



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/CV/22/0151

Re: Property at 193/9 Bruntsfield Place, Edinburgh, EH10 4DQ (“the Property”)

Parties:

Ms Adela Koubova, 12 South Bridge, Edinburgh, EH1 1DD (“the Applicant”)

Edinburgh Holiday & Party Lets, 2 Corstorphine High Street, Edinburgh, EH12 7ST (“the Respondent”)

Tribunal Members:

Nairn Young (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

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

- Background
1. This is an application for an order for repayment of a deposit alleged to have been paid by the Applicant to the Respondent in terms of a private residential tenancy at the Property. After various procedure, it called for a hearing at 10am on 18 November 2022 by teleconference. That hearing at first considered the preliminary matter of whether the Applicant was required to give her address in order for the matter to be allowed to proceed. The Tribunal having heard parties on that matter and determined that she should, the Applicant’s representative requested an adjournment, on the basis that he would not be in a position to appear that afternoon, as he had to attend the funeral of a relative. The Respondent objected to an adjournment, on the

basis that its representative had rearranged his own plans in order to be available for the full day and that no evidence of the engagement was being presented by the Applicant's representative.

2. The Tribunal indicated that it in any event required further information from the parties. It noted that the land certificate for the Property indicated its owner was Mr Fortune (the Respondent's representative at the hearing and one of its directors) in a personal capacity. Given the evidence that had been presented around the formation of the tenancy, the Tribunal directed parties to address the question of whether or not the landlord under the tenancy was the Respondent or Mr Fortune; and, if the latter, whether it should exercise its discretion under rule 32 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 to substitute or add a Respondent. The Tribunal adjourned the hearing to a further hearing, to consider parties' response to that direction and the substance of the case.

3. The further hearing was fixed for 10am on 10 March 2023, again by teleconference. The Applicant was on the call in-person and was represented by Mr Seamus McLeod of Living Rent. The Respondent was represented by Mr Mark Fortune.

- Findings in Fact

4. On 4 January 2020, the Applicant answered an advertisement posted by a person identifying themselves as 'Alex' on Gumtree offering accommodation in Edinburgh, in the following terms:

"I am an exchange student at the University of Edinburgh, starting very soon and looking for accommodation from around the 7th of January till the end of May.

Could you tell me more? I am very interested!

How many people are sharing the flat? What kind of room are you offering, is there a desk? I am guessing the bills are not included? How much for the bills?

How much is the deposit?

What is the exact address?

Something about me:

I am a student of architecture in Prague, going to do an exchange program in painting. Very happy, sociable and clean, also reliable.

Looking forward to hearing from you!

Thank you for your time.”

5. Alex was an employee of the Respondent and acted on its behalf in negotiating and concluding tenancy agreements at various properties, including the Property.
6. Alex responded on 4 January 2020 saying:

“Thanks for replying to the add [sic]. The double room ready now for immediate move in.

Flat located in Gillespie Crescent

Rent £375 month inc
electric £15

Deposit £275

Viewing will be tomorrow Sunday.”

7. Over the course of 5 to 9 January 2020, the Applicant and Alex had the following exchange by email:

[5 January 2020]

Applicant: "Ok great! My friend will be there. What is the exact address? ..."

Alex: "Viewing today at 3pm.

40 Gillespie crescent

Top flat 6

[later that day]

Somebody took the room and paid a deposit at the viewing.

The room next to it will be free on 18th jan."

Applicant: "I will take the room. Please let me know what is needed."

Alex: "Same price... basically the same room next to today's

The rooms are only available as tenant was caught sub letting."

Applicant: "I see, how much is it for the other room?"

[7 January 2020]

Alex: "Thanks for replying to the add [sic]. The double room was taken but there is another Efy [sic] ready now for immediate move in.

Flat located in Bruntsfield Place

Rent £375 month inc
electric £15

Deposit £275

Viewing will be probably be Thursday.”

[8 January 2020]

Applicant: “that’s amazing, I am already in Edinburgh, right now staying at my friend’s place, but want to move as soon as possible.

Please let me know what time is the viewing tomorrow.”

Alex: “Due to the amount of emails I am getting viewing will be today at 4:30pm.”

Applicant: “Ok, great, I will be there! What is the exact address please?”

Alex: “193 Brunstfield Place

Top floor flat 9

The tenant just left today so the room may still need vacuuming”

Applicant: “Thank you, will be there.”

8. The Applicant viewed the Property, as discussed in the above exchange, on 8 January 2020.
9. The individual known as Alex showed her the room and told her she would have to make a payment of £100 upfront to secure it.
10. Alex gave her the bank details to which she was to forward payment; the account being in the name of ‘mefortune’.

11. The Applicant paid a deposit of £100 to the bank details she was given, during that visit to the Property.

12. After the Applicant had paid the £100, on the same day, she sent a text message to a number she had been given for the Respondent asking for confirmation of receipt and that she could move in the following day at 2pm.

13. In response, she received the following two texts (the same day): “Received £100 to hold the room at 193 Bruntsfield Place.”

“2 o’clock is fine for tomorrow.”

14. The Applicant responded on the same day: “OK great, thank you. Otherwise I have a British number [she gave the number] but use it mainly for WhatsApp.”

15. On 9 January 2023, the following exchange took place by text between the parties:

Respondent’s representative: “We will meet u at 2pm. Street Door Do you want to pay balance £550 in cash or transfer”

Applicant: “Ok great, I will pay by transfer please, after checking the contract and making sure that everything is sorted....”

Respondent’s representative: “The contract is 1 page – so it will take u 2 mins to read it.... We have other move ins so he will have no more than 5 mins”

16. The Applicant attended the Property on 9 January 2023 with a friend.

17. A young man who was a representative of the Respondent was at the Property and gave her a copy of a document, dated 8 January 2020 and purporting to be a licence (‘the Agreement’), to sign.

18. The Agreement was headed, "EHPL Limited [Edinburgh Holiday & Party Lets]... HOUSING [SCOTLAND] ACT 1988 Schedule 4: Paragraph 8," gave the Property address, and stated (so far is relevant to this case):

"On receipt of £375 for the offer of Accommodation at the above property.

The licence period is 9th January 2020- 9th February 2020 and you confirm in acceptance the property is not your sole or main residence and you are not entering an assured tenancy. The licence holder agrees and acknowledges that this agreement is an excluded agreement for the purpose of the Protection of Eviction Act 1977...

1 months notice required."

19. The terms of the Agreement are used by the Respondent in other lettings, both at the Property and at other properties it lets, in some instances lasting several years.

20. The Applicant asked the Respondent's representative at the Property about the terms set out in the Agreement and spoke on the phone to a representative of the Respondent to request if the £100 she had already paid would be returned if she did not sign. The representative confirmed that it would not. The Applicant signed the Agreement, as did the representative of the Respondent.

21. Immediately after signature of the Agreement, the Applicant transferred £550 to the bank details she had used for the previous payment.

22. The £100 paid on 8 January 2023 and £175 of the £550 paid on 9 January 2023, were taken together as a deposit of £275 paid to the Respondent by the Applicant.

23. The Applicant was given a receipt by the Respondent for both sums, which stated, among other things:

“Deposits are refunded as due at least 15 days after the end of the stay. Deposits cannot be transferred to or used in lieu of future rent or unissued licences.”

24. The Applicant moved into the Property with her luggage, but no other belongings, on 9 January 2023.
 25. The Applicant had exclusive possession of her room at the Property during the period she stayed there and shared kitchen and bathroom facilities with three other individuals. None of these other individuals was residing at the Property while on holiday. She occupied the Property as her only dwelling, during which period she was undertaking a course of study.
 26. The Applicant was immediately dissatisfied with Property. On 10 January 2023 she gave notice that she wished to leave on 10 February 2023.
 27. The Applicant left the property on 10 February 2023 and requested return of her deposit of £275 from the Respondent. The deposit has not been returned and no reason has been given for its being retained.
- Findings in Fact and Law
28. The agreement by which the Applicant occupied the Property was a lease agreement under which she had the right to continue to occupy it as a separate dwelling, with exclusive possession, in exchange for the payment of rent of £375 per month. The legal relationship between the parties was that of landlord and tenant.
 29. The Applicant’s tenancy of the Property was not a holiday let falling within the terms of paragraph 6 of Schedule 1 to the Private Housing (Tenancies) (Scotland) Act 2016. It was a private residential tenancy in terms of section 1 of that Act.
 30. The Respondent is liable to repay the deposit of £275 to the Applicant.

- Discussion

31. This case has a somewhat complicated factual basis; but, in law, so far as this Tribunal is concerned, it ultimately comes down to a question of jurisdiction. That in turn is determined by the answer to one question: was the agreement entered into between the parties a private residential tenancy? If it was, this Tribunal has jurisdiction to order the repayment of the deposit paid by the Applicant. (The Respondent has not set forth in submissions any contention that the Tribunal should not award the order sought, if it finds it has jurisdiction: or any basis for such a contention.) If the Tribunal should find that the agreement was not a private residential tenancy, it simply does not have jurisdiction to make the order sought.

32. The Applicant's position is that her tenancy of the Property fits the definition of a private residential tenancy ('PRT') as contained in section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 ('the Act'). That states (so far as is relevant):

"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... ."

33. The Respondent variously characterises the agreement as a licence to occupy and as a holiday let. If taken as a lease, it does not suggest that the first of the criteria in s.1 of the Act was not satisfied. It does however contend that the Property was not the Applicant's only or principal residence; and that it fell within the terms of Schedule 1 to the Act, specifically paragraph 6, which stated at the relevant time:

"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."

34. The parties referred to a previous decision of the First-tier Tribunal, *Carcangiu v Edinburgh Holiday & Party Lets* (Chamber Ref: FTS/HPC/PR/19/4030). On the question of whether the agreement in that case was a holiday let, that decision principally adopted the reasoning found in the Sheriff Court case *St Andrews Forest Lodges Ltd. v Grieve* [2017] SC DUN 25. Neither of these decisions is binding on the Tribunal, but the latter in particular is persuasive, as it sets out helpfully the key features of the law on two points of relevance to this case: when an agreement may be characterised as a lease; and what is required for a lease to be considered a 'holiday let'.

Lease or Licence?

35. On the first of these points, Sheriff Collins considers the various authorities around the question, in both Scotland and England, and concludes (at para.34):

"In both jurisdictions leases and licences are contracts, and the terms of those contracts fall to be construed by ascertaining the intentions of the parties, derived in particular from the terms of any written agreement, what they said, and what they did. In both jurisdictions the distinction between a lease and a licence has been seen to turn on the question whether, properly construed in the light of their intentions, there was not only agreement as to parties, subjects, rent and duration, but also as to whether the occupier was to have exclusive possession. In both jurisdictions it has been accepted that the words

used in the written agreement are not determinative of whether the agreement is a lease or a licence. In principle I can see no good reason why the further principle underlying *Street* [v *Mountford* [1985] A.C. 809] and *Bruton* [v *London & Quadrant Housing Trust* [2000] 1 A.C. 406], that while the terms of a contract can be determined by ascertaining the intentions of the parties, the legal effect and consequences of their agreement is a matter of law for the court to determine, is not equally applicable in Scotland. Furthermore, like Lord Templeman, I can in the normal case identify no proper distinction between a residential lease and a residential licence other than the presence or absence of exclusive possession.

...

[at para.35] I would readily hold that in Scotland too, where it has been established that there is *consensus in idem* [i.e. agreement between the parties] as to parties, premises, rent, duration and exclusive possession, and that possession is not referable, exceptionally, to another legal contract (such as in the case of a lodger or service occupier) then the agreement will as a matter of law be a lease and not a licence, and this will be so even if the parties did not intend it to have that legal characterisation.”

36. In this case, the terms of the Agreement show clearly that there was agreement as to parties, premises and duration. The Tribunal also considered that agreement as to rent and exclusivity was easily inferred from the terms of the Agreement and the context of the email conversation quoted at paras.4-7 above. The Applicant was clear that she was looking for a property from early January to the end of May 2020. In response, a figure of, “£375 month inc electric £15,” was quoted. In context that must be read to mean £375 per month was payable. The Agreement also makes reference to, “1 months notice required,” which also shows that the parties understood the contract to be a continuing one beyond the end date mentioned. Similarly, the whole conversation around holding and paying deposits for rooms indicated that occupation was understood to be on an exclusive basis; as in fact it transpired to be.

37. Following the reasoning set out in *St Andrews Forest Lodges Ltd.*, therefore, the Tribunal is satisfied that the Agreement constituted a lease, despite referring to itself as a licence.

Holiday Let?

38. Sheriff Collins, considering the analogous exception to the assured tenancy regime in paragraph 8 of Schedule 4 to the Housing (Scotland) Act 1988 in *St Andrews Forest Lodges Ltd.*, states:

“Critically, in my opinion, whether or not the terms of paragraph 8 are satisfied is a matter of 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.”

39. The Tribunal considers that this conclusion is correct and applies equally to the exception set out in paragraph 6 of Schedule 1 to the Act. The purpose of the Act is to regulate residential tenancies, by making the default position in relation to these that they will be PRTs. Schedule 1 sets out exceptions; but it would be nonsensical and render the protections applied to parties under PRTs useless if all that was required to avoid them was to add a clause to the effect that one of the exceptions applied to an agreement.

40. Nonetheless, the fact that the Applicant signed an agreement with a company called ‘Edinburgh Holiday & Party Lets’, one of the terms of which stated, “you confirm in acceptance the property is not your sole or main residence and you are not entering an assured tenancy,” lends some weight to the Respondent’s case that this lease was agreed by the parties to be a holiday let.

41. However, it is notable that the Agreement itself does not refer to the arrangement being a holiday let and it is certainly not inconceivable that a company with the name of the Respondent could also let property on different basis. Indeed, the Respondent’s representative stated on various occasions in

his submissions that its business model included lettings of a much longer-term nature, including up to, “multiple years.”

42. The meaning of the confirmation given by the Applicant is also somewhat unclear, since it could be taken as two separate points (i.e. “the property is not your sole or main residence,” and, “you are not entering an assured tenancy”) or one point (i.e. “the property is not your sole or main residence and you are not entering an assured tenancy”). If the latter, there can be no issue with its terms, since there is no question that the Agreement constituted an assured tenancy, so both elements could not be satisfied.
43. The context again is determinative of the position. The email conversation was very clear as to the purpose for which the Applicant intended to use the Property, and this was not for a holiday. She was clear that she was looking for somewhere to live as her only residence during the period she was in Edinburgh. The whole process of reserving, viewing, paying a deposit and signing a contract at the Property itself was characteristic of an ordinary tenancy and not at all characteristic of a holiday let, which one would expect to be arranged by a holiday maker in advance of arriving at their destination. The fact that the Property was shared with other tenants who were not on holiday too tends to suggest that the parties did not intend the exception to apply to the Applicant’s tenancy. The requirement added to give 1 months notice too is not indicative of a holiday let, which would normally be negotiated for a fixed period, most often for shorter than a month, and not require notice of termination to be given.
44. In that context, regardless of whether the words of the confirmation are read as two points or one, the Tribunal has no difficulty in concluding that both parties were aware that this Agreement was not for a holiday let and did not intend it constitute one.
45. It follows that this was a PRT and that this Tribunal has jurisdiction to grant the order sought. As has already been noted, the Respondent did not suggest

that there was any other basis upon which the Tribunal should refuse the order: so it will be granted.

Other Matters

46. It is worth noting explicitly in this decision that the findings in fact outlined above are largely based on the documentary evidence that was presented and, where that is not the case, the unopposed oral evidence given by the Applicant and/ or Mr Fortune, speaking as a director of the Respondent. Where there was disagreement on any point between the two, the Tribunal preferred the Applicant's position. The Applicant presented as credible and reliable, with the relevant parts of her position being internally coherent and backed up by the documentary evidence. Mr Fortune generally sought only to cast doubt on her probity by asking questions, without putting forward much in the way of positive evidence to back up any assertion that he made. His own position was often contradictory and therefore could not be treated as reliable: for example, he told the Tribunal that his business model involved letting properties via the Respondent as holiday lets, but went on to state that in many cases these would last for some years, and also assert that the Agreement constituted a licence. Crucially, he was very clear throughout that he had not been present at the time the Agreement was executed; but did not bring forward the witnesses who had been there on behalf of the Respondent. In particular, 'Alex' was never identified and there was no first-hand evidence presented by the Respondent to contradict the Applicant's version of the events surrounding the formation of the tenancy. Mr Fortune was not therefore a reliable witness to the points that were in contention.

47. Separately, the Tribunal had also requested submissions on of whether or not the landlord under the tenancy was the Respondent or Mr Fortune; and, if the latter, whether it should exercise its discretion under rule 32 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 to substitute or add a respondent. Having heard parties' submissions on

this, it was satisfied that it should not, the Respondent being the landlord under the tenancy.

48. Mr Fortune, in giving submissions on behalf of the Respondent, did on a number of occasions seem to refer to himself as the landlord accidentally; and there was also some documentary evidence presented to show that the Respondent's accounts showed it was dormant at the time that the tenancy was entered into, which would suggest that it was not carrying out letting activity itself at the time.

49. However, as has been concluded above, it is clear from the terms of the Agreement that the parties understood who the parties to the lease were, and that can only mean that the Respondent was the landlord. Mr Fortune indicated that he has a separate, commercial agreement with the Respondent which is the basis of its title to let the Property (and other properties) and there was no evidence presented to suggest that that was not the case.

50. Finally, the Respondent made an application for the expenses of the adjourned hearing to be awarded against the Applicant, on the basis that it did not believe that the reason given by her representative for his unavailability was genuine; and that, if it was, it should have been brought to the Tribunal's attention in the morning and not following the leading of some evidence. It suggested an award of a nominal sum should be made.

51. Rule 40(1) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 sets out the basis upon which expenses may be awarded:

“40.— Expenses

(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.”

52. The Tribunal does not consider an award of expenses is appropriate. In the first instance, it was satisfied on the submission of the Applicant's representative that the reason he gave was genuine and that he had genuinely expected that the hearing might be concluded in the morning. His behaviour, acting on behalf of the Applicant, was not unreasonable.

53. In any event, there was no unnecessary or unreasonable expense caused. The hearing did not conclude until the afternoon of the second day, so took longer than one day in total and would have required to be adjourned to a second day, even just for lack of time. The adjournment was also necessary to allow parties to respond to the direction made by the Tribunal. The adjournment shortly after lunch on the first day therefore made no appreciable difference in terms of expense to the parties; as is supported by the fact that the Respondent's application was only for a nominal sum.

- Decision

Order made for payment by the Respondent to the Applicant of the sum of TWO HUNDRED AND SEVENTY-FIVE POUNDS (£275) STERLING.

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.



4th April 2023

Legal Member/Chair

Date