



**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/23/1423**

**Property : 16 Flat 1, Avonmill Road, Linlithgow EH49 7QX (“Property”)**

**Parties:**

**Kevin Morrison and Natalia Morrison, Flat 20, 1 Heron Place, Edinburgh EH5 1GG (“Applicant”)**

**Vincent McColgan, 106 Avalon Gardens, Linlithgow EH49 7PL (“Respondent”)**

**Tribunal Members: Joan Devine (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“Tribunal”) determined to refuse the Application.**

**Background**

The Applicant sought an order for *“recision and / or damages based on misrepresentation for the unlawful rental charges of £2325 plus interest at 8% that the landlord took from us from 15<sup>th</sup> Jan 2021 to 16<sup>th</sup> April 2021”*. The Applicant had lodged Form F. The documents produced were:

1. a Tenancy Agreement dated 13 and 15 January 2021
2. excerpts of covid-19 guidance
3. emails between the Parties dated 29 December 2020, 4 and 5 January 2021
4. a summary of text messages from 28 December 2020 to 23 September 2021 and a written representation.

On 27 July 2023 the Respondent lodged a written representation with supporting documents numbered 1 to 10 as follows :

1. Response to Application

2. Notes of a Case Management Discussion (“CMD”) dated 6 December 2022 in case FTS/HPC/CV/22/2466.
3. Decision dated 2 May 2023 in case FTS/HPC/CV/22/2466
4. Payment Order dated 2 May 2023 in case FTS/HPC/CV/22/2466
5. Decision on an application for a review dated 19 May 2023 in case FTS/HPC/CV/22/2466
6. Decision on an application for permission to appeal dated 6 June 2023 in case FTS/HPC/CV/22/2466
7. Notes on a CMD dated 24 March 2023 in case reference FTS/HPC/PR/22/4143
8. Simple Procedure Claim Form in Application by the Applicant against the Respondent seeking a revised tenancy agreement with a start date of 16 April 2021 failing which payment of £5000 plus interest at 8%
9. Simple Procedure Decision Form dated 20 October 2022 dismissing the claim by the Applicant against the Respondent in case LIV-SM10-22
10. The Health Protection (Coronavirus)(Restrictions and Requirements)(Local Levels)(Scotland) Amendment (No. 10) Regulations 2021

### **CMD**

A CMD took place on 22 August 2023 by teleconference. Mr Morrison represented both Applicants. The Respondent was in attendance.

The Applicant told the Tribunal that on 5 January 2021 he was contacted by the Respondent. He said he told the Respondent he was concerned he may not be able to move into the Property because of lockdown restrictions. He said the Respondent was upset and said he would not “cancel the contract”. He said the Respondent told him there was nothing the Government had said that would stop the Applicant moving house. He said at the end of the call the Respondent sent him a link to the non-government website produced. He said the Respondent held himself out to be an expert. He said that because of the article produced, he signed the tenancy agreement. He said he was induced to enter into the tenancy agreement when the Parties met on 15 January 2021. He said the guidance changed on 13 January but he was unaware of that and signed the tenancy agreement on 16 January 2021. He said that the rules published on 13 January strongly advised to postpone house moves. The Applicant said he thought the Respondent had a duty of care to tell him about changes in covid rules.

The Tribunal noted the written submission lodged by the Respondent and asked if his position, in summary, was that the matters raised in the current application had been dealt with in FTS/HPC/CV/22/2466. The Respondent said that was correct. The Tribunal asked the Respondent about the Sheriff Court Simple Procedure forms produced. He said that the Sheriff Court dismissed the application on the basis of no jurisdiction and said the matter should be raised with the First-tier Tribunal.

The Tribunal referred the Applicant to the findings in FTS/HPC/CV/22/2466 and noted that the issues dealt with in that case were the same as the issues raised by the Applicant in the current application. The Tribunal explained to the Respondent the plea of *res judicata*. The Applicant disagreed that the issues raised were the same and said that the decision in FTS/HPC/CV/22/2466 was ring fenced to deal with rent arrears. He said that the findings in that case were not relevant to the current application. He said that the Government Guidance changed on 13 January 2021 and the Respondent had misrepresented the position on 7 January 2021. The Applicant referred the Tribunal to the Government Guidance he had lodged and said that he would not have entered into the contract on 17 January if he had been aware of the Guidance. The Tribunal asked the Applicant if he wished to refer to any authorities on the plea of *res judicata*. He said that he wished to refer to *Banks v Cox* which dealt with misrepresentation. He said his claim today is about negligent misrepresentation. He said that misrepresentation was not discussed in FTS/HPC/CV/22/2466.

The Respondent told the Tribunal that the only paperwork he sent to the Applicant was a leaflet prepared by Aberdeen Considine. He said that it contained a link to the legislation in force at the time it was produced. He said that he was no expert on covid. He said the Applicant would have been more knowledgeable as he worked for Scottish Government on covid projects. He said the arguments put forward in the current application were made by the Applicant many times including in FTS/HPC/CV/22/2466 where the argument was dismissed. He said that the documents lodged by the Applicant showed that people were allowed to move house. He said that legislation prevailed over guidance. The respondent had lodged a copy of the Health Protection (Coronavirus)(Restrictions and Requirements)(Local Levels) (Scotland) Amendment (No.10) Regulations 2021 which state that a reasonable excuse for leaving a place where a person is living is to move home. The Respondent said that the decision in FTS/HPC/CV/22/2466 made clear that he did not mislead the Applicant. He said that the Applicant is abusing the legal process.

The Tribunal asked the Applicant if there was any further documentation he would wish to place before the Tribunal regarding the plea of *res judicata*. The Applicant said he had lodged everything that was relevant.

## **Findings in Fact**

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent entered into a Tenancy Agreement dated 13 and 15 January 2021 ("Tenancy Agreement").

## **Findings in Fact and Law**

The Tribunal made the following findings in fact and law:

1. The issues raised by the Applicant in the application have been the subject of judicial determination pronounced in *foro contentioso* by a competent tribunal.
2. The determination in case reference FTS/HPC/CV/22/2466 excludes any subsequent action in regard to the same matter between the same parties and on the same grounds.
3. The claim made in the application is *res judicata*.

## **Reasons for the Decision**

In this application the Applicant states that their claim is based on misrepresentation by the Respondent of Covid-19 stay at home guidance as at 13 January 2021 that misled the Applicant into signing a tenancy that commenced on 15 January 2021. The Applicant seeks "*recision and / or damages based on misrepresentation for the unlawful rental charges of £2325 plus interest at 8% that the landlord took from us from 15<sup>th</sup> Jan 2021 to 16<sup>th</sup> April 2021*". The factual matter founded upon as being the misrepresentation was an article prepared by a firm of solicitors which the Respondent shared with the Applicant on 7 January 2021. The Applicant's position is that the Government Guidance changed on 13 January 2021, he became aware of that on 17 January 2021 and the Respondent had a duty to tell him about that change before he signed the Tenancy agreement on 16 January 2021 (it is noted that the Tenancy Agreement bears to have been signed by the Applicant on 15 January 2021 and by the Respondent on 13 January 2021). The Tribunal notes that the copy emails and text messages lodged by the Applicant covering the relevant period make no reference to any change in guidance but to uplifting furniture. The Tribunal also notes that the Government Guidance lodged by the Applicant does not ban a house move but states "*Whilst it is currently permitted to conduct activities in connection with moving home...you are strongly advised to postpone at this time.*"

Case reference FTS/HPC/CV/22/2466 related to an application by the Respondent against the Applicant for payment of rent arrears. The note of the CMD dated 6 December 2022 states that the sole defence raised was whether Covid-19 regulations in force at the commencement of the tenancy prohibited the Applicant from taking up

occupation of the Property and as a consequence the Applicant was entitled to withhold rent. The outcome of the CMD was that an evidential hearing was fixed and took place on 2 May 2023. A Decision was issued dated 2 May 2023 in which the Tribunal ordered the Applicant to pay to the Respondent £1004.31. The Tribunal made a number of findings which are relevant to the current application including :

- Paragraph 8 – *At the time that the tenancy was entered into there was no strict ban on house moves and there was nothing which prevented the parties entering into the tenancy agreement and moving into the property.*
- Paragraph 9 – *The respondents did not raise any concerns regarding the payment of rent with the applicant at the time that the tenancy was entered into or at the time that they took up occupation of the property. It was not until over one year later that the respondents first raised such concerns with the applicant.*
- Paragraph 15 – *While the respondent relies upon the existence of Covid-19 guidelines to justify the non-payment of rent for a 3 month period between January and April 2021, there is no legal basis for this.*
- Paragraph 17 – *The respondents were under a legal obligation to pay rent for the entire period of their occupation namely 15 January 2021 to 23 September 2022*

The Applicant sought a review of the decision issued in FTS/HPC/CV/22/2466. This was refused in a decision dated 19 May 2023 in which the Tribunal states :

*“There is absolutely no doubt whatsoever that the respondents were well aware of the nature of the tenancy contract which they were entering into and were happy to do so knowing full well the financial implications of this. There was no legal barrier to the tenancy commencing when it did. There was no misrepresentation on the part of the Applicant.”*

The Applicant sought permission to appeal the decision issued in FTS/HPC/CV/22/2466. This was refused in a decision dated 6 June 2023 in which the Tribunal states :

*“The Tribunal has found as a fact that there was nothing illegal in law nor was there any statutory provision which prevented the tenancy commencing. ....There was no misleading behaviour of the part of the applicant.”*

The rule of *res judicata* is : *when a matter has been the subject of judicial determination pronounced in foro contentioso by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties and on the same grounds.*

The matters raised in this application are the same as those raised in defence of case reference FTS/HPC/CV/22/2466. They have already been the subject of a judicial determination.

### **Decision**

The Tribunal refuses 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.**

Joan Devine  
Legal Member

Date: 22 August 2023

**J Devine**