

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 and Schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”) and Rule 109 of the First-tier Tribunal Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Rules”)

Chamber Ref: FTS/HPC/EV/19/1629

Re: Property at 25 Galloway Crescent, Broxburn, West Lothian, EH52 6XP
 (“the Property”)

Parties:

Miss Anna Millar, 1/1, 10 Mountstewart Road, Rothesay, Isle of Bute, PA20 9DY
 (“the Applicant”)

Hannay Fraser & Co, Solicitors, 34 Castle Street, Rothesay, Isle of Bute PA20 9HD
 (“the Applicant’s Representative”)

Mr Kris Cumming, 25 Galloway Crescent, Broxburn, West Lothian, EH52 6XP
 (“the Respondent”)

Tribunal Members:

Susanne L. M. Tanner Q.C. (Legal Member)
 Elaine Munroe (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) was satisfied that Ground 12(1) in Schedule 3, Part 3 to the 2016 Act was established by the Applicant, in that on the day the tribunal considered the application for an eviction on its merits the Respondent was in rent arrears greater than one months’ rent and had been in arrears of rent for a continuous period of more than three consecutive months up to and including that day; that rent arrears were not wholly or partly a consequence of a delay or failure in payment of a relevant benefit; and made an order for eviction in terms of Section 51 of the 2016 Act.

Statement of Reasons

1. Procedural Background

- 1.1. The Applicant's Representative made an application to the tribunal on 29 May 2019 in terms of Section 51 of the Private Housing (Tenancies)(Scotland) Act 2016 ("the 2016 Act") and Rule 109 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 Respondents' eviction from the Property in terms of Section 51 of the 2016 Act under Ground 12 of Schedule 3 to the 2016 Act, namely that the Respondents have been in rent arrears for three or more consecutive months.
- 1.3. The Applicant lodged with the Application:
 - 1.3.1. A handwritten cover letter dated 27 May 2019;
 - 1.3.2. Copy letter and invoice from Hannay Fraser & Co, Solicitors, dated 29 June 2018;
 - 1.3.3. Bank statements for the period from 8 February 2019 to 10 May 2019;
 - 1.3.4. Copy email from DWP dated 2 May 2019;
 - 1.3.5. a copy of the Notice to Leave to the Respondent dated 7 May 2019; with proof of service by Sheriff officers.
- 1.4. On 30 May 2019 the Applicant was asked to produce a copy of the notice given to the local authority as required under Section 56(1) of the 2016 Act.
- 1.5. On 13 June 2019, the Applicant produced a Section 11 notice sent to the local authority dated 7 May 2019, with proof of service on 7 May 2019.
- 1.6. On 9 July 2019 the Applicant produced a copy of an unsigned and undated Private Residential Tenancy agreement between the Applicant and the Respondent with a cover letter in which the Applicant stated that she could not find her original tenancy agreement having searched her house and that the copy produced had been provided by the lawyer who drafted the agreement. The Applicant also stated that the Respondent had been given a copy of his agreement.

- 1.7. On 28 June 2019, the Application was accepted for determination by the tribunal. Both parties were notified by letters dated 4 July 2019 of the date, time and place of Case Management Discussion (“CMD”) in relation to the Application to take place at 1000h on 14 August 2019 at George House, 126 George Street, Edinburgh, EH2 4HH. The Respondent was invited to make written representations in response to the Application by 24 July 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 8 July 2019.
- 1.8. The Respondent did not submit any representations or make any contact with the tribunal.
- 1.9. A Case Management Discussion took place on 14 August 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 identified that the following issues required to be resolved before a decision could be made on the Application:
- 1.9.1. Whether or not the parties entered into a Private Residential tenancy Agreement in terms of the 2016 Act;
- 1.9.2. The date on which that tenancy agreement was entered into; and
- 1.9.3. Whether or not the Respondent has been in arrears for three or more consecutive months in accordance with Ground 12, schedule 3 of the 2016 Act.
- 1.10. The case was adjourned to a hearing. Directions were issued to the Applicant to produce further evidence in advance of the hearing, namely:
- 1.10.1. Evidence that the parties entered into a Private Residential Tenancy agreement and the date on which the tenancy agreement was entered into;
- 1.10.2. Evidence that the Respondent has been in arrears for three or more consecutive months, in accordance with ground 12, schedule 3 of the 2016 Act.
- 1.11. The Applicant was further ordered to lodge documents and lists of witnesses no later than 7 days prior to the hearing.

- 1.12. Further Directions were issued to parties on 24 August 2019, requiring the Applicant and Respondent to do certain things.
- 1.13. The Applicant complied with the Directions in part. She produced the following:
 - 1.13.1. Rent statement.
 - 1.13.2. List of witnesses including one witness.
- 1.14. The Applicant failed to comply with the Directions requiring her to produce an indexed numbered bundle of documents upon which she intended to rely and a summary legal argument with reference to the evidence upon which she intended to rely, having had the benefit of any legal or housing advice she wished to obtain.
- 1.15. The Respondent failed to comply with the Directions and did not make any contact with the tribunal.

2. Hearing: 1000h on 2 October 2019 (George House, Edinburgh) and 10 December 2019 (Glasgow Tribunals Centre, Glasgow)

- 2.1. A hearing took place over two days on 10 October 2019 and 10 December 2019.
- 2.2. In respect of the first day of the hearing, reference is made to the Notes on the Hearing prepared by the tribunal and sent to parties.
- 2.3. The Respondent did not appear on the first hearing day. The Respondent did not attend the CMD or make any contact with the tribunal.
- 2.4. The tribunal, being satisfied that the requirements of Rule 24(1) regarding the giving of notice of a hearing had been duly complied with, proceeded with the Application upon the representations of the party present and all the material before it, in terms of Rule 29 of the 2017 Rules.
- 2.5. Having heard from the Applicant the tribunal determined that the hearing should be continued to allow the Applicant to prepare and to seek any advice she wishes prior to the next hearing; to consider appointing a legal or lay representative; and to comply with the tribunal's previously issued Directions.
- 2.6. The Respondent was served by Sheriff Officers with notice of the second hearing day. He did not make any contact with the tribunal prior to the second hearing day.

2.7. In about November 2019, the Applicant instructed Hannay Fraser & Co. Solicitors, 34 Castle Street, Rothesay to act as her representatives.

2.8. Directions were issued to the Applicant's representative and in responses the Applicant's Representative lodged a Note of Arguments for the hearing together with a numbered bundle of documents.

2.9. Mr James Hannay, solicitor, appeared on the Applicant's behalf at the second hearing day on 10 December 2019.

2.10. The tribunal, being satisfied that the requirements of Rule 24(1) regarding the giving of notice of a hearing had been duly complied with, proceeded with the Application upon the representations of the party present and all the material before it, in terms of Rule 29 of the 2017 Rules.

2.11. Mr Hannay advised the tribunal that the Applicant had intended to be present but had been prevented from travelling from Rothesay due to the weather which had caused transport difficulties with the ferries. He indicated that he was instructed to proceed on her behalf in her absence.

2.12. Mr Hannay stated that he had been recently instructed by Applicant to consider the Applicant's case. She had previously discussed the situation with the firm but had commenced the proceedings herself. She had reverted to the agents with various comments regarding the tribunal process and separately in relation to communications from the Respondent which she has had to contact the police about. Mr Hannay stated that the Applicant is very upset about the Respondent's behaviour.

2.13. Ground upon which eviction is sought - Ground 12

2.14. In relation to the Application, the ground upon which she is seeking eviction is that he has failed to pay his rent for three or more consecutive months. Mr Hannay submitted that the Respondent now owes the Applicant over £7,000 (as at 21 November 2019). He has been living in the Property rent free since January 2019. The Respondent has told the Applicant that he is looking to obtain council house accommodation and wishes to be evicted.

2.15. The existence of a private residential tenancy

2.16. Mr Hannay made submissions in relation to the existence or otherwise of a private residential tenancy agreement and referred Sections 1 and 3 of the 2016 Act. Section 1 is the description of the meaning of a private residential

tenancy. Section 3 provides that writing is not required to constitute a private residential tenancy.

- 2.17. In relation to the unsigned tenancy agreement, Mr Hannay stated that it was prepared by his firm and an account was issued to the Applicant. The lease is not signed or dated by either party. There is no evidence that it was received by the Respondent. The document states that the tenancy will start on 16 June 2018 and rent is £700 per calendar month.
- 2.18. The Applicant sent the lease through to her friend, Miss Denniston, who stated that she had left the lease with him to sign.
- 2.19. Number 3 of the bundle is the analysis of rental payments. This was prepared by the Applicant and shows that rent was paid from 6 July 2018 onwards until 21 January 2019 and that no rent has been paid since 21 January 2019.
- 2.20. Mr Hannay further submitted that it can be inferred that the Respondent is still in the Property as Sheriff officers have been to the house to serve tribunal documentation on him in relation to the CMD and hearing. The Sheriff Officers communications in respect of the first day of the hearing contain information that they made appropriate investigations at the property and were satisfied that he was residing there. In relation to the notification of the second day of the hearing, the tribunal clerk confirmed that service was executed on 18 November 2019 by the Sheriff Officers and the execution stated that after diligent enquiries they had established that he resided there.
- 2.21. Mr Hannay further referred to document number 9, screenshots of text messages, which he stated that the Applicant had provided to him. Mr Hannay stated that he was asking the tribunal to accept that these are text messages between the Applicant and the Respondent. On page 3, there are messages from 23 August 2019. Not all of the messages are dated. On page 3, a message said to be from the Respondent states "I haven't paid rent and that's all I'm guilty of. You have got nothing on me..." On page 4, there is a message which bears to be from the Applicant to the Respondent and refers to a court hearing on 14th August. There was a Case Management Discussion in this application on 14 August. The messages are being relied upon to show that there is an ongoing tenancy, that he has not paid rent and that was is in the premises at least in August 2019. Mr Hannay accepted that there is no evidence about the dates upon which the rest of the messages were sent.
- 2.22. Mr Hannay submitted that in all of the circumstances it can be submitted that there is a private residential tenancy between the parties which started on

18 June 2018, which provided for rent to be paid at the rate of £700 per calendar month.

2.23. Notice to Leave

2.24. The tribunal chair invited submissions from Mr Hannay as to the application being made within the 28 day notice period with reference to Sections 52 and 54 of the 2016 Act.

2.25. The Notice to Leave was sent to the Respondent dated 7 May 2019. The NTL was served on 7 May 2019 by Sheriff Officers. The tribunal noted that it specifies that the start date of the tenancy was 12 May 2018 rather than the date previously referred to and Mr Hannay had no information to support a start date of 12 May 2018. The Notice stated that the Respondent was in rent arrears over three consecutive months for 21 February, 21 March and 21 April 2019. It further stated that no application would be made to the tribunal before 5 June 2019. The Application was received by the tribunal on 29 May 2019. At the time that the Application was received the Notice to Leave was missing from the Application documentation and it was requested and provided by the Applicant at a later date.

2.26. On the basis that the Notice to leave did not provide 28 days' notice to the tenant, the tribunal invited submissions on the test of "reasonableness" in Section 52(4) of the 2016 Act.

2.27. Mr Hannay submitted that Mr Cumming has shown scant regard for this tribunal; and that the communication with the Applicant in the screenshots shows scant regard for her as well. There is now £7000 increasing the longer he remains there to the loss of the Applicant. She has submitted this Application on her own. It appears to be a small time period lacking in respect of the full notice period which should have been given. It is clear from the text messages that the Respondent is looking to get out of the Property. There is a huge financial loss owing to Miss Miller that she has been advised that it will be difficult to recover. She is a vulnerable person.

2.28. Ground 12 – test for eviction on the ground of rent arrears.

2.29. Mr Hannay stated that he was proceeding under 12(2), the mandatory ground for eviction on the basis of rent arrears. On the basis of the submissions about the existence of the tenancy agreement and the rent schedule, there is at least one months' rent outstanding today and there are at least three consecutive months of rent arrears.

2.30. The arrears are not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit. There is an indication that the Applicant has attempted to find out in Document 5, dated 9 September 2019, either that he does not get universal credit, there are not arrears (the Applicant claims that there are) or that the circumstances do not support direct payment. Mr Cumming has not made any submissions to the tribunal that it is because there is a delay or failure in the payment of relevant benefits.

2.31. The tribunal adjourned to deliberate.

2.32. Reasons for Decision

2.33. In relation to the application being made within the notice period the tribunal was satisfied, having taken account of Mr Hannay's submissions on behalf of the Applicant, it was reasonable to proceed to determine the Application. In particular, the Respondent has not engaged with the tribunal process or challenged the fact that the Application was made within the notice period. The tribunal accepted on the balance of probabilities that that the text messages from August 2019 were between the parties and at least in August 2019 the Respondent accepted that he had rent arrears, and there is discussion of police involvement in those texts. The Applicant was an unrepresented party at the time of the Application being made and up until Hannay Fraser was instructed in November 2019. The tribunal is of the view that there is no prejudice to the Respondent.

2.34. In relation to the existence of a tenancy agreement, although there was no evidence before the tribunal that the Respondent had received the tenancy agreement which had been produced as a document with the Application, the tribunal was satisfied on the balance of probabilities that the parties entered into a private residential tenancy agreement with a start date of 16 June 2018 and that the rent was £700 per calendar month. The tribunal relied upon the fact that the Respondent started to pay some rent from 6 July 2018 for an amount greater than £700 which appears to pro rata payment from the start of the tenancy. The tribunal stated that it was satisfied that he is living there and paying rent. He made 11 payments to the Respondent of varying amounts from 6 July 2018 until 21 January 2019 and then nothing. There has been no defence from the Respondent to the Application or any involvement in the proceedings despite service by sheriff officers on three occasions. From the text messages from August 2019 it appears that he was still in the property but wanted to be evicted.

2.35. The tribunal was satisfied that the requirements of ground 12 were met by the Applicant.

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 16 June 2018.

3.3. The Respondent paid rent from 6 July 2018.

3.4. The rent payable is £700.00 per calendar month payable monthly in advance on the date of entry and thereafter on or before 16th of each month.

3.5. The rent has remained at £700.00 per calendar month from 16 June 2018 to date.

3.6. As at 10 December 2019 the Respondent is in arrears of rent of £7000.00, which is greater than one months' rent under the tenancy.

3.7. As at 10 December 2019, the Respondent has been in arrears of rent for a continuous period up to and including 10 December 2019, of three or more consecutive months.

3.8. The Notice to Leave which was served on the Respondent includes notice that the ground upon which eviction is sought is Ground 12 of Schedule 3 of the 2016 Act.

3.9. The rent arrears are not a consequence of delay or failure in payment to the Respondents of relevant benefits.

4. Findings in fact and law

4.1. The tribunal entertained the Application because it considered that it was reasonable to do so under Section 52(4) of the 2016 Act.

4.2. There is a private residential tenancy between the Applicant and the Respondent for the Property which started on 16 June 2018.

4.3. Because the tribunal is satisfied that the facts required in para 12(2) of Schedule 3 to the 2016 Act have been established, the tribunal must find that

the Ground named in para 12(1) of Schedule 3 of the 2016 Act applies, namely that the Respondent has been in rent arrears for three or more consecutive months.

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.

Susanne Tanner

10 December 2019

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