

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 and Schedule 5 of the Housing (Scotland) Act 1988 (“the 1988 Act”) and Rule 65 of the First-tier Tribunal Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Rules”)

Chamber Ref: FTS/HPC/EV/19/3264

**Re: Property at Flat 2F2, 115 Ferry Road, Edinburgh, EH6 4ET
 (“the Property”)**

Parties:

**Scottish Midland Co-operative Society Limited, Hilwood House, 2 Harvest Drive, Newbridge, EH28 8QJ
 (“the Applicant”)**

**Gilson Gray LLP, 29 Rutland Square, Edinburgh, EH1 2BW
 (“the Applicant’s Representative”)**

**Mr Kenneth Whitson, Flat 2F2, 115 Ferry Road, Edinburgh, EH6 4ET
 (“the Respondent”)**

Tribunal Members:

Susanne L. M. Tanner Q.C. (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) was satisfied that Ground 8 in Schedule 5 to the 1988 Act was established by the Applicant, in that both at the date of service of the notice under section 19 of the 1988 Act relating to the proceedings for possession and at the date of the hearing, at least three months’ rent lawfully due from the Respondent was in arrears; and made an order for possession in terms of Section 18 of the 1988 Act.

Statement of Reasons

1. Procedural Background

1.1. The Applicant's Representative made an application to the tribunal on 9 October 2019 in terms of Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act") and Rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules").

1.2. The Applicant seeks the Respondent's eviction from the Property in terms of section 18 of the 1988 Act under Ground 8 of Schedule 5 to the 1988 Act, namely that both at the date of the service of the notice under section 19 of the 1988 Act relating to the proceedings for possession and at the date of the hearing, at least three months rent lawfully due from the Respondent is in arrears.

1.3. The Applicant lodged with the Application:

1.3.1. A paper apart to the Application;

1.3.2. Tenancy agreement between the Applicant and Duncan F Whitson, 36 Patriothall, Edinburgh dated 30 April 1976;

1.3.3. Succession correspondence;

1.3.4. Rent increase correspondence including AT2 dated 7 December 2018;

1.3.5. Tenancy details form;

1.3.6. Form AT6 dated 11 September 2019; and Sheriff Officer's execution of service dated 12 September 2019;

1.3.7. Rent arrears statement; and

1.3.8. Section 11 notice sent to the Local authority

1.4. On 29 October 2019, the Application was accepted for determination by the tribunal. Both parties were notified by letters dated 12 November 2019 of the date, time and place of Case Management Discussion ("CMD") in relation to the Application to take place at 1000h on 12 December 2019 at George House, 126 George Street, Edinburgh, EH2 4HH. The Respondent was invited to make written representations in response to the Application by 3

December 2019. Both parties were advised that they were required to attend the CMD. The parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the Application which may involve making or refusing an eviction order. The parties were also advised that if they do not attend the CMD this will not stop a decision or order being made if the tribunal considers that it has sufficient information before it to do so and the procedure has been fair. Service was effected on the Respondent by Sheriff Officers on 13 November 2019.

- 1.5. On 6 December 2019 the Respondent submitted a request to postpone the CMD on 12 December 2019 as he had been cited for jury service. He attached a copy of a citation. He also stated that he had limited time to obtain advice and to submit representations by 3 December 2019.
- 1.6. The Respondent's postponement request was sent to the tribunal for consideration. The CMD was not postponed.
- 1.7. The Respondent did not submit any written representations by 3 December 2019 or prior to the CMD on 12 December 2019.
- 1.8. A Case Management Discussion took place on 12 December 2019. It proceeded in the absence of the Respondent. Reference is made to the Notes on a Case Management Discussion which were prepared by the Legal Member and issued to parties. The tribunal continued the CMD so that the Respondent could attend and state his position. The Respondent was encouraged to submit a typewritten response to the Application before the next CMD but was not ordered to do so by way of a Direction.
- 1.9. The case was adjourned to a further CMD on 7 January 2020 at 1400h at George House, 126 George Street, Edinburgh. Both parties were notified with the date, time and place of the adjourned CMD and received a copy of the Note of the CMD on 12 December 2019.
- 1.10. On 31 December 2019, the tribunal received a letter from the Respondent (dated 24 December 2019). The Respondent raised an issue in respect of the rent increase which had been applied. He stated that he had submitted an application to the tribunal at the time challenging the proposed rent increase but had then been told in a telephone enquiry that no record of his application existed. He stated that he has not made any further application challenging the rent increase. He stated that he had asked for a postponement of the previous CMD. He stated that he had received the letter stating that the CMD was going ahead on 13 December 2019, which was after the CMD had taken place. In relation to the substantive issue of rent

arrears, he objected to the Applicant's Representative's contention at the previous CMD that he had not paid rent from May to September 2019, stating that he has paid the original rent but not the increase imposed from December 2018. He confirmed that he would attend the CMD on 7 January 2020. He attached copies of two letters previously sent to the tribunal, dated 25 November 2019.

1.11. A copy of the Applicant's letter dated 24 December 2019 was sent by the tribunal to the Applicant's Representative by email on 3 January 2020.

1.12. No further written representations were submitted by either party in advance of the adjourned CMD.

1.13. The legal member asked the tribunal's administration whether there was any other tribunal applications (previous or current) in the name of the Respondent in relation to rent increases. The tribunal's administration confirmed that there are no other cases in the name of the Respondent, ongoing or closed.

2. CMD (adjourned from 12 December 2019): 7 January 2020 at 1400 at George House, 126 George Street, Edinburgh

2.1. Mr Scott Runciman from the Applicant's Representative attended with Mrs Mandy Forrest from the Applicant.

2.2. The Respondent attended and was not represented.

2.3. Applicant's Representative's submissions

2.3.1. Mr Runciman stated that the Ground upon which eviction is sought is Ground 8 of Schedule 5, in that both at the date of service of the AT6 and at the date of the hearing of the adjourned CMD, at least three months' rent lawfully due from the Respondent is in arrears.

2.3.2. Mr Runciman referred to the AT6 Form which had been served on the Respondent on 12 September 2019. There were over three months' rent arrears due at the date that of service and there remain over three months' rent arrears.

- 2.3.3. Mr Runciman produced an updated rent account which show a running total of rent arrears. Copies were made for the tribunal and the Respondent.
- 2.3.4. The rent statement produced shows rent due as at 12 September 2019 was £2496.86. Mr Runciman stated that at least three months of rent arrears had accrued before 12 September 2019, which is the date that the AT6 was served. The current rent arrears are £3611.51 and rent arrears are continuing to accrue.
- 2.3.5. Mr Runciman stated that there was a regulated tenancy in favour of the Respondent's father. It was written up in 1976. Mr Whitson (senior) passed away November 2016. Since then the Respondent has succeeded to a statutory assured tenancy. During the late Mr Whitson's tenancy, the rent increased on a number of occasions. It was a regulated registered rent. At the time that he passed away it was £375.00. It remained at £375.00 until an AT2 notice was served on the Respondent. It was served on 14 November 2018 by recorded delivery and the respondent returned the form stating that he intended to object to the increase but he did not do so.
- 2.3.6. Mr Runciman stated that the rent increase was not referred to a rent assessment committee as a rent determination. The Respondent wrote to the Applicant and explained that he was attempting to challenge the rent and that the tribunal could not find his application. However, the Respondent has never produced any vouching that any application to challenge the rent was ever made.
- 2.3.7. Mr Runciman stated that from 28 December 2018 the rent was increased to £650.00. Every month the rent has been paid at £375.00 but not at £650.00. No extra amounts have been paid by the Respondent since the proceedings were raised.
- 2.3.8. Mr Runciman referred to Section 24 of the 1988 Act which provides that where a notice is served in the prescribed form, the new rent shall take effect unless the tenant refers to the notice to the First-tier Tribunal for a rent determination in the prescribed form. He stated that the Respondent has not produced any prescribed forms or any evidence that an application has gone to the tribunal. The time to challenge the rent increase has elapsed and the rent of £650.00 per month has been lawfully due since 28 December 2018.

2.3.9. Mr Runciman stated that there are rent arrears over three months and those will continue to increase. The Respondent's excuse for not paying is that he does not refuse to pay the increased amount, he simply cannot afford it. Mr Runciman stated that the same matter of lack of affordability had been discussed at meetings with the Applicant and the Respondent. Mr Runciman produced a letter (undated) from the Respondent. Copies were made for the tribunal and the Respondent. It bears to have been sent in July 2019 (which was accepted by the Applicant). It states that the Applicant cannot afford the rent and says nothing about delay or failure in payment of benefits. Mr Runciman submitted that lack of affordability is not a defence to proceedings on the basis of ground 8. He submitted that an order for possession should be granted today on the basis that Ground 8 has been established and Section 18(3) is a mandatory ground. He submitted that there is no information to suggest any delay or failure in respect of relevant housing benefit. He moved for an order for possession today given that the statutory requirements have now been satisfied.

2.4. Submissions by the Respondent

2.4.1. The Respondent stated that he is opposing the order for possession. He stated that when he first got the notice for the rent increase he downloaded the forms and filled them in and send them to Glasgow by mail, first class post. He did not keep copies. He downloaded them from the computer, handwrote the information and sent them to Glasgow. He does not think that he has a copy of anything he sent on his computer. He has changed laptops since then, about eight months ago.

2.4.2. The Respondent stated that after the appeal time lapsed, he spoke to someone in the tribunal's offices on the telephone. He was told that no application had been received. He felt that there was nothing he could do. He stated that he has been to the Citizens Advice a couple of times, most recently in November 2019 but had not done anything else in respect of the rent increase.

2.4.3. The tribunal chair asked the Respondent on what basis he submitted that the rent of £650.00 per calendar month is not lawfully due. The Respondent stated that he could not deny the rent arrears because he has paid £375.00 every month since December 2018. He has not paid the increase. He admits that he has got the arrears at the amount stated in the rent statement. He stated that the only thing that he can afford to

pay is £375.00 per calendar month and that is on the basis of affordability.

2.4.4. He stated that the Citizens Advice had not been very clear on what would happen at the CMD. The tribunal chair asked whether he had any questions about the procedure and the Respondent stated that he did not. He stated that he understood that he could be evicted because he had looked up the powers of the tribunal.

2.4.5. The Respondent then stated that he had a second argument, although this had not been included in his letter of 24 December 2019 (received by the tribunal on 31 December 2019). He stated that as the Applicant had failed to keep the property up to the repairing standard, the rent is too high. In response to a question from the tribunal chair, he stated that he has not made any application to the tribunal about the Property not meeting the repairing standard. He stated that the reason he has not done so is that this is something that he had got advice on in the last seven weeks. He said that he had gone to Shelter Scotland and then had to look up everything for himself. He stated that he did not mention it in his letter of 24 December 2019 in relation to his defence to this Application because he was still researching what the grounds were and what the landlord's responsibilities were. He stated that his time is limited but accepted that he was aware that he was facing eviction proceedings and had chosen to send a letter on 24 December 2019 which only mentioned rent increases and affordability and nothing about repairs or any effect on the rent lawfully due. He stated that he has been to the Council about the possibility that he will be evicted.

2.4.6. When the tribunal chair asked whether he had notified any repairing standard issues to the Applicant, the Respondent stated that Mrs Forrest and Mr Eclair from the Applicant had discussed it in September 2019. He stated that he raised the repairing issues with them when they were at the Property. He stated that he felt that he should still be paying the original rent as a result of the condition of the Property. He stated that the property should be wind and watertight and that it is not. He stated that rainwater was dripping into his kitchen from the ceiling. He stated that this happened not long after the rent went up in December 2018 but did not know the date. He thought that it was in around March or April 2019. He stated that the Applicant sent a man down to paper the ceiling and the walls and that they went upstairs and said that it was the man upstairs who had moved the washing machine. The man upstairs got someone to repair it himself. The water was quite clear. He stated that he said to the Applicant at the time of the repairs that that is a big hike in rent, because the property is not worth that. He submitted that

because of the repairs issues in the kitchen he should only have to pay £375.00 per month and not £650.00. However, he accepted that he had not paid the increase in rent from December 2018 onwards and had given the only reason of lack of affordability for such a large increase. He stated that in August/September 2019, the kitchen ceiling had come in and that he had photographs taken by him at that time and showing how it still appears now. He stated that he still has rainwater running down the walls. He stated that the south facing wall is in a bad state of repair and allows water to come in. He stated that it has been an ongoing issue for 18 months and that he was not aware that he could make an application until around 6 weeks ago when he spoke to Citizens Advice. He repeated that he did not mention it in his letter of 24 December 2019 because he still had to look things up and get things done. He has not made any application because his time is limited. He made no submission about how water leaking into the kitchen for a period of time would mean that the rent was only lawfully due at £375.00 per calendar month, rather than £650.00 per calendar month. He did not submit that he has been retaining the additional £275.00 per calendar month, stating that he cannot afford £650.00 per calendar month.

2.4.7. The Respondent stated that he does not get housing benefit. He has applied but been told that he is entitled to zero. They do not take into account that he makes maintenance payments for his children.

2.5. Response by Applicant's Representative

2.5.1. Mr Runciman submitted that the tests in Section 18 and Ground 8 have all been satisfied. He referred again to the letter from Mr Whitson sent in around July 2019, in which he was saying that he was continuing to pay £375.00 because he was unable to afford £650.00 per calendar month. He stated that there is nothing in that letter or any other about repairs issues and any consequent effect on rent lawfully due. There was no objection lodged with the tribunal in relation to the increase in rent. There is an admission by the Respondent that the rent arrears are due. There is no defence in terms of section 18. This Application was made on 9 October 2019. There has been a previous CMD. The Respondent has had sufficient time to lodge this defence. He did not mention it in his written submissions on 24 December 2019. The longer this goes on the more rent arrears will accrue. Mr Runciman stated that the second ground of defence looks fabricated on the day. He stated that if this was a real problem it would have been put in defences. The Respondent has never stated that he is paying less rent because of repairs issues. He has

only stated that he objects to the increase and that he cannot afford the rent of £650.00 per calendar month.

2.5.2. Mrs Forrest stated that there have been no complaints by the Respondent about repairs matters. She joined the Applicant in August 2019. The Respondent was in touch in August 2019. Mrs Forrest attended at the Property and then instructed repairs and the matter was resolved. As far as she is aware there have been no other repairs or complaints since then. All certificates are up to date and the property complies with the repairing standard.

2.5.3. Mr Runciman submitted that any question of abatement of rent would be a matter for a repairs application to the tribunal. There has been no evidence at all and it would have been helpful for the Respondent to provide notice of this defence as the tribunal needs to be satisfied that rent arrears are due. Mr Runciman referred back to the mandatory part of the test and submitted that there was no substance to the defence that the rent was not lawfully due. He submitted that the repairs issue had been fabricated today to avoid eviction at the CMD.

3. The tribunal makes the following findings-in-fact:

3.1. The Proprietor of the Property is the Applicant.

3.2. The Respondent was a tenant of the Applicant from around November 2016 when he succeeded to his father's tenancy.

3.3. Rent was initially due by the Respondent at the rate of £375.00 per calendar month.

3.4. In November 2018, the Applicant served an AT2 form on the Respondent notifying of a rent increase to £650 per calendar month with effect from 28 December 2018.

3.5. The Respondent returned a form stating that he intended to challenge the rent increase but no application was made to the tribunal to do so.

3.6. The Respondent has stated that is unable to afford the increased rent of £650.00 per calendar month.

- 3.7. The Respondent has paid rent at the rate of £375.00 per calendar month since 28 December 2018 on the basis of lack of affordability of the increased rent.
- 3.8. The Respondent has not made any application to the tribunal stating that the Property does not meet the repairing standard.
- 3.9. The Respondent has not retained any rent due on the basis of the condition of the Property.
- 3.10. The AT6 notice was served on the Respondent on 12 September 2019.
- 3.11. The AT6 which was served on the Respondent includes notice that the ground upon which eviction is sought is Ground 8 of Schedule 3 of the 1988 Act.
- 3.12. As at the date of service of the AT6 notice on 12 September 2019 the Respondent was in arrears of rent of £2496.86, which is at least three months' rent lawfully due from the Respondent.
- 3.13. As at 7 January 2020, the Respondent has arrears of rent of £3611.51, which is at least three months' rent lawfully due from the Respondent.
- 3.14. The Respondent is not in receipt of any housing or other relevant benefits.
- 3.15. The rent arrears are not a consequence of delay or failure in payment to the Respondents of any housing or other relevant benefits.

4. Findings in fact and law

- 4.1. A notice in the prescribed form under Section 24 of the 1988 Act was served on the Respondent and the Respondent did not refer the notice to the tribunal in the prescribed form, with the effect that the new rent of £650.00 per calendar month took effect as from 28 December 2018 in terms of Section 24(3) of the 1988 Act.
- 4.2. The rent lawfully due from 28 December 2018 is £650.00 per calendar month.
- 4.3. Because the tribunal is satisfied that the facts required in Ground 8 of Schedule 5 to the 1988 Act have been established, namely that at the date of service of the notice under Section 19 of the 1988 Act and at the date of the

hearing on 7 January 2020, at least three months' rent lawfully due from the Respondent is in arrears, and the arrears are not a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit, the tribunal must make an order for possession.

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.

7 January 2020

**Susanne L. M. Tanner Q.C.
Legal Member/Chair**