



Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 16 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/TE/23/0498

Re: Property at 1 The Water House, Old Largs Road, Greenock, PA16 9AR (“the Property”)

Parties:

Ms Michelle Brandt, 1 The Water House, Old Largs Road, Greenock, PA16 9AR (“the Applicant”)

Mr Alex Ewing, 12 Caddlehill Street, Greenock, PA16 8TU (“the Respondent”)

Tribunal Members:

Nairn Young (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

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

- Background
1. This is an application for the Tribunal to draw up terms of a tenancy between the parties and also to impose a sanction for failure to provide information. It initially called for a hearing on 22 January 2024 at 10am at The Beacon Arts Centre, Greenock. It became clear that the Applicant was not prepared to proceed on that day, having failed to bring various witnesses and produce some documentary evidence she wished to rely on. The hearing was therefore adjourned to 13 May 2024 at 10am in Glasgow Tribunal Centre. The Applicant appeared on that date on her own behalf, with her supporter Mrs

Murphy. The Respondent was present and was represented by Mr Lamb of Maitlands Solicitors.

2. Following the last calling of this case, the Tribunal made a direction requiring the Applicant to lodge a list of witnesses, including a description of the topics they would speak to. She was also directed to produce an inventory of documentary evidence, formatted in a manner that would allow easy reference during the hearing. A further direction was made on 12 March 2024 reiterating this requirement and further requiring the Applicant to submit a list of any video evidence she wished to refer to, along with a description of its relevance to the issues to be determined.
3. The Applicant submitted a note of two items of video evidence she wished to refer to: one to show the state of the previous tenancy she lived in; the other being footage taken of her describing the Property and, she suggested, some of the relevant terms agreed shortly after the agreement was formed.
4. The first of these was not allowed by the Tribunal, on the basis that it was not relevant to the question of the terms that were agreed between the parties. The second video was allowed, under reservation as to its relevance; but the Applicant did not upload it in advance of the hearing.
5. Prior to the commencement of the hearing on 13 May 2024, the Applicant had submitted a list of several witnesses she wished to call. She was instructed by the Tribunal that only those who had evidence related to relevant points in contention would be heard. In particular, she was informed that character evidence, whether in relation to her or the Respondent's character, would not be admissible. She confirmed on the day of the hearing that she wished to call five witnesses, as well as giving evidence on her own behalf.
6. Two of these potential witnesses were allowed to give evidence: Mr Stephen Mills, who would speak principally to the circumstances surrounding the Applicant's forming the agreement with the Respondent; and Ms Cressida Lewis, who was present at the Property on the day the Applicant moved in

and was stated to have witnessed various discussion between the Applicant and the Respondent regarding the terms of the agreement.

7. The remaining witnesses were not allowed to give evidence by the Tribunal. A Mr Trefor Davies was described as a member of the Applicant's extended family who would speak to what she had told him were the terms of the agreement between her and the Respondent. The Tribunal did not consider that hearsay evidence of that type added to the Applicant's own direct evidence of her negotiation of the terms of agreement, particularly since it would only relate to what she said the terms were and would not represent evidence deriving from any separate source. The Respondent, for his part, did not seek to challenge the assertion that she had reported to Mr Davies that the terms were as she states in this application.
 8. Finally, a Mr Steven Ward and Mrs Hazel Ward were described as being prepared to speak to their being happy to offer an alternative residence to the Applicant prior to her agreeing to let the Property. This was not a controversial point: the Respondent accepted that such an offer was available. The Tribunal therefore did not allow the witnesses to be called.
 9. The Respondent gave evidence himself and called no other witnesses.
- Findings in Fact
10. The Applicant was living in a property in Wemyss Bay until around August 2021, when she had to terminate her lease.
 11. At that point, she placed her furniture in storage and moved temporarily to England. Her furniture was approximately sufficient to furnish a 5 bed roomed house.
 12. The Applicant continued to fly up to Scotland every second weekend at that point and was very keen to secure accommodation in Scotland that was large

enough to take her furniture. She looked at four or five different properties which proved unsuitable.

13. The Applicant and the Respondent and his wife had a mutual friend who communicated that the Property might suit the Applicant's requirements.

14. The Applicant went to view the Property on 7 November 2021 and was shown around by the Respondent and his wife.

15. The Applicant agreed later that day in an email to the Respondent's wife to rent the Property from the Respondent.

16. There was no discussion of any amendment to the standard terms of a private residential tenancy between the parties at any point.

17. The Applicant paid a deposit of £800 to the Respondent to secure rental of the Property on 8 November 2021.

18. The Applicant moved into the Property on 3 January 2022. She paid rent of £850 for her first month on the same date.

19. The Applicant was not provided with written terms of tenancy before the end of 3 January 2022 by the Respondent.

20. The Respondent has subsequently offered to provide written terms of agreement in the form of the standard private residential tenancy agreement found on the Scottish Government's website.

- Relevant Law

21. Section 10 of the Private Housing (Tenancies) (Scotland) Act 2016 ('the Act') states, so far as is relevant to this case:

“10 Duty to provide written terms of tenancy

(1) Where the terms of a private residential tenancy are not set out in writing between the parties, the landlord must, before the end of the day specified in subsection (2) ... provide the tenant with a document which sets out all of the terms of the tenancy.

(2) The day referred to in subsection (1) is—

(a) the day on which the tenancy commences, if the tenancy is a private residential tenancy on that day....”

22. Section 16 of the Act states (again, so far as is relevant):

“16 First-tier Tribunal's power to sanction failure to provide information

(1) On an application by the tenant under a private residential tenancy, the First-tier Tribunal may make an order under subsection (2) where—

(a) the landlord has failed to perform a duty arising by virtue of section 10 ... to provide the tenant with information,

(b) at the time the First-tier Tribunal considers the application, the landlord has still not provided the tenant with the information, and

(c) the landlord does not have a reasonable excuse for failing to perform the duty.

(2) An order under this subsection is one requiring the landlord to pay the person who made the application an amount not exceeding—

(a) three months' rent, if the order is in respect of a failure by the landlord to perform—

(i) a duty arising by virtue of section 10, ...

(3) An application under subsection (1)—

(a) may be made only during the course of the tenancy in question,

(b) where the application relates to a failure to perform a duty arising by virtue of section 10, may be made only as part of an application under section 14(1), and

(c) may not be made unless the tenant has given the landlord notice of the tenant's intention to make the application and the notice period described in section 17 has expired.

...

(7) In subsection (2), "rent" means—

(a) the amount that was payable in rent under the tenancy at the time that notice of the application was given to the landlord...."

23. There is no need in this case to go into the detail of the notice period required by section 17, or the other restrictions set out in s.16(3), as there was no suggestion that the Applicant had failed to meet these requirements. The application was originally raised under s.14; but, by the time it came to a hearing, the tenancy had come to an end, and the only remaining live issue was the question of whether or not a sanction was appropriate for a continuing failure to provide the Applicant with the terms of the private residential tenancy agreement in writing. Whether there was such a failure depended on whether the Tribunal agreed with the Applicant that, at the time the tenancy was agreed, two modifications to the standard tenancy terms formed part of the agreement: a specific term setting out that the Applicant

could keep a cat at the Property; and a specific term setting out that the Applicant would be allowed to sub-let the Property.

24. As a matter of basic contract law, in order for a term to form part of the contract, the parties must both have agreed to include it as such. The test for whether or not they did agree is an objective one. That is to say, it is not a question of whether or not they actually agreed in their own minds; but rather whether the Tribunal can reasonably infer from their speech and actions that they did agree.

- The Evidence

25. The Applicant, in her evidence, appeared keen to provide a lot of background and contextual information about her situation at the time of formation of the agreement, to support her contention that the disputed terms had been part of it. However, in some of the key points, she contradicted herself. She wished to make clear to the Tribunal that she had alternative options for places to stay, and therefore would not have agreed to rent from the Respondent unless her special terms were agreed; but later, while she was describing her discussion with the Respondent and his wife when viewing the Property, she said that she was, “desperate to find accommodation.” She stated that the only reason she had been looking for a larger property was to allow her to take in a lodger, as she did not want to live alone; but she also described how she had been living for several months with a significant amount of furniture in storage and looking for a large enough place to accommodate that.

26. There was also a fundamental contradiction in her position, in that she professed to consider the matters of her having a cat and taking a lodger of such importance that specific terms would have to be included in the tenancy agreement for her to agree to it; but that she did not insist on the terms being set out in writing before moving into the Property and paying the deposit and the rent. The Applicant tried to explain this contradiction by saying that she just trusted the Respondent and his wife; but if that were the case, why would it be necessary to agree that these terms form part of the agreement, rather

than relying on clauses 11 and 34 of the standard agreement, which allow subletting and pets, with the landlord's permission?

27. On the key question of what was actually discussed about the terms at issue, she was not able to describe the conversation that she had with the Respondent and his wife in any real detail. She did state that they had spent, "about two hours," discussing terms and conditions; but she did not describe there being any exchange around the technical question of how the terms would differ from the standard private residential tenancy terms, far less anything like an offer of specific terms that was then explicitly accepted. She was able to say only that she was sure that the fact she had a cat, and that she wished to sublet, was mentioned.
28. These problems in the Applicant's evidence impacted on her credibility and reliability, particularly in relation to the question of whether it had actually been explicitly agreed between her and the Respondent that the disputed terms should be included.
29. The Applicant's second witness, Mr Mills, appeared both credible and reliable as a witness; but did not ultimately have much to add. He did confirm that the Applicant's cat was very important to her; and that he was offering the Applicant a place to live on a short-term basis when she agreed to rent the Property. He was clear that he would have assumed the cat would come with her; but that she would not have been allowed to sublet. He did not discuss the terms of the Applicant's tenancy agreement with the Respondent with her, however.
30. The Applicant's third witness, Ms Lewis, also presented as credible and reliable; but also had little to add. She confirmed that the Applicant was looking for a property that would allow her to have her cat living with her and to take a lodger. She had gone to help the Applicant move into the Property on 3 January 2022. She described overhearing a conversation on that day between the Applicant and the Respondent's wife regarding having a lodger,

where it was said by the latter that an HMO licence could be required, but that a couple, “would be OK.”

31. The existence of this conversation tends to undermine the Applicant’s position. It takes place after the commencement of the contract; and if the matter of the Applicant taking a lodger had already been discussed and settled as a term of that contract, it is not clear what the purpose of the conversation would have been. The conversation can more naturally be explained as a request in terms of the standard clause 11 to allow a sublet, than a discussion about how an already agreed position can be put into practice.
32. The remainder of Ms Lewis’s evidence related to the deterioration of the parties’ relationship in the days that followed and was not, therefore, of relevance to the matters at issue.
33. The Respondent’s evidence was that he was renovating the Property in November 2021 with the intention to sell it. He suggested that when he received the payment of the deposit this was, “just for holding,” the Property, which he had not yet decided he would let. He did not recall there being any discussion of either a cat or subletting in the course of showing the Property or arranging the deposit.
34. Thereafter, he indicated that he had intended to complete written terms of agreement with the Applicant when she moved in, but that that had not happened on 3 January 2022, due to her being busy moving in her furniture. He returned later in the day, and again did not manage to secure signature of a written lease, but did observe a cat’s climbing frame and told the Applicant she was not allowed pets. A few days passed, and on 6 January 2022, the Respondent again met the Applicant to complete the paperwork. At that point he was explicit that she could not keep a pet and could not sublet the Property. She reacted angrily and stated that the Property was no good to her if she could not sublet it and that she, “may as well give you notice.” The parties’ relationship has deteriorated from there.

35. The Respondent's evidence struck the Tribunal as candid and consistent. The Respondent appeared to have been labouring under the misapprehension that there could be no contract between the parties until written terms were executed. As has been discussed above, that subjective misapprehension does not mean, however, that agreement was not reached on an objective consideration of the circumstances.

- Discussion

36. The central difficulty in this case is that there is no clear evidence of any detailed discussion of the terms that were to form the contract on either side of the dispute. The Applicant wishes the Tribunal to infer that she would have insisted both on being allowed a cat and to sublet, on the basis that these were important matters to her, and that she was under no compulsion by her circumstances to agree to take the Property if they were refused. The main difficulty with that position has been mentioned already: if these matters were so important, why were they not reduced to writing? But a second issue for the Applicant is that the standard private residential tenancy terms as delivered to her by the Respondent do allow for both pets and subletting, with the landlord's agreement. What she is asking the Tribunal to conclude, therefore, is that the Respondent agreed that, rather than have these issues regulated as set out in those terms, on a case-by-case basis, the Applicant should be granted these rights as part of the contract, without any further scope for him to control how they would be exercised by her. In other words, that she be allowed to have, not just the cat that she owned at the time, but any cat that might replace it; and any lodger or subtenant that she chose to move in, without any reference to the Respondent. That would be an extraordinary concession for a landlord to make to a tenant, and the evidence overall could not support a conclusion that it was made.

37. The onus to prove that any such term was agreed is on the Applicant. Considering the totality of evidence, the Tribunal considered the Applicant may have assumed that the Respondent knew she had a cat (she put to him

in cross examination that he had this knowledge via their mutual friend and he denied it). She may also have mentioned the possibility of taking a lodger during their discussion. There was evidence to indicate that he had mentioned having envisaged the Property could be used as a bed and breakfast at some point. However, there is simply not enough evidence to conclude that this was put to the Respondent as an amendment to the standard terms and conditions of let and was accepted as such by him. The mere mention of these facts would not be enough objectively for the Tribunal to conclude that the Respondent had agreed to such amendment.

- Decision

Application refused.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

N. Young

16 DECEMBER 2024

Legal Member/Chair

Date