Upper Tribunal for Scotland

2024UT49
Ref: UTS/AP/24/0044

**DECISION OF**

Sheriff O'Carroll

**ON AN APPEAL**
**IN THE CASE OF**

Ms Judith Kennard,
per Bannatyne Kirkwood France & Co,

Appellant

- and -

Mr Jack Sykes, Mr Henry Crone, Mr George Tompkins, Mr Arthur Wills, Mr Hugo Andrew
per Mr Charlie Sykes

Respondent

FTS Case reference: FTS/HPC/PR/23/1990

6 September 2024

**Decision**

The appeal against the decision of the FTS dated 22 April 2024 is allowed. The case is remitted to a differently constituted FTS for redetermination.

**Reasons**

*Introduction*

[1] This is an appeal against the decision of the First-tier Tribunal for Scotland ("the FTS") dated 22 April 2024 that the appellant pay a total sum of £5,175 in aggregate to the five respondents, all of whom were at the material time studying in further education in

Edinburgh, as a penalty for having failed timeously to lodge a tenancy deposit in an appropriate scheme in breach of the Tenancy Deposit Schemes (Scotland) Regulations 2011 ("the 2011 regulations"). It was agreed that the respondents did use the accommodation in question, they paid a deposit between them of £3,450 on 29 March 2022 to the appellant, that the appellant owned the accommodation and the appellant did not lodge the deposit in an approved scheme. It was agreed that the deposit was returned by the appellant to the respondents, albeit after a delay. The question before the FTS was whether the 2011 regulations applied.

[2] The appellant said not. She said the accommodation was occupied under short term lets, which are excluded from the 2011 regulations. She also said the respondents were personally barred from making an application to the tribunal since an email sent on behalf of the respondents to the appellant on 8 June 2023 amounted to an undertaking that if the deposit was repaid by 12 June 2023, no application would be made to the tribunal under the 2011 regulations; but she paid in full by that date.

[3] The FTS held that the accommodation was let under a private residential tenancy in terms of the Housing (Scotland) Act 2016 ("the 2016 Act"), to which the 2011 regulations did apply, not as a short term let. Furthermore, the FTS held that the respondents were not personally barred from making an application to the FTS so it could and did entertain the application.

[4] Permission to appeal was granted by the FTS on four grounds, which in reality collapse into two grounds, as confirmed by the appellant in its submissions to this Tribunal.

[5] The first ground was that the tribunal erred in law in determining that the 2011 regulations did apply to the deposit. That is because while the FTS made a determination that the accommodation was the respondents' only or principal home for the period 15 September 2022 to 20 May 2023, the FTS was not entitled to reach that conclusion on the very limited evidence presented to it. That conclusion being flawed, the tribunal's conclusion as to the correct legal classification of the accommodation occupied was flawed.

[6] The second ground was that the FTS was wrong in law to conclude that the respondents were personally barred from making the application to the FTS.

[7] Both parties asked that this appeal be determined on the papers without the need for a hearing. This Tribunal consented to that request on 3 September 2024. This decision proceeds therefore on a consideration of the terms of the appeal, the submissions of the parties to that date, consideration of the applicable law, the FTS decision and its decision to grant permission to appeal.

*The grounds of appeal*

[8] *Ground 1.* It is common ground that among the many types of accommodation agreements which are excluded from the convoluted provisions of the 2011 regulations are short-term lets. One gets to that conclusion via regulation 3(b) of the 2011 regulations which provides for exclusions from the ambit of the 2011 regulations, which takes the reader to section 83(6) of the Antisocial Behaviour etc (Scotland) Act 2004, paragraph (n) of which takes one to the Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, article 3 of which defines a short-term let as one which requires *inter alia* at article 3(a) that "the guest does not use the accommodation as their only or principal home". One important additional exclusion from the definition of short term let is provided by article 3(f) and schedule 1(2)(m) of the 2022 order: a private residential tenancy within the meaning of the Housing (Scotland) Act 2016. (I note that schedule 1 and schedule 2 of the 2022 Order also exclude "student accommodation" and a "student residential tenancy" but nothing was made of that by the parties). A private residential tenancy falls within the ambit of the 2011 regulations.

[9] A private residential tenancy is defined by section 1 of the 2016 Act which definition provides that the tenant must occupy the property or any part of it as the tenant's "only or principal home" (even if subsequently the tenant then ceases to occupy the property as their only or principal home).

[10] Thus, the FTS and the parties correctly identified that it was necessary for the tribunal to determine whether the accommodation was occupied by the respondents as their "only or principal home" standing the contention of the parties.

[11] It is rather unfortunate that none of the respondents were able to attend the tribunal due to their studies and so were unable to give oral evidence to the tribunal. Neither was very much in the way of documentary evidence provided by the respondents to the tribunal as regards the way in which they came to occupy the accommodation, what the accommodation was used for, how long they were in the accommodation, what other accommodation was open to them, how it was used, the use made in term time and outside term time. The respondents were represented at the hearing by the father of one of them, Mr Sykes, who understandably was unable to provide detailed information with regard to factual material bearing on the question of whether the accommodation was the only or principal home of all of the respondents. He was able to say that his son was a full-time student at Edinburgh University who "came home" for Christmas and Easter and who was not "back and forth" during term time. He was able to say that the other respondents were full-time students also during the relevant period but little further; and nothing about the rest of the respondents. He was not legally qualified. He understandably may well not have understood in advance of the hearing that this was an important question to be decided by the FTS.

[12] The position taken by Mr Sykes on behalf of the respondents, very broadly put, was that the various agreements entered into by the respondents with the appellant, including so-called holiday lets and a purported series of short-term lets, over many months were a series of sham arrangements designed to avoid tenant protection. The appellant by contrast told the tribunal that she believed the main purpose of letting the property in June 2022 was to store belongings. The appellant also told the tribunal that she accepted that the respondents did not occupy the accommodation for the purposes of a holiday even though the documents she provided to the respondents purported to be "holiday letting agreements". The FTS was sceptical about her evidence. It rejected her evidence that the

respondents occupied the property only occasionally and her contention that accommodation occupied by students during term time can never be regarded as their only or principal home. However, though the FTS acknowledged that it had that had quite limited factual material bearing on the question of whether the accommodation was the respondents' only or principal home it nonetheless decided on the basis of the material before it that the accommodation was the only or principal home of them all. It further determined that the accommodation was occupied as a private residential tenancy and that therefore the 2011 regulations applied.

[13] Against the whole background which was before the FTS (not all of which is repeated here) I have some sympathy with the way in which the FTS proceeded. Nonetheless, unfortunately the FTS did not have an adequate factual basis on which to reach that conclusion. Whether a person occupies a property as their only or principal home (or alternatively sole or main residence or only or main residence) is relevant in a number of statutory contexts. This and cognate phrases have been subject to extensive judicial analysis over many decades. It is convenient to refer to another decision of the Upper Tribunal for Scotland in the case of *Ramsay v Johnson* 2023 UT 40 in which Sheriff Simon Collins KC considered this phrase albeit in the context of a different statutory provision. I adopt gratefully his summary of the legal background at paragraphs 9 and 10.

[14] I also consider that the decision in *Roxburgh District Council v Collins* 1991 SLT (Sh Ct) 49 a decision of Sheriff Principal Nicholson may be of relevance. In that decision, (which concerned succession to a tenancy and the requirement that the successor have his only or principal home at the date of the tenant's death in the house in dispute), the Sheriff Principal concluded that regular or habitual residence was not a prerequisite and that the question that must be asked, in cases where regular or habitual residence is lacking, is whether on the facts of the case, the person concerned had such a real, tangible and substantial connection with the house in question that it, rather than any other place of residence, can properly be described as having been his only or principal home during the relevant period

[15] In my view, as the Sheriff held in the *Ramsey* case, careful fact-finding is usually required in cases in which this question arises. A tribunal will need to analyse the nature and extent of the personal ties of the five respondents (the FTS treated them as a single unit) to the accommodation that they occupied and any other accommodation which they occupied during the relevant period, such as their parents' houses. Questions such as where the respondents are registered to vote, where they receive important official post (such as personal bank statements, official and university communications), where the majority of their possessions are kept, registration with the local authority for any purpose, where they are registered with a doctor or dentist, what periods of absence from the accommodation there have been and for what reasons, their connections with other accommodation which they might occupy, comparison between their ties and connections to different accommodations and so on may all be relevant. This is not an exhaustive list. It will be important to decide for each respondent what they consider during the period in question to be their principal home. The weight to be given to each factor will be a matter for the FTS to determine

[16] Unfortunately, very little of this fact finding has been done by the FTS in this case and therefore the appeal on this ground must succeed. I will remit the case back to a differently constituted tribunal to determine this matter afresh. The respondents and Tribunal will need to decide how that evidence is to be provided. That might be by the respondents giving evidence directly to the tribunal in person or a remote digital hearing. It may be that affidavits would be sufficient. However it is done and whatever documentary material is to be provided will ultimately be a matter for the tribunal and the parties to decide. Fresh findings of fact require to be made by the FTS. The tribunal will then need to determine the question of whether the accommodation was occupied during the relevant period as the respondents' only or principal home. Once that is decided, the tribunal will then need to decide whether or not the appellant's argument that the accommodation was occupied under a series of short-term lets is made out or whether by contrast, the accommodation was let under some other form of tenancy such as a private

residential tenancy. That question will require the issue of only or principal home to be decided but the question of what type of tenancy was held by the tenants does not turn only on that question. The Tribunal will need to consider all the circumstances of occupation including the analysis of the tenancy or occupancy written agreements. The tribunal will be astute, as all tribunals and courts must be in cases such as this, to the possibility of sham arrangements being entered into designed to avoid legal protections for tenants, including their deposits and to rule accordingly. Having made carried out that exercise, the tribunal will then be in a position to decide whether the deposit was caught by the 2011 regulations.

[17] *Second ground of appeal.* The appellant claimed that the respondents were personally barred from proceeding with the claim under the 2011 regulations. Following the end of the tenancy in May 2023, the tribunal found that the deposits were not immediately returned. There was considerable correspondence and discussion about whether the appellant was entitled to retain some of the deposit in respect of damage to the accommodation. That process appeared to have been brought to a halt on 8 June 2023, when Mr Sykes sent an email to the appellant on behalf of the respondents in the following terms

> "I am writing to inform you that the full deposit should be paid into the following bank account by Monday the 12th June following advice received from the Private Rented Services Enforcement team at Edinburgh Council…. If I do not hear from the account holder by 5 pm on 12 June that the full deposit (£3,450) has been paid I will submit a form G to the Housing and Property Chamber First Tier Tribunal for Scotland indicating that you are in breach of rule 103 of the Tenancy Deposit Scheme (Scotland) Regulations 2011. I will also be forced to inform Private Rented Services of this action as well as Licensing Enforcement of my concerns that you are not a fit and proper person due to concerns about your inability to comply with your responsibilities. Please note neither I nor any of the tenants will enter into any further correspondence until the monies are repaid in full as per our request."

[18] A payment was made by the appellant on 9 June 2023, although the amount does not appear from the FTS decision. It was not the full amount. Neither does the FTS decide whether or when the email was received or whether that payment was a consequence of the email. On 11 June 2023, one day before the expiry of the ultimatum, the respondents made an application to the FTS complaining that the respondent had failed to place the

deposit in an approved deposit scheme. The FTS make no findings about why that application was made on that day before the ultimatum expired or whether the part-payment was the cause. Neither does the FTS make any findings about why the respondents did not wait until the expiry of the deadline. Neither does the FTS determine whether the fact of that application having been made was known to the appellant before payment of the balance. Nor does the FTS make any findings in fact as to what the recipient, the appellant, made of the email or what she believed would be the effect of repaying the deposit in part and why. The following day, on 12 June 2023, the balance of the deposit was paid by the appellant. The FTS does not say how much that was, why it was paid then or how much was paid or the reason why that second payment was made.

[19] The FTS approached the matter by directing itself that the law on personal bar was formulated in *Gatty v MacLaine* 1921 SC (HL) 1 referring to the dictum of Lord Birkenhead, LC at page 7 and quoting an abbreviated version of the dictum:

> "Personal bar arises where A by his words or conduct justified B in believing that a certain state of facts exists and B has acted upon such belief to his prejudice".

It is worth noting that though the ground of appeal does not challenge the accuracy of this statement of the law of personal bar, a considerable amount of judicial water and academic analysis has gone under the bridge since 1921. While of course that decision remains authoritative, in so far as it goes, a more comprehensive and accurate analysis of the law of personal bar is available. A detailed modern analysis of the law in this area may be found in *Personal Bar* (2006) by E.C. Reid and J.W.G. Blackie in which the authors analyse personal bar by reference to two elements: inconsistency together with unfairness. See Chapter 2 and the concise summary of the essential ingredients at page lxv. Paragraphs 19.10 to 19.12 focus on personal bar in the specific context of barring a right to bring court and tribunal proceedings. The general approach and analysis in Reid and Blackie was adopted by Lord Eassie and Professor McQueen, General Editors of *Gloag and Henderson, The Law of Scotland* (15th ed., 2022), in their summary of the law in this area at paragraphs 3.05 to 3.07, which

is perhaps more accessible. It may be that the parties and the FTS would find reference to such material and the authorities cited in those works to be of assistance.

[20] However, it is unnecessary for the purposes of this appeal to examine further the law of personal bar and whether the FTS properly itself as regards the definition. I do not decide that matter. That is because it is plain in my view that even on the FTS's own statement of the law, the FTS has erred. That is for two principal reasons. The first is that the application of personal bar is highly fact dependent. That means that the fact finder must make detailed findings in fact at the outset before it is able to apply the law. This has not been done: see paragraph [18] above. The facts found are sparse even though the FTS had before it both the sender and the recipient of the email. No notice appears to have been taken of the fact that the application to the FTS appears to have been made before the expiry of the ultimatum. The FTS therefore did not have before it the facts on which it could determine correctly whether the ingredients of personal bar were established.

[21] The second error appears from the FTS's own reasoning as to why personal bar was not established. It said that since the author of the email was not a tenant of the appellant, he had no locus to make an application to the tribunal. But plainly, he held himself out as a representative of the respondents and could be presumed to have had the necessary locus. He was representing them at that very hearing. If that is not correct, no reason is given. In addition, the FTS held, as a further reason why personal bar could not apply, that the reference in the email to rule 103 was wrong since there is no rule 103 in the 2011 regulations. While it is true that rule 103 is not a part of the 2011 Regulations, as the FTS knew (see paragraph 1 of its reasons), rule 103 does appear in the FTS Rules of procedure and that rule specifically concerns applications to the FTS in connection with deposit disputes under the 2011 regulations. It might reasonably be thought reading the whole terms of the email (the FTS appear to concern itself with an extract only), notwithstanding the inaccurate legal reference, that the substance of the content was that the writer was threatening to take the matter of the deposit to a tribunal under the 2011 regulations if the money was not paid in full by the given date. Neither the writer nor the recipient of the

email were legally qualified. By focusing on the inaccurate legal reference rather than the substance, the FTS has failed to consider the correct legal test.

[22] It follows therefore that the appeal succeeds. The whole matter is remitted to a differently constituted FTS for redetermination.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff O'Carroll
Member of the Upper Tribunal for Scotland