



Decision with Statement of Reasons of Alan Strain, Legal Member of the First-tier Tribunal with delegated powers of the Chamber President of the First-tier Tribunal for Scotland (Housing and Property Chamber)

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

Chamber Ref: FTS/HPC/CV/20/0942

Re: 50 Westend Drive, Bellshill, ML4 3AS ("the Property")

Parties

Mrs Jessica Walker (Applicant)

Mr David Gemmell, Mrs Nancy Gemmell (Respondent)

Tribunal Member:

Alan Strain (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules and that it would not be appropriate to accept the application in terms of Rule 8(1)(c).

Background

1. The application was received by the Tribunal under Rule 70 on 12 February 2020. The application sought an order for payment in respect of rent paid whilst the landlord had not been registered. The following documents were enclosed with the application:
 - (i) Paper Apart;
 - (ii) Rent receipts;
 - (iii) Rent Statement.

Reasons for Decision

2. The Tribunal considered the application in terms of Rule 8 of the Chamber Procedural Rules. That Rule provides:-

"Rejection of application

8.-(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if-

(a) they consider that the application is frivolous or vexatious;-

(c) they have good reason to believe that it would not be appropriate to accept the application;

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

3. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in ***R v North West Suffolk (Mildenhall) Magistrates Court, (1998) Env. L.R. 9***. At page 16, he states: - "What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic".

4. The Tribunal wrote to the Applicant by letter of 27 February 2020 in the following terms:

"I refer to your application. In order to progress with your application the Tribunal would like to see:

- *letters or e-mails from the three deposit-holding schemes in Scotland confirming that they do not hold any deposit for the property in question*
- *Information from you about when and how you paid the deposit to the Respondent*
- *Clarification of the amount (if any) in addition to £450 which you wish to be included in the order for payment*
- *Clarification of what any such additional sums are claimed for*

Please supply this information by 10 March 2020. If you do not do so it is possible that the President will reject the application."

The Applicant responded by email of in the following terms:

"Good afternoon

I can confirm that I have contacted all 3 companies in regards to check that my deposit has been protected and they have no record of such information.

I can also confirm that the landlord did not protect my deposit has I moved into the property July 2015 and Mr Gemmell never registered and a legal landlord until March 2019.

Mr Gemmell was paid 13 months rents which was transferred from my parents bank account to his.

I have a copy of the money in my parents account.

You may wish to ask Mr Gemmell for this as he did receive payment but due to data protect the bank would not give us that information which we already knew.

The bank is I question was The Clydesdale Bank.

I have sent this also over on a separate email if it doesn't allow me to attach to this.

Am unsure what I can ask for with regards to payment but 13 months rent was paid to Mr Gemmell as a lump son.

A would like to request the 1st payment given back. The lump sum

If if this is given as 3x then this would be greatly appreciated."

The Tribunal considered this response and requested further information by letter of 20 March 2020 as follows:

"Before a decision can be made, we need you to provide us with the following:

- In respect of this Rule 70 case the Tribunal would be grateful by your confirming the amount of payment order sought and the reason for this. It is noted that you have a separate Rule 103 application in respect of the Landlords alleged failure to lodge the tenancy deposit in an approved scheme.*

*Please reply to this office with the necessary information by **3 April 2020**. If we do not hear from you within this time, the President may decide to reject the application."*

The Applicant responded by email of 4 June 2020 in the following terms:

"In respect of more information please see below:

1: Payment am looking for is: what I have paid to Mr and Mrs Gemmell before they registered as landlords. £19.350

2: My mum is happy to either speak to someone or send a letter or email which ever is easier for you."

The Tribunal wrote to the Applicant again on 12 June informing her:

"Before a decision can be made, we need you to provide us with the following:

- In you recent response to a request for further information in relation to CV/20/0486 you advised that you are seeking a payment order to recover rent paid by you before the Respondent was registered as a landlord.*

Please confirm that this is the subject of your application. If the application relates to a different claim please clarify the position. Please also confirm the amount of money you are seeking and the legal basis for this claim.

- **It appears that application CV/20/0942 also relates to this same subject – repayment of rent. Please clarify the position. If the applications relate to the same claim then you will require to withdraw one of them as you cannot proceed with 2 identical applications.**

Please reply to this office with the necessary information by 26 June 2020. If we do not hear from you within this time, the President may decide to reject the application.”

5. The Applicant responded by email of 26 June 2020 in the following terms:

“Good afternoon in relation to CV/20/0486 & CV/20/0942 it appears they both have duplicated information on which I apologise and happy to go forward with either one. The amount am asking is £19.800 This is taken into account the years Mr Gemmell was not registered. July 2015 and Mr Gemmell only registered March 2019. Legal basis for this: Mr Gemmell by law has broken the law and has done for a number of years as am not the 1st he has rented out too. I can provide this information to you if needed. Mr Gemmell was not a accidental landlord. He worked full time and the money I paid each month was never declared to HMRC Mr Gemmell also didn't have a buy to let mortgage he had a interest only mortgage and never advised he had sitting tenants which meant we weren't protected of anything went wrong and either way we would have been out at some point for him to sell the house. When Mr Gemmell registered as a landlord I believe he has lied and manipulated the application to get registered. I have a number of pending cases against this man as he is a man that doesn't deserve to be a landlord. He gives landlords a bad name.”

6. The Tribunal considered the application and wrote to the Applicant by letter of 22 July requesting further information as follows:

“Before a decision can be made, we need you to provide us with the following:

- 1. You have confirmed that both of these application relate to the same subject matter. Please confirm which application you wish to withdraw.*
- 2. You have indicated that you are seeking a payment order for £9800. Please submit a replacement part 5 of the application form which states that this is what is sought and the basis of that figure. Please note that the form should be restricted to information about the payment order. Furthermore, the Tribunal cannot grant an order removing the applicant from the Landlord register.*
- 3. You were asked about the legal basis of the application. Your response in noted. However, you have not explained why you were not due to pay rent for the property. Please confirm if there has been a Notice from the Local authority in terms of Section 94 Antisocial Behaviour etc (Scotland) Act 2004 stating that rent was not to be paid or some other basis for the claim that rent was not due to be paid.*

Please reply to this office with the necessary information by 5 August 2020. If we do not hear from you within this time, the President may decide to reject the application.”

7. The Applicant responded by email of 10 August in the following terms:

“Legal Basis:

Mr Gemmell rented out his property without being registered since July 2015 which is a criminal offence.

If you are a landlord and you fail to register before you let or advertise for let residential property, or before you have submitted a valid application for registration, you are committing an offence. This is a legal requirement of the Antisocial Behaviour etc (Scotland) Act 2004.

Mr Gemmell didn't register March 2019 even this was forced on him as he refused to do so and asked to come to an agreement.

From July 2015 up until - September 2018 (this was when things started to get complicated) I have paid Mr Gemmell

July 2015 to July 2016 £5850 this was a lump sum which he took a year to take from us. July 2016 to September £11250 all in £17,100 During this time:

Failed to register as a landlord which meant he failed to inform the HMRC that he has a second income by being a landlord so this £17,100 was put in his pocket as a financial gain.

My legal basis is Mr Gemmell has failed to comply with the rules and regulations of being a landlord and failed to notify the council for over 5 years that he was letting out his property. (He rented to another person before me) this is a criminal offence.

Mortgage is in a joint name but landlord registration is only one name. I would ask both to be held accountable for breaking the law.

If HM Revenue and Customs finds out that you have not declared income on which tax is due, you may be charged interest and penalties on top of any tax bill, and in more serious cases there is even a risk of prosecution and imprisonment. (This is for the income he has gained over the years which he hasn't declared to HMRC.”

8. In light of the response from the Applicant the Tribunal considered the test identified by Lord Justice Bingham in the case of ***R v North West Suffolk (Mildenhall) Magistrates Court*** (cited above). The Applicant sought repayment of rent paid during the tenancy on the basis that the landlord was not registered (which was a criminal offence). The fact that a landlord was not registered when renting a Property does not mean that a tenant who paid rent was entitled to have rent repaid. The application could not succeed against the Respondent (***AB v CD [2017] SAC (Civ) 32***). The Tribunal considered that the application was frivolous,

misconceived and had no prospect of success. Furthermore, the Tribunal consider that the lack of a proper legal basis constituted good reason why the application should not be accepted. The application is accordingly rejected.

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.

Alan Strain

31 August 2020

Legal Member/Chair

Date