



**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/19/1683**

**Re: Property at 34 Broughton Place, Edinburgh, EH1 3RT (“the Property”)**

**Parties:**

**Miss Wendy Robertson, 34 Broughton Place, Edinburgh, EH1 3RT (“the Applicant”)**

**Mr Sergio Pellisso Navas, Mr Daniel Fernandez Schepers, UNKNOWN, UNKNOWN, UNKNOWN (“the Respondent”)**

**Tribunal Members:**

**Lesley Johnston (Legal Member)**

**Decision (in absence of the Respondents)**

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

**Background**

1. By application lodged with the Tribunal on 31 May, the Applicant seeks an Order for Payment in the sum of £1000 in respect of payment of rent arrears said to be due by the Respondents in relation to their occupation of 34 Broughton Place, Edinburgh, EH1 3RT (‘the property’). The application is made in terms of rule 11 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.
2. The Applicant lodged the following items with the application:
  1. Paper Apart providing the details and background to the application;
  2. Email from Alex Hewitt to the Application dated 28 May 2019 at 11.01am
  3. Email chain between the parties commencing from 29 May 2019 at 10.38am

4. Email chain between the parties commencing from 20 May 2019 at 5.17pm
  5. Email chain between the parties commencing from 14 March 2019 up to 15 March 2019 at 5.21pm
  6. Email chain between the parties dated from 14 May 2019
  7. Email chain between the parties dated from 20 May 2019 at 5.17pm
  8. Email chain between Alex Hewitt and the parties dated from 24 May 2019 at 1.13pm
3. In response to a request from the Tribunal administration, the Applicant lodged the following documents on 17 June 2019:
9. Rent statement;
  10. Tenancy agreement (undated and unsigned).
4. On 2 July 2019 the Tribunal wrote to the Applicant to advise that the tenancy agreement appeared to be a fixed term holiday let for a period of three months. The Applicant was asked to address the tribunal on why the tribunal had jurisdiction to deal with such a contract.
5. By email dated 4 July the Applicant advised that she was advised to make the application to the Tribunal by Edinburgh Sheriff Court, who rejected her Simple Procedure application.
6. By letter dated 19 July 2019 the Tribunal asked the Applicant to provide further details on why she considered the Tribunal to have jurisdiction, in light of the case of *St Andrews Forest Lodges Limited v Grieve* 2017 GWD 14-224.
7. On 9 August 2019 the Applicant submitted a written submission outlining why she considered the Tribunal had jurisdiction to consider the application.
8. Between August and November 2019 the Tribunal attempted to obtain the Respondents' addresses from the Applicant, service on the addresses provided in the application having failed by reason of "addressee unknown". The Tribunal issued a direction on 7 January 2020 in which the Applicant was directed to provide the up-to-date addresses for the Respondents, or alternatively, if no addresses were available, an application for service by advertisement. In response the Applicant provided only the address of the Respondents' school in Spain. The Tribunal therefore advised that unless it heard from the Applicant by 30 January, service on the Respondents would proceed by way of advertisement.

### **The Case Management Discussion**

9. A Case Management Discussion took place on 29 January 2020 at 10am by telephone. The Applicant was present. The Respondents were neither present nor represented. The Tribunal was satisfied, per a certificate of service dated 29 July 2020, that the application had been served by way of advertisement from 11 June 2020 until 29 July 2020 in compliance with rule 24 of the Rules. The

Tribunal therefore exercised its discretion to continue with the hearing in the absence of the Respondents.

10. The Tribunal explained the purpose of a Case Management Discussion with reference to rule 17 of the Rules. In particular, the Tribunal highlighted to the Applicant that at a Case Management Discussion, the Tribunal can do anything that can be done at a hearing, including making a decision on the application.

### **Submissions**

11. The Applicant explained that she had further documents in support of her application which she only located when preparing for the hearing. They had previously been lost and had only been found by her shortly prior to the hearing. At the outset of the hearing she therefore lodged by email:
  1. word document entitled "list of claims prices" detailing costs said to have been incurred by the Applicant following the Respondent' departure; and
  2. word document entitled "Lourdes Casamayour Supervisor" comprising a copy of email correspondence between the Applicant and a Lourdes Casamayour regarding the Respondents occupation of the property.
12. The Tribunal exercised its discretion and allowed the documents to be received, although late on the basis that the Tribunal accepted the Applicant's explanation as to why they had not been produced timeously and that it considered she had a reasonable excuse.
13. The Applicant explained that the property was her principal home. However, she moved out before the Respondents moved into the property and was not living there at the time the Respondents occupied it.
14. She advertised the property on Gumtree as a "holiday let and short-term available". The Respondents responded to the advert via messages on gumtree. The messages were produced in the bundle of documents. The subject heading of the message was the title of the advert "fab flat with bills included. Short-term available."
15. The Applicant advised that the Respondents were students from Spain who were in Edinburgh as interns. In the correspondence the Respondents confirmed that they had the funds to pay a £1,000 deposit. A viewing was arranged for 15 March at 11am. At the viewing the Respondents confirmed that they would like to take the flat and they paid £1,000 deposit that day. They also provided the Applicant with documents confirming their education, although those documents were not produced with the Tribunal.
16. At the time of the viewing, the Applicant was still residing in the property. It was arranged that the Respondents would attend the property on 17 March to get the keys and the Applicant would leave the property on 18 March, on which date the Respondents could take entry.

17. A 'tenancy agreement' was issued to the tenants on around 17 March. The tenancy agreement was for a fixed term of 17 March 2019 to 20 June 2020. During the hearing the Applicant located the signing page of the lease and she lodged it with the Tribunal by email. The Tribunal allowed the document to be received although late for the same reasons outlined above. Only the signing page was produced with the Applicant's signature and date of 17 March 2019 and the Respondents signature and date the lease on 27 March 2019.
18. In terms of the agreement, £1,200 per month was due by way of rent.
19. The Respondents took entry on 18 March. The Applicant referred to the rent statement lodged with the application. It was entitled "Rent statement at 17 June 2019; 34 Broughton Place Edinburgh, EH1 3RT; bill to: Daniel Schepers & Sergio Navas; for: holiday rental contract from 17 March 2019 to 20 June 2019 @ £1200 per month all-inclusive rent."
20. The rent statement showed that the Respondents paid £1,280 on 18 March; £1,200 on 20 April and £200 on 20 May 2019.
21. The Applicant advised that the first payment of rent was £80 higher than set out in the agreement on account of the fact that the Respondents were taking the property a few nights over and above a one-month period. She had calculated the rent per day and rounded the figure up to arrive at £80.
22. The Applicant advised that the Respondents paid only £200 in respect of the final payment of rent because they wished the deposit to be appointed to unpaid rent. That was borne out in the correspondence lodged with the Tribunal.
23. The Applicant's position was that she required the deposit in relation to the Respondents having damaged the property. The Respondents vacated the property around 20 June 2020 and left the property in a bad condition. She made reference to the list of costs lodged with the Tribunal. The list of costs included interest on the unpaid rent; costs for replaced items; costs for missing or stolen items; cleaning costs; admin time; and loss of holiday let earnings in July 2019. The Applicant explained that she had other holiday guests due to take occupation of the property after the Respondents removed from the property but could not do so due to the condition of the property.
24. The Respondents had therefore been wrong to make payment of only £200 and remained due to pay the outstanding £1,000.
25. The Applicant explained the circumstances of her making the application when she did. In around May 2019 the Applicant had attended the property to fix the Wi-Fi and saw at that stage that the property was not in a good state of repair. That prompted her to contact the Respondents by email on 14 May 2019 (produced with the Tribunal) in which she reminded the Respondents that their next rent payment was due on 20 June. She also outlined the cleaning tasks for the flat. She advised that deductions would be made from the deposit for stains

on mattresses or carpets; missing/damaged linen/missing/damaged items; if the flat was not thoroughly cleaned and required professional cleaning on departure. The Respondent replied to advise that they were not confident that they would receive the return of their deposit and had been advised only to pay £200 and for the remainder of the deposit to be appointed to the unpaid rent.

26. The Tribunal enquired with the Applicant whether she paid the deposit into a tenancy deposit scheme. She submitted that she had not done so on the basis that her past experience of deposit schemes was that it took a long time to get the deposit back, and since the Respondents were only residing at the property for three months, she decided to keep the deposit in a separate bank account.
27. The Tribunal enquired with the Applicant whether she is registered as a Landlord in respect of the property in terms of the Antisocial Behaviour etc (Scotland) Act 2004.
28. The Applicant advised that the Respondents had also asked her that question, which she considered to be irrelevant on the basis that no landlord registration is required in terms of a holiday let. She was registered as a Landlord in respect of a different property, but not in relation to this property on the basis that it was a holiday let. She confirmed that the property was rented to the Respondents as a holiday let.
29. The Tribunal explained that the application had been presented on the basis that the Respondents had a Private Residential Tenancy. The Applicant's written submission dated 9 August 2019 stated that, despite the references to "holiday let" in the documentation, the tenancy was in fact a Private Residential Tenancy. It made reference to the case of *St Andrews Forest Lodges Limited v Grieve* (cited above) and submitted that the Respondents took the lease because they wished to occupy the property as their principal home while working as interns in Edinburgh. An internship was not a holiday.
30. The Applicant advised that she had not actually read the submission dated 9 August 2019. It had been prepared by an Advocate with whom she is acquainted. The Tribunal pointed out that the submission was signed off "Wendy Robertson". The Applicant apologised and advised that she had simply lodged it without reading it. The Tribunal read the relevant section of the submission to the Applicant. The Applicant was asked to clarify her position. The Applicant advised that she did wish to rely upon the submission, albeit that was at odds with what she had just said.
31. The Tribunal asked the Applicant about the reference in the paper apart to the application in which it described the having to carry out repairs and cleaning costs "prior to the next guests arriving." The Tribunal asked the Applicant if the property was due to be rented as a holiday let following the term of the Respondents' occupation and she confirmed that it was.
32. The Tribunal asked the Applicant about the reference in the paper apart to "*they [the Respondents] have been trusted with an entire property which is filled with my possessions, books etc and supplied with all they need to be comfortable*

*down to their towels.*” The Applicant confirmed that was all correct, she provided the Respondents with “everything down to spoons and towels”.

33. The Tribunal asked the Applicant if the property was primarily rented out as a holiday let and she confirmed that it was rented for holiday accommodation and short-term lets at the time the Respondents resided there. However, she is residing in the property again.
34. In relation to the non-payment of rent, the Applicant advised that she had not heard from the Respondents following the email correspondence contained within the application. She had attempted to contact them by phone. She had spoken to Mr Hewitt about the matter. She had also attempted to speak to their college to obtain payment through them.
35. The Applicant advised that she had no further representations to make in respect of the application.

### **Findings in Fact**

1. The Applicant advertised the property at 34 Broughton Street, Edinburgh on gumtree around 14 March 2020 as a “holiday and short-term let”;
2. The Respondents agreed to reside in the property for three months between 17 March 2019 and 20 June 2019
3. The parties entered into a lease on around 17 March 2020 for the Respondents to occupy the property between 17 March 2019 to 20 June 2019;
4. It was agreed that rent would be paid in the sum of £1,200 per month;
5. A deposit of £1,000 was paid by the Respondents to the Applicant;
6. The Respondents paid the sum of £1,280 rent to the Applicant on 18 March;
7. The Respondents paid the sum of £1,200 rent to the Applicant on 20 April;
8. The Respondents paid £200 part rent to the Applicant on 20 May 2019;
9. The Respondents removed from the property on around 20 June;
10. The deposit of £1,000 was not paid into a tenancy deposit scheme;
11. The Applicant was not a registered landlord in respect of the property during the Respondents’ occupation of the property;
12. Holiday guests had been due to take occupation of the property at the end of the period of let to the Respondents;
13. The property was fully furnished including towels and linen;
14. The rent included the utility costs of gas and electricity on a ‘fair usage’ basis;
15. The Applicant intended to rent the property to the Respondents as a holiday let.

### **Reasons for Decision**

36. In this Application there are two matters for the Tribunal to consider and to decide:
  1. Does the Tribunal have jurisdiction to determine the application; and
  2. If the answer to question 1 is yes, should an Order for Payment be granted and in what sum?

Does the Tribunal have jurisdiction?

37. Section 1 of the 2016 Act provides:

*“1. Meaning of private residential tenancy*

*(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.”*

38. Paragraph 6 of Schedule 1 to the Act provides:

*“A tenancy cannot be a private residential tenancy if the purpose of it is to confer on the tenant the right to occupy the let property for a holiday.”*

39. In *St Andrews Forest Lodges Limited v Grieve* (cited above) the pursuer sought ejection of the defenders from a property occupied by them in terms of a ‘holiday let’ agreement. The defenders argued that they in fact had an assured tenancy and should be afforded the protections of an assured tenancy under the 1988 Act. The pursuer argued, amongst other things, that the defenders occupied the property as a holiday let, which was excluded from the definition of an assured tenancy in terms of section 12(2) of the Housing (Scotland) Act 1988.

40. The factual background is relevant. From 2007, the defenders had owned and operated a holiday park, in which they also resided. The defenders limited liability partnership went into administration in 2014. The Administrators allowed them to continue to reside in the property. The pursuer agreed to purchase the holiday lodge business from the Administrators. The defenders wished to purchase their lodge from the pursuer. The sale was conditional on the local authority granting a discharge of a planning restriction in respect of the lodge. The pursuer allowed the defenders to continue to reside in the lodge meantime. An agreement was drawn up to regulate the defenders’ occupation of the property. It was headed “Holiday Let Agreement”. It referred to the tenancy being for a fixed period following which it would continue on a month to month basis until such time as the defenders had purchased the property. The agreement set out the rent to be paid.

41. In the event, the defenders continued to reside in the lodge beyond the fixed period, and continued paying rent to the pursuer for a time, until the pursuer stopped accepting payment. The pursuer withdrew the offer to sell and asked the defenders to remove from the property. The defenders refused to remove from the property.

42. In considering whether the property had been occupied as a holiday let, the Sheriff held that:

*“a holiday let is simply a tenancy which, if it satisfies the terms of paragraph 8 of schedule 4 to the 1988 Act, will not be an assured tenancy. Critically, in my opinion, whether or not the terms of paragraph 8 are satisfied is a matter for the Court to determine in the light of the evidence before it. The tenancy does not become a holiday let just because one or both of the parties wish it so or describe it as such in a written agreement. The reality is that since March 2015 the defenders have occupied the Lodge as their only or principal home; indeed they have done so since 2007. At no time did they agree that their occupancy was for the purpose of a holiday. Nor could they have done, given that it manifestly was not. On the evidence I am quite clear that in fact and in law the defenders’ occupancy of the Lodge since March 2015 has at no point been for the purpose of a holiday. So paragraph 8 of schedule 4 is not in play, and the tenancy which the parties created is not precluded by this paragraph from being an assured tenancy.”*

43. Taking into account the documentary evidence and oral submissions from the Applicant, the Tribunal considers that on the evidence the Respondents occupied the property as a holiday let. Accordingly, there was not a Private Residential Tenancy between the parties in terms of section 1(1)(c) of the Act.
44. In her oral submissions to the Tribunal, the Applicant submitted that she had advertised the property as a holiday let. She had offered the property to the Respondents as a holiday let for a fixed period of three months. She had other holiday guests due to arrive at the property following the end of the Respondents’ occupation of the property. She therefore relied upon the Respondents vacating from the property at the end of the period in the agreement. At the time, she frequently rented her property out as a holiday let. In addition, the Applicant relied upon the property having been let out as a holiday let to explain why she was not registered as a Landlord in respect of the property at the time. Importantly, she submitted to the Tribunal that the agreement between the parties was a holiday let. While not determinative in itself, the Applicant also accepted that she had not paid the deposit into a Tenancy Deposit Scheme.
45. The Applicant’s position in the hearing reflected the references in the papers lodged with the application to “holiday rental contract” (in the statement of rent arrears); “holiday flat” (in the paper apart to the application); as well as the fact that all utility charges were included in the rent subject to fair usage; and the property contained all of the Applicant’s “possessions, books etc and supplied with all they need to be comfortable down to their towels” (see paper apart to the application).
46. At the hearing, the Applicant appeared not to know that she had applied to the Tribunal on the basis that there was a Private Residential Tenancy. She queried with the Tribunal why, because this was a holiday let, the matter of the Tribunal not having jurisdiction in relation to holiday lets had not been raised before now.



The Tribunal had to point out to the Applicant that the Tribunal administration had raised with the Applicant on two occasions that the property appeared to be a holiday let and asked her to confirm why the Tribunal had jurisdiction. In response she had submitted the written submission dated 9 August 2019. She had not read the submission which had been prepared on her behalf by an Advocate friend, albeit it had been signed by her. Upon having the submission read to her, she confirmed that she did wish to rely upon it, albeit it was at odds with what she had submitted in her oral submission.

47. On that basis, and in all the circumstances of this particular case, the Tribunal considers that the parties entered into a holiday let.
48. In any event, the Tribunal is also of the view that the circumstances of the case can be distinguished from the case of *St Andrews Forest Lodges v Grieve* (cited above). In that case the defenders had occupied the property for a number of years as their only or principal home. They continued to pay rent following the end of the fixed period agreed for their occupation. It was obvious that the defenders did not occupy the property as a holiday let, rather, it had been their family home for a number of years. By contrast, in this case it is clear that the Respondents answered an advertisement for a holiday let. They intended to occupy the property for a short-term fixed period while visiting Edinburgh from Spain during which time they were completing an internship. The circumstances, supported by the documentation and oral submissions from the Applicant, were more analogous to the Respondents occupying the property for a holiday.
49. Taking all of the evidence into account, including the Applicant's oral submissions at the hearing, the Tribunal considers that the property was a holiday let within the meaning of paragraph 6 of Schedule 1 of the Act.
50. Accordingly, there was not a Private Residential Tenancy created between the parties. This Tribunal does not therefore have jurisdiction to consider the application for an Order for Payment.
51. Accordingly, the application is refused.

### Decision

The application is refused on the basis that the Tribunal has no jurisdiction to consider the 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.**

Lesley Johnston

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**Legal Member**

**29 July 2020**

**Date**