a landlord with effect from 16 September 2022 and continues to be so registered.
- xv. The Property is not leased by the Applicant as a house in multiple occupation.
- xvi. The Respondent remains in occupation of the Property.
- xvii. The last payment of rent made by the Respondent was in a sum of £500 in June 2022.

Reasons for Decision

The Tribunal considered carefully the parties' written submissions and the oral submissions made by the Applicant and his representative at the CMD. It was unfortunate the Respondent's representative (her father), Mr Pankaj Patel, elected not to attend in order that his written representations could be discussed. Having chosen not to attend the Tribunal based its decision on the evidence before it.

Jurisdiction

In his email of 4 March 2024 Mr Patel complains that the Tribunal has no jurisdiction "to even convene a Case Management Hearing of the applicant's wrongful application. The proper forum to initiate a claim, if the applicant wishes to do so, is a Court of Law...". He referred to the Tribunal violating the Respondent's "Article 6 Convention Rights" and unjustly taking jurisdiction if it continued to consider the Applicant's application.

In his email of 6 February 2024 Mr Patel suggested that it was "imperative that the issue of jurisdiction be decided upon internally by the Tribunal". He said the Respondent was entitled to a fair and public hearing and suggested the CMD was "non-public". He said the CMD should be cancelled.

To determine whether it has jurisdiction the Tribunal is obliged to give the parties the opportunity at a CMD to make submissions as to their respective positions on jurisdiction before coming to a decision on that matter and it correctly did so in this instance. There may

be occasions where evidence requires to be heard before the question of jurisdiction can be resolved. Whilst that is not the position here it is simply not correct to suggest that the Tribunal should make a decision on jurisdiction “internally”. The CMD is also a public hearing.

The application proceeds on the basis that the arrangement between the Applicant and the Respondent is a private residential tenancy under the 2016 Act. If established to be correct that would give the Tribunal jurisdiction. In suggesting the Tribunal does not have jurisdiction it is notable that despite the Respondent taking occupation of the Property in March 2022, paying the deposit and rent in terms of the “Lodger Agreement” and continuing to live there as at the CMD Mr Patel offers no explanation as to his view of the nature and status of the arrangement between the Applicant and the Respondent. If the arrangement is not a lease what is it? If it is a lease but not a private residential tenancy what type of lease is it? The Tribunal had no submissions from Mr Patel to that effect and had he participated in the CMD his views on those matters could have been heard. He chose not to attend.

In determining that the status of the “Lodger Agreement” the Tribunal considered the terms of Sections 1 and 2 of the 2016 Act which, together, set out the requirements for a private residential tenancy to be created. The Property is let to an individual, the Respondent. The Property is let as a separate dwelling. In reaching that view the Tribunal took into account that the terms of the Lodger Agreement were not in dispute nor was the extent of the Property occupied by the Respondent challenged, with her having exclusive use of a bedroom and other shared facilities. The Tribunal considered the decision of the Upper Tribunal in *Affleck v Bronsdon* and in particular at paragraph 23 which is particularly apposite and where the judge stated:-

“The question, however, is not only whether there was a lease between the parties, but whether it was a specific type of lease, namely a PRT. The answer to that question depends primarily on the interpretation of ss.1 and 2 of the 2016 Act set out above and the application of that interpretation to the facts found. The flat was let to an individual, the appellant for the purposes of s.2(2). Having regard to s.2(3), the main purpose of the contract was to provide the appellant with a home. The subjects of the lease include both the exclusive occupation of a room in the flat but also the shared use of a kitchen, living room and bathroom. This is shared accommodation within the meaning of s.2(4) of the 2016 Act. The subjects of the lease can properly be regarded as a separate dwelling for the purposes of s.2. Therefore the statutory conditions for a PRT are met in this case. It follows that as a matter of law the appellant has established that there was a PRT.”

The Property was let to the Respondent to occupy as her only or principal home. That is not in dispute. She continues to live there.

The lease between the parties is not excluded from being a private residential tenancy by Schedule 1 of the 2016 Act which the Tribunal considered in detail - paragraph by paragraph - at the CMD and satisfied itself that none of the situations outlined therein applied.

The Tribunal therefore determined that the arrangement between the parties is a private residential tenancy. As such the Tribunal has jurisdiction to determine the application and proceeded to do so.

Rent Arrears

There is no dispute that the Respondent has paid no rent since June 2022. This is acknowledged by Mr Patel in his submissions to the Tribunal attached to his email of 11 September 2023 in which he refers to payments of rent being deliberately withheld. The Respondent continues in occupation of the Property and rent is payable for her entire occupation of the Property at £550 per month.

Other matters

- i. *Landlord registration* – The Applicant accepted he was not registered as a landlord in Scotland when the Lodger Agreement was entered into. He was unaware of the need to register as a landlord and put that right as soon as he was so advised by Mr Stevenson’s firm. He has been registered as a landlord since 16 September 2022. Failure to register as a landlord does not render the Lodger Agreement or the private residential tenancy agreement created by it as void and no properly supported legal submissions were made by Mr Patel to that effect.
- ii. *House in Multiple Occupation* – Mr Patel complained the Property was being used as an unlicensed HMO with the Applicant renting out all three bedrooms within the Property to three different people unrelated to each other at the same time. He produced no evidence to that effect and enquiries by the Private Rented Sector Enforcement Unit of Edinburgh City Council concluded that no HMO licence was required. The Tribunal accepts the Property was not being operated by the Applicant as an unlicensed HMO.
- iii. *Actions of Applicant’s Agents* - In his various emails to the Tribunal Mr Patel repeatedly made statements derogatory of the Applicant’s legal representatives, for example, that the Applicant’s solicitors “*proceeded to assist [the Applicant] in covering up his unlawful and criminal acts*”, “*decided to start abusing their positions of power (including as a solicitor and law firm)*” and “*abused the process*” in order to obtain a favourable outcome. He referred to them “*bullying and intimidating*” the Respondent, to “*criminal conduct*” on their part, to them conspiring with the Applicant to “*systematically dupe*” the Tribunal and stated that they “*have committed numerous acts of perjury*” such that the Tribunal ought to refer them to the Lord Advocate, Solicitor General and Law Society of Scotland. There is absolutely no evidence of any description whatsoever presented by Mr Patel to that effect and the Tribunal had no hesitation in dismissing these remarks as entirely groundless.

Decision

The Tribunal:-

- i. Allows the application to be amended to increase the sum claimed to £7,700 in terms of Rule 14A of the Rules; and
- ii. Thereafter grants an order for payment against the Respondent in favour of the Applicant in a sum of £7,700.

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.



Legal Member/Chair

8 April 2024
Date