



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

Chamber Ref: FTS/HPC/CV/19/0056

Re: Property at 12 Seafield Close, Dundee, DD1 4DZ (“the Property”)

Parties:

Miss Emily Butler, Miss Hannah Ross, 16 Main Street, Saline, Dunfermline, Fife; 119 Ravenswood Avenue, Edinburgh, EH16 5SG (“the Applicant”)

Ormidale Properties, 14 Kilburn, Newport on Tay, Fife, DD6 8DE (“the Respondent”)

Tribunal Members:

Graham Harding (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the tenancy entered into by the Applicants with the Respondent with an actual date of occupation of 3 August 2018 was a Private Residential tenancy as defined by the Private Housing (Tenancies) (Scotland) Act 2016

Background

1. By application dated 8 January 2019 the applicants applied to the Tribunal for a declarator that they were entitled to terminate their lease on giving 28 days’ notice as the tenancy commenced after the coming into force of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”).
2. The applicants provided the Tribunal with a copy of the signed lease agreement, copies of emails between the parties and copies of emails between the Applicants and Shelter.

3. By notice of acceptance dated 12 February 2019 a legal member of the Tribunal with delegated powers accepted the application and a Case management discussion was assigned.
4. Intimation of the Case Management discussion was given to the Applicants by post on 1 March 2019 and to the Respondent by Sheriff Officers on 5 March 2019.
5. The Applicants submitted further written representations to the Tribunal by email dated 16 February 2019. The Respondent's Solicitors Baillie Shepherd, Solicitors, Dundee, made written representations to the Tribunal by letter dated 14 March 2019.

The Case Management Discussion

6. The Case Management Discussion was held at Dundee Carers Centre, Seagate House, 132-134 Seagate, Dundee on 25 March 2019. It was attended by the Applicants who were represented by Ms Sarah Wilson of Shelter, Dundee. The Respondent did not attend nor was she represented. In accordance with Rule 29 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations") the Tribunal determined to proceed with the Case Management Discussion in the absence of the Respondent.
7. The Applicants representative explained to the Tribunal that although the Applicants signed the offer to lease the property on 30 November 2017 the tenancy was not due to commence until 1 July 2018. The applicants were given no information about Private Residential Tenancies commencing with effect from 1 December 2017 but in any event because the contractual essentials all took place after the coming into force of the Private Housing (Tenancies) (Scotland) Act 2016 they Applicants would not have entered into a Short Assured Tenancy as suggested by the Respondent and her representative but rather a Private Rented Tenancy Agreement. That being the case the Applicants were entitled to give the Respondent 28 days' notice of their intention to leave the property which they had done on 11 December 2018.
8. Ms Wilson went on to say that although the Respondent's representative claimed that there was a Short Assured Tenancy the Applicants had never been provided with a Form AT5 . Ms Wilson also stated that several of the clauses including Clauses 5, 9 and 15 were unfair and would be unenforceable.
9. Ms Ross explained that although the agreement had provided for an entry date of 1 July 2019 she and Ms Butler had been unable to obtain vacant possession of the property at that date as the previous tenants were still in occupation. Ms Butler stated that she was finally able to collect the keys to the property on 3 August 2018. Ms Ross said that the Applicants first month's rent

had been paid to the Respondent on 1 June 2018 but then refunded to them about one month later.

10. The Tribunal raised with Ms Wilson the point made by the Respondent's representative that as it appeared that as the contract between the parties had been signed on 30 November 2017 that was the date on which the tenancy was granted and the actual date of occupation was irrelevant. The Tenancy was accordingly a Short Assured Tenancy. Ms Wilson pointed out that it had been the Scottish Parliament's intention when enacting the 2016 Act to give tenants greater security and also to provide them with more flexibility to leave a rented property. The Scottish Government website stated that people who rented private domestic properties after 1 December would do so under the new Private Residential Tenancies.
11. Ms Wilson also stated that in terms of the Consumer Rights Act 2015 sections 68 and 69 where in any tenancy agreement there was any uncertainty then the term most favourable to the tenant will apply. In the present case if there was some uncertainty as to what was meant by the tenancy being granted then it should be determined in the way most favourable to the tenant i.e. by concluding that the grant was when the tenancy commenced not when the offer was signed.
12. The tribunal noted from the Respondent's representative's letter of 12 March that although reference was made to the date of signing of the offer to let being 30 November 2017 there was no confirmation of the date it was countersigned by the Respondent and the document itself was not dated.
13. Ms Ross confirmed that the Applicants had stopped paying rent in December 2018 and were no longer in occupation of the property.
14. Ms Wilson asked the Tribunal to grant an order finding that the Applicants had entered into a Private Residential Tenancy Agreement with a date of occupation of 3 August 2018.

Findings in Fact

15. The applicants signed an offer to let the property on 30 November 2017.
16. The date of entry in said offer was 1 July 2018.
17. The lease did not purport to be a Short Assured Tenancy.
18. The lease did purport to have a termination date of 30 June 2019.
19. The Applicants were not given a form AT5
20. Neither the offer nor acceptance was dated.

21. A Short Assured Tenancy was not constituted.
22. The Respondent was unable to give the applicants vacant possession of the property on 1 July 2018 and was therefore in breach of contract.
23. The parties agreed to a new date of entry of 3 August 2018.
24. The tenancy was granted when the Applicants took entry on 3 August 2018.
25. At that time the Private Housing (Tenancies) (Scotland) Act 2016 was in force and the tenancy entered into between the parties was subject to the terms of that Act.

Reasons for Decision

26. This application raises an interesting and difficult point of law. It is quite clear from the 2016 act and the transitional legislation that it was the Scottish Parliament's intention that with effect from 1 December 2017 with very few exceptions all new private tenancies that commenced after that date would be Private Residential tenancies. Provision was made however for situations where there was an existing Short Assured or Assured Tenancy in force to be continued when its term was after 1 December 2017. The Scottish Parliament did not directly make provision for cases where the parties contracted to enter into a Short Assured or Assured tenancy before 1 December 2017 but with a date of entry after that date. The issue therefore for the Tribunal to decide is what is meant by the word "granted" in Schedule 5 of the 2016 Act.
27. Matters are further complicated as the offer of let and acceptance are not dated. However it is quite clear from the fact that no mention of an AT5 was made by the Respondent and the lease document itself being totally silent that whatever else it was it was not a Short Assured Tenancy as suggested by the Respondent's representative. Furthermore the document does not hold itself out as constituting an Assured Tenancy. Therefore the Tribunal has to determine what kind of tenancy agreement it was.
28. Even if it was the Respondent's intention to create something other than a Private Residential Tenancy she was unable to keep her side of the contract when it came to the date of entry and the parties post 1 December 2017 had to re-negotiate the terms of the contract.
29. It clearly was the Scottish Parliament's intention that new domestic tenancies formed after 1 December 2017 between private individuals would be constituted as Private Residential tenancies and therefore on balance after taking account of both parties representatives arguments the Tribunal is persuaded that the correct interpretation of the tenancy is to conclude that the parties entered into a Private Residential tenancy Agreement with a date of occupation of 3 August 2018.

Decision

30. The Tribunal finds that the Applicants are entitled to an order stating that the tenancy entered into between the Applicants and the Respondent of the property with a date of occupation of 3 August 2018 was a Private Residential tenancy in terms of the Private Housing (Tenancies) (Scotland) Act 2016.

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.

Graham Harding

Legal Member/Chair

25 March 2019

Date