

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 51 Private Housing
(Tenancies) (Scotland) Act 2016 (“the Act”)**

Chamber Ref: FTS/HPC/EV/19/3198

Re: Property at Flat G/R, 98 Old Dumbarton Road, Glasgow, G3 8PZ (“the Property”)

Parties:

Mrs Christina Mary Graham Burbidge Executrix of Montague Llewellyn Burbidge, 59 Hillfoot Street, Dunoon, PA23 7DR (“the Applicant”)

Mr Victor Chugbo, Flat G/R, 98 Old Dumbarton Road, Glasgow, G3 8PZ (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member) and Elaine Munroe (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession of the property should be granted against the Respondent in favour of the Applicant.

Background

1. By application dated 4 October 2019 the Applicant seeks an order for possession of the property in terms of Rule 65 of The First-tier tribunal for Scotland housing and Property Chamber (Procedure) Regulations 2017 (“the Procedure Rules”) and Section 18 of the Housing (Scotland) Act 1988 (“the Act”). A number of documents were lodged in support of the application including copy tenancy agreement, Notice to Quit and AT6 Notice with Sheriff Officer certificates of service, a rent statement, correspondence with the Respondent and with Halifax Building Society. In terms of application an order for possession is sought on grounds 8,11,12 and 13 of Schedule 5 of the Act.
2. A copy of the application and supporting documents were served on the Respondent by Sheriff Officer on 25 October 2019.

3. The application called before the Legal Member of the Tribunal for a case management discussion (“CMD”) on 11 November 2019. At the CMD and following discussion with the parties the case was adjourned to a hearing on 10 January 2020 at Glasgow Tribunal Centre, 20 York Street, Glasgow. On 27 December 2019 the Respondent requested a postponement of the hearing in order to obtain legal representation. The request was opposed by the Applicant. The request was refused by the Tribunal and both parties advised that the hearing would proceed.
4. The application called before the Tribunal for a hearing on 10 January 2020. A related application for a payment order under Tribunal reference HPC/CV/19/0569 (“the payment application”) also called. The Applicant attended together with Ms McAlpine-Scott, joint Executrix of the late Mr Burbidge. They were represented by Ms McCluskey, solicitor. Mr Cooper also attended with the Applicant as supporter. The Respondent also attended.

The Hearing

5. At the start of the hearing the Respondent renewed his request for a postponement. He stated that he wanted time to obtain legal representation and had been unable to do this as a result of the Christmas holiday period. He said that there was a factual error in the note from the CMD with regard to the start of the tenancy. Ms McCluskey advised that the request was opposed. The Tribunal noted that the Applicant had been represented by a solicitor in relation to the payment application until September 2019, when the solicitor withdrew from acting. The same solicitor had represented the Respondent in relation to a previous application for possession of the property which was withdrawn by the Applicant at a hearing on 26 August 2019. Prior to the CMD on 11 November 2019, and during the discussions which took place at the CMD, the Respondent indicated that he wished to obtain legal advice. The CMD was adjourned to enable him to do so. The Tribunal was of the view that there had been sufficient time for the Respondent to take advice and instruct a new representative. Having regard to the overriding objective, and in particular the requirement to avoid delay, the Tribunal refused the request.
6. The Tribunal proceeded to discuss the applications with the parties. It was noted that the Applicant lodged an updated rent statement on 23 December 2019 which had not been circulated by the Tribunal administration. In addition, the Respondent had lodged a document and written submission immediately before the start of the hearing which had not been seen by the Applicant or the Tribunal. A short adjournment took place to provide parties with copies of all documents. Following the adjournment both parties confirmed that they had no objection to the late lodging of the documents.
7. The Tribunal noted that the Applicant had lodged a number of documents with the application, including a copy tenancy agreement. This is dated 1 November 2008, although there are other dates which appear to have been written on the document, possibly at a later stage. The term of the tenancy appears to be 1 October 2018 to 1 October 2009. No provision is made for the tenancy to

continue on a monthly basis after this term. Ms McCluskey advised the Tribunal that this is the only tenancy agreement which the Applicant can locate. Mr Chugbo advised the Tribunal that he disputes that this agreement is the current one. He referred the Tribunal to a copy letter from Glasgow City Council Tax department which he lodged on 27 December 2019. This states that Mr Chugbo was registered for Council tax at the property from 1 June 2005. Ms McCluskey responded by stating that it is not disputed that he may have occupied the property since 2005 but that the 2008 tenancy agreement is, nonetheless, the current written agreement and would supersede any previous agreement, if one existed. Mr Chugbo disputed this stating that he has correspondence indicating that a new agreement was to be signed in 2011 and he believes that this did take place. However, he was unable to produce a copy of the agreement or other evidence of its existence.

8. The Tribunal noted that the Applicant lodged a copy of a Notice to Quit and AT 6 notice served on the Respondent in advance of the application being lodged. The Respondent does not dispute that these notices were served on him and had no other comments to make regarding the Notices.
9. The Tribunal proceeded to hear evidence and submissions from the parties regarding the merits of the application. Ms McCluskey confirmed that she had a submission to make on behalf of the Applicant. She advised that the Respondent is currently the tenant of the property and is due to pay rent at the rate of £300 per month. The former owner and landlord of the property, Mr Burbidge, died in July 2017. In August 2017 his bank account was closed. The Respondent was notified that future payments of rent should be made to the McRoberts solicitors client account and those details were provided. She referred to letters lodged with the application dated 15 August 2017, 13 November 2017 and 5 April 2018 regarding this instruction. She also referred to a letter of 4 September 2017 which notified the Respondent that all future correspondence should be sent to McRoberts solicitors and not to Mrs Burbidge. Notwithstanding the various letters issued to the Respondent, no rent payments were received from the Respondent between September 2017 and September 2019. When the Applicant became aware of the Respondent's claim that he had continued to pay his rent by standing order into the late Mr Burbidge's account, Ms McCluskey contacted the Halifax building society. She referred the Tribunal to a letter from the Halifax dated 21 May 2019. This states that Mr Burbidge's accounts were closed in August 2017 and that any payments received thereafter from the Respondent's Royal bank of Scotland account would have been returned to the Royal Bank. Ms McCluskey then referred the Tribunal to the documents lodged by the Respondent. Firstly, a series of heavily redacted bank statements which have the Respondent's name and address on them. She pointed out that although these appear to show monthly payments of £300 to a payee "M. Burnbrige", all other entries have been redacted out so that it is impossible to see if any of these payments have been returned to the account. Secondly, she referred to an "account transaction search" dated September 2019 which the Respondent lodged in response to a direction of the Tribunal. This relates to the period 9 April 2019 to 9 September 2019. It shows 6 payments of £300 leaving the account on 9th of each month with reference "M Burnbrige". On the same date each month a payment of £300 is returned to

account with the same bank code and the words "FP Return". In her submission Ms McCluskey stated that this clearly demonstrates that the payments made during this period were returned to the Respondent. It follows that any previous payments were likely also to have been returned. Certainly, they were not received by the Applicant. Lastly, Ms McCluskey referred to the copy bank statement lodged on the morning of the hearing. This is dated June 2017 and shows a payment of £300 made by the Respondent with no corresponding receipt. However, this statement pre-dates the death of Mr Burbidge, when his account was still operation, and therefore is not relevant to the period during which the rent arrears have accrued. Ms McCluskey concluded her submission by stating that a total of £7500 in unpaid rent is due. Three payments of £300 were received by McRoberts solicitors between October 2019 and December 2019. However, no payment to the arrears has been made and the sum of £7500 is outstanding. She stated that as a sum greater than 3 months rent was due at the date of service of the notices and remains due at the date of the hearing, the Applicant is entitled to an order for possession of the property on ground 8 of Schedule 5 of the Act, a mandatory ground. In response to questions from the Tribunal, she advised that the Applicant is not aware of the Respondent having claimed housing benefit at any time in order to pay his rent.

10. Mr Chugbo advised the Tribunal that although he has had some problems with his rent in the past, he has not missed a payment since 2012. He stated that he met with Mr Burbidge in 2011. He had received correspondence from McRoberts which included a Notice to Quit. Mr Burbidge assured him that he was taking back management of the property and said that Mr Chugbo should have no further contact with McRoberts solicitors or 1 STOP, their associated estate agency. Mr Chugbo regarded this instruction to be part of the agreement between them. It is for this reason that he continued to pay his rent to Mr Burbidge's account, rather than to McRoberts. It would have breached his agreement with his landlord to have done otherwise. When McRoberts contacted him and said that he hadn't paid his rent, he contacted his bank and was assured that his standing order was valid. In response to questions from the Tribunal, Mr Chugbo said that he did not know whether his rent payments between September 2017 and 2019 had been returned to his account. He was not aware of this happening, but his account is a busy one and he did not keep track of every transaction. He confirmed that he has not investigated to see whether he got the money back or not. He further advised the Tribunal that he went into his bank and spoke to a cashier in December 2017. He was trying to find out whether McRoberts could be preventing his standing order from being received. The cashier told him that it would be unusual, but McRoberts could have declined the payments. With regards the bank statements lodged by him, he said it was not clear from the account trace that the £300 receipts were the rent payments returning as the reference "M Burnbrige" is not mentioned. Lastly, Mr Chugbo confirmed that he has claimed housing benefit from time to time and received same in connection with his rent for the property.

Findings in Fact

11. The Applicant is the Executrix nominate of the late Montague Llewellyn Burbidge, former owner of the property.
12. The Respondent has been the tenant of the property since 1 June 2005.
13. The Respondent and the late Mr Burbidge entered into a tenancy agreement for the property dated 1 November 2008.
14. The Respondent is due to pay rent at the rate of £300 per month for the property.
15. The Respondent has failed to pay rent for the period September 2017 until September 2019. The sum of £7500 is owned in unpaid rent.

Reasons for Decision

The Tenancy Agreement and Section 19 of the Act

16. The application is made in terms of Section 18 and grounds 8,11,12 and 13 of Schedule 5 of the Act. The Tribunal firstly considered whether the applicant has complied with the legal requirements of Section 19 of the Act prior to lodging the application with the Tribunal. "The Applicant lodged a Notice to Quit and AT6 notice both with Sheriff officer certificates of service. The Notice to Quit was served on 30 July 2019 and calls upon the Respondent to vacate the property on 1 October 2019. The tenancy contract was terminated on that date. The AT6 was served on 4 September 2019 and states that proceedings will not be taken before 2 October 2019. The Respondent does not specifically challenge the Notices. However, he argues that the tenancy agreement lodged with the application is not the correct tenancy agreement. This could in turn invalidate the Notice to Quit if the date upon which the Respondent was called upon to vacate the property does not coincide with the ish date of the current agreement between the parties.
17. The Tribunal accepted the evidence of the Respondent that his tenancy of the subjects began before 2008. He provided evidence in the form of a letter from Council Tax which confirms that he has occupied the property since 2005. However, the Applicant argues that if there was a previous written tenancy agreement in 2005, which neither party can produce, then this was superseded by the 2008 agreement. The Tribunal was persuaded by this argument. The Tribunal also accepted the Respondent's claim that there may have been plans to sign a new tenancy agreement in or around 2011. However, although the Respondent gave evidence that he recalled discussions with Mr Burbidge regarding a new agreement (which included a provision that all future contact regarding the property was to be with him, and not the solicitors or estate agents) neither party has been able to produce this. Ms McCluskey advised the Tribunal that an exhaustive search been carried out without success.

Furthermore, the Respondent was unable to provide the Tribunal with any details of the alleged later agreement or any evidence that this was in fact signed. The Tribunal therefore concludes that 2008 agreement is the current tenancy agreement for the property for the purposes of the application.

18. The Tribunal notes that the agreement submitted with the application appears to have been signed by both Mr Burbidge, on 20 November 2008, and the Respondent on 1 November 2008. This is not disputed. The term of the tenancy is stated to be "rental period 1/10/08 starting from and including and ending on 1/10/09". Other, later dates ("1/11/10" and "1/11/09 1/11/10") have been written in after both this section of the agreement and later, on the signing page. No explanation was offered for these additional dates and no information forthcoming as to who added them to the agreement or when. They have not been initialled or signed. The Tribunal therefore concludes that the tenancy was for an initial term of 12 months from 1/10/08 to 1/10/09 and as it was not brought to an end at that time has continued by tacit relocation for further 12 month terms until the Notice to Quit served by the Applicant on 30 July 2019. The Applicant has also served a valid AT6 Notice advising the Respondent that proceedings were to be raised on grounds 8,11,12 and 13 of the Act. A copy of the Notice to the local authority in terms of the Homelessness etc (Scotland) Act 2003 has also been produced. The Tribunal is therefore satisfied that the Applicant has complied with all legal requirements prior to lodging the application.
19. The Tribunal notes that the 2008 agreement stipulates rent to be £270 per calendar month, not £300 as is claimed in the applications before the Tribunal. However, the rent charge of £300 is not disputed by the Respondent, indeed this is what he claims was paid by him. It therefore appears that at some point since 2008 the rent specified has been increased and that the rent due during the relevant period was £300 per month.

Grounds for possession

20. The Tribunal proceeded to consider the basis upon which the application has been brought. Both the application and the AT6 state that the Applicant seeks an order for possession on grounds 8, 11,12 and 13. The Tribunal determined that as ground 8 is a mandatory ground, and as the Respondents defence is not based upon the amount of the arrears but rather, whether any arrears exist at all, that it would proceed to consider ground 8 first.
21. Section 18(3) of the Act states "If the First-tier Tribunal is satisfied that any of the grounds in Part 1 of Schedule 5 to the Act is established then, subject to subsections 3A and 6 below, the tribunal shall make an order for possession." Ground 8 (which falls within part 1 of Schedule 5) states "Both at the date of service of the notice under section 19 of this Act relating to the proceedings for possession and at the date of the hearing, at least three months rent lawfully due from the tenant is in arrears"
22. The Tribunal notes that the Respondent does not dispute that between September 2017 and September 2019 he did not pay his rent into the account

nominated by McRoberts solicitors who were instructed to deal with the estate of the late Mr Burbidge. What is argued by him is that he continued to pay his rent every month by standing order to account of the late Mr Burbidge. The Applicant's position is that they did not receive these sums because the account was closed, and any monies received would have been returned to the Respondent.

23. The Applicant relied on a number of documents in support of their claim. Letters to the Respondent dated 15 August and 13 November 2017 clearly informed the Respondent that he required to pay his rent to McRoberts client account, and those details were provided. The November letter also advised him that they had not received rent payments since the previous letter. A letter of 4 April 2018 again informed him that he had not paid his rent that that this was still outstanding. The Tribunal is therefore satisfied that the Respondent was made aware that no payment of rent had been received. The Applicant also relied on a letter from the Halifax dated 21 May 2019 which states that the account of the late Mr Burbidge was closed in August 2017 and that any payments made to this account by the Respondent thereafter would have been returned to the Royal Bank of Scotland.
24. The Respondent sought to persuade the Tribunal, firstly, that he had made all payments of rent due and secondly, that he had been entitled to continue to pay to the late Mr Burbidge's account because of an agreement between them that he was to have no further dealings with McRoberts. The Tribunal was not persuaded. Even if such an agreement had been reached, this could not have continued following the death of Mr Burbidge. McRoberts were not only the solicitors appointed by the Executrix, but one of their solicitors was jointly appointed. The Respondent does not dispute that prior to October 2019 he made no payments to their client account. His sole argument is that he spoke on several occasions to his own bank who confirmed that his standing order was valid. Heavily redacted bank statements for the period show payments leaving his account. The Tribunal is not persuaded by the Respondent's evidence and submission on the matter. No correspondence from his bank had been produced which supports his claim that payments were made from his account and not returned to it. The account trace document he himself obtained and lodged shows that for a 6 month period from April to September 2019 payments of £300 were in fact paid out but were returned to the account on the same day. The Tribunal is of the view that this clearly supports the Applicant's argument that if payments were made, they were returned and not received by the Applicant. It is also significant that the Respondent advised the Tribunal that he does not know whether the rent payments for the two-year period came back into his bank account or not. He had not checked and as there are a lot of transactions on his account, he had not noticed whether or not this had occurred. The Tribunal also noted an anomaly in relation to the various copy bank statements lodged. The June 2017 statement, which predates the death of Mr Burbidge, has his name correctly spelled as "M Burbidge". The later statements and the transaction search, state "M Burnbrige" which is incorrect. For some reason the payment reference, which would have been supplied by the Respondent himself, has changed between the two documents.

25. The Tribunal concludes that the Respondent has failed to pay rent in the sum of £7500. The Tribunal accepts the Respondent's evidence that until September 2019 he had a standing order for £300 for his rent set up. However, the payee was deceased, the account closed, and the Respondent was aware that he was supposed to pay his rent to McRoberts solicitors. No information was submitted that any part of these arrears was the result of delay or failure in the payment of housing benefit, therefore Section 18(3A) does not apply. The Tribunal is satisfied that both at the date of service of the AT6 Notice and the date of the hearing at least three months rent arrears was owed. The Tribunal therefore concludes that an order for possession must be granted.

26. As the Tribunal concluded that ground 8, the mandatory ground, has been established, it did not require to consider the other grounds referred to the application.

Decision

27. The Tribunal determined that an order for possession of the property should be granted in favour of the Applicant.

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.

Josephine Bonnar, Legal Member/Chair

10 January 2020