

Housing and Property Chamber
First-tier Tribunal for Scotland



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/18/2863

Re: Property at 2/3 2 Torridon Dr, Renfrew, Paisley, PA4 0US (“the Property”)

Parties:

Mr Jagdish Singh Panpher, 25 Corran Avenue, Glasgow, G77 6EX (“the Applicant”)

Contempo Property, Mirren Court (Three), 123 Renfrew Road, Paisley, PA3 4EA (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

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

Background

This is an application for a payment order dated 24th October 2018 and brought in terms of Rule 111 (Application for civil proceedings in relation to a private residential tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant is the landlord of the Property, and the Respondent is his letting agent. This application seeks payment in relation to various financial losses said to have been incurred by the Applicant “as a direct result of estate agent negligence and lack of reasonable care and skill in ones duty”.

The Applicant listed his daughter as his representative in the application. Neither are legally qualified.

The Tribunal was concerned as to whether it had jurisdiction in relation to such a claim, but accepted the application in terms of Rule 9 of *The First-tier Tribunal for Scotland Housing*

and *Property Chamber (Procedure) Regulations 2017* as amended in order to allow parties the opportunity to be heard in relation to that question, and to explore and confirm with the Applicant and his representative the legal basis of his claim.

The Tribunal is aware that lay parties may use words in an application which have a particular meaning in law, without being aware of that meaning and without intending them to be interpreted with that meaning.

The overriding objective of the Tribunal is to deal with proceedings justly and in a manner which is proportionate to the complexity of the issues and the resources of the parties in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, including assisting any party in the presentation of the party's case without advocating the course they should take.

For this reason, the Tribunal considered it appropriate to hear submissions and explanation from the parties at a Case Management Discussion in order to confirm and clarify with the Applicant upon what legal basis he was advancing this application, and to allow both parties to address the Tribunal on the question of jurisdiction in light of that information.

The Tribunal advised both parties and their representatives by advance e-mail in the week preceding that of the Case Management Discussion that the Tribunal wished to be addressed on the question of whether the Tribunal has jurisdiction to deal with this application. The e-mails also indicated that the parties might wish to take legal advice on the issue, as it would be dealt with at the Case Management Discussion set for the following week.

Case Management Discussion

A Case Management Discussion was held on 17th December 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Applicant appeared, and was represented by his daughter, Mrs Kainth. Mrs Kainth was not physically present, but requested that she be allowed to participate by listening to what was taking place and responding via her father's mobile phone.

The Respondent's Mr Wolda appeared, and was represented by Mr McBain, who holds a senior position with the Respondent company, of which Mr Wolda's branch is apparently a subsidiary. The Respondent had no objection to Mrs Kainth participating by telephone, and the Tribunal accordingly allowed her to do so.

The Tribunal explored the legal nature and basis of the application with both the Applicant and Mrs Kainth. Since the application was accepted, the Applicant had submitted much more detailed particulars in relation to his claim which appeared to confirm that he did indeed seek payment of damages from the Respondent upon the legal basis of its professional negligence in acting on his behalf in relation to the letting of the Property to a tenant.

Mrs Kainth and the Applicant both confirmed that the application was brought as a claim for financial loss and damage allegedly sustained as a result of the professional negligence of

the Respondent. Having done so, they submitted that such a claim fell within the jurisdiction of the Tribunal.

Mr McBain submitted in response that the Tribunal did not have jurisdiction in relation claims for professional negligence such as this, which would require to be raised in the Sheriff Court.

The Tribunal, after hearing parties, rose to consider their respective submissions, and then resumed to give its decision on the question of jurisdiction.

Statement of Reasons

The First-tier Tribunal for Scotland was established by the *Tribunals (Scotland) Act 2014*. The Housing and Property Chamber commenced operating with effect from 1st December 2017.

The jurisdiction of the Tribunal in relation to Private Residential Tenancies, such as that which applied to the Property, is set by statute. Section 71(1) of the *Private Housing (Tenancies) (Scotland) Act 2016* provides:

“First-tier Tribunal's jurisdiction

- (1) In relation to civil proceedings arising from a private residential tenancy—
 - (a) the First-tier Tribunal has whatever competence and jurisdiction a sheriff would have but for paragraph (b),
 - (b) a sheriff does not have competence or jurisdiction.
- (2) For the purposes of subsection (1), civil proceedings are any proceedings other than—
 - (a) the prosecution of a criminal offence,
 - (b) any proceedings related to such a prosecution.”

There appears to be no further statutory definition provided in relation to what is meant by “arising from a private residential tenancy”, nor have there been any decisions which are legally binding upon the Tribunal in that regard of which it is aware.

Indeed, the only decision on the point which the Tribunal was able to locate was a decision dated 2nd August 2018 by Mr Upton, legal member of the First-tier Tribunal for Scotland Housing and Property Chamber rejecting an application in terms of Rule 8 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Though not bound by that decision, the Tribunal respectfully agrees with Mr Upton’s reasoning. In that application, the Tribunal concluded that it had no jurisdiction in relation to a claim for payment under Rule 70 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended in relation to a guarantee which was separate and collateral to a tenancy agreement.

The jurisdiction of the Tribunal in that application was also set by statute in terms of section 16 of the *Housing (Scotland) Act 2014*, which gives the Tribunal jurisdiction “in relation to actions arising from...” various identified forms of tenancy agreement. The operative

wording is (perhaps understandably) almost identical to that used in section 71 of the *Private Housing (Tenancies) (Scotland) Act 2016*.

Mr Upton considered in paragraph 7 of his decision that “The aim or subject matter of the agreement is a guarantee, not a tenancy. The object is to enforce an obligation owed to the applicant by the respondent under a guarantee.” As a result, he considered that the application did not arise from a tenancy agreement, and accordingly that the Tribunal did not have jurisdiction in the matter.

In this application, the Applicant seeks payment in respect of financial loss allegedly sustained by him and caused by the Respondent’s professional negligence. Such a legal claim is one which might be brought either upon the ground of a breach of the contract between the parties for the Respondent to provide professional services to the Applicant, and/or upon the ground that the Respondent has breached a duty of care which it owed to the Applicant.

Albeit that but for the existence of the private residential tenancy agreement, the Respondent would no doubt not have been providing its professional services in connection with the lease to the Applicant, the obligation in question which the Applicant alleges the Respondent has breached is not one which comes from the private residential tenancy agreement itself. Rather, it is a separate legal obligation based on different legal principles (either contractual and/or delictual).

The object of all statutory interpretation is to discover the intention of Parliament. This intention must be deduced from the language used (see *Stair Memorial Encyclopedia, Volume 12 “Interpretation of Statutes, Deeds and Other Instruments”* at paragraph 1102).

Adopting a purposive approach to the statutory interpretation of section 71 of the *Private Housing (Tenancies) (Scotland) Act 2016*, the Tribunal considers that the intention of the Scottish Parliament appears to have been to give jurisdiction to the Tribunal in matters relating to the new private residential tenancy agreement created by that Act.

It does not appear to the Tribunal that the Scottish Parliament intended to give jurisdiction to the Tribunal to deal with claims for damages upon the grounds of negligence which are brought by landlords against their professional advisors under the laws of contract and delict.

It is worth noting that that such claims are notoriously complex, involving the application of legal tests formulated by the courts over many years in relation to the legal duties of professional advisors, the legal standard which those professional advisors must fall short of to be held negligent, and what types of loss and damage might be recoverable in the event that negligence is established.

Due to these complexities, the Courts have repeatedly held that fair notice must be given by a party to their opponent in relation to these issues in their written court pleadings (see, for example, *Lamb v Wray* 2014 SLT (Sh Ct) 2, which made this point and confirmed that even where simplified forms of pleading were utilised, that did not absolve a party of the responsibility to give fair notice of their case).

The Tribunal does not operate in terms of its procedures with traditional formal written pleadings such as the courts generally use. It utilises pro-forma application forms which are completed by applicants, instead of traditional court pleadings. This form of procedure is in the Tribunal's view not suited to, or appropriate for, complex legal claims such as professional negligence.

The Tribunal does not consider that it was the intention of the Scottish Parliament to transfer jurisdiction in such matters away from the Sheriff Court (and Court of Session) to the Tribunal. Those courts have more detailed rules of procedure which are more appropriate to, and suitable for, such claims.

For these reasons, the Tribunal considers that it does not have jurisdiction in this matter, and will accordingly dismiss this application.

In light of the Tribunal's decision, the Respondent sought an award of expenses against the Applicant.

In terms of Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, the Tribunal may award expenses 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.

It is undoubtedly the case that the Applicant has put the Respondent to significant expense in this application. However, the Tribunal does not consider that such expense was caused by unreasonable behaviour by the Applicant in the conduct of his case, and the Respondent could not identify to the Tribunal any such unreasonable behaviour in the Applicant's conduct of his case.

In those circumstances, the Tribunal does not consider it appropriate to make any award of expenses against either party in this application, and does not do so.

Decision

For the above reasons, the Tribunal dismissed 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.

Neil Kinnear

Legal Member/Chair

17/12/18

Date