



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 18 of the Housing (Scotland)
Act 1988**

Chamber Ref: FTS/HPC/EV/21/2170

Re: Property at 1 Maybank Lane, Glasgow, G42 8RF (“the Property”)

Parties:

Mrs Eileen Shepherd, Mr Ian Shepherd, Lamar, Ayr Road, Irvine, KA11 5AB (“the Applicants”)

Mr Ian P Scott, 1 Maybank Lane, Glasgow, G42 8RF (“the Respondent”)

Tribunal Members:

Andrew Upton (Legal Member) and Eileen Shand (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession should be granted

FINDINGS IN FACT

1. The Applicants are the landlords, and the Respondent is the tenant, of the Property under an assured tenancy agreement dated 13 April 2016 for the period 13 April 2016 until 12 April 2017.
2. The contractual monthly rent was £320.
3. The contractual tenancy agreement was brought to an end on 12 April 2021 by service of a Notice to Quit dated 7 January 2021.
4. A Notice in terms of section 19 of the Housing (Scotland) Act 1988 (“the 1988 Act”) in form AT6 and dated 7 January 2021 was also served on the Respondent, in terms of which the Applicants gave notice to the Respondent of their intention to raise proceedings for possession of the Property under grounds 8, 11 and 12 of Schedule 5 to the 1988 Act.
5. The property is a one-bedroom basement flat.
6. The property has an unusual configuration in that, although the property is a basement flat, it has level access without needing to go down a staircase.

7. The property has not been adapted for the Respondent.
8. The property is near to a bus stop, which has a service to the Queen Elizabeth University Hospital that takes in the region of 25-30 minutes.
9. The New Victoria Hospital is approximately a five minute walk away.
10. The property had been furnished when let, but that the Respondent has replaced most of the items with his own furniture without the consent of the Applicants.
11. The Respondent is in rent arrears, at the date of the Hearing, of £14,080.
12. The Respondent has not made any payments towards his rent since 2 November 2018.
13. There is other alternative accommodation available to rent in the area.
14. The Respondent's continued occupancy of the Property is having a detrimental effect on the Applicants' mental health.
15. There are ongoing costs associated with the Property, including factoring, insurance and general maintenance.
16. The Applicants do not have the available finance to cover costs associated with the Property.
17. Without payment of rent from the Respondent, the Applicants have had to finance regular payments associated with the Property by altering their lifestyle and selling other properties.
18. Mr Shepherd has been financing the costs associated with the Property for his parents.

FINDINGS IN FACT AND LAW

1. The contractual tenancy reached its end at 12 April 2021.
2. Tacit relocation is not operating.
3. Both at the date of service of the Form AT6 and at the date of the Hearing the Respondent was in arrears in a sum in excess of three months' rent.
4. The Respondent has been persistently late in paying rent.
5. Ground 8 of Schedule 5 to the 1988 Act is established.
6. Ground 11 of Schedule 5 to the 1988 Act is established.
7. Ground 12 of Schedule 5 to the 1988 Act is established.
8. It is reasonable to grant an order for possession of the Property.

STATEMENT OF REASONS

1. This Application called for a Hearing on 11 February 2022 by WebEx. The Applicants were represented by Mrs Valerie West. The Respondent was neither present nor represented.

Preliminary Matters

Hearing in Absence

2. At the outset, the Tribunal required to determine how to deal with the Respondent's absence. In terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules"):-

“24.— Hearings

- (1) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a hearing (including any adjourned or postponed hearing) and any changes to the date, time and place of a hearing.
- (2) The notice period for a hearing must be no less than 14 days from the date of receipt of the notice, unless the parties consent to a shorter period or there are urgent or exceptional circumstances.
- (3) A hearing must be held in public unless the First-tier Tribunal, on its own initiative or on an application by a party, decides that it is necessary to do otherwise in the interests of justice.
- (4) Subject to any direction of the First-tier Tribunal, at a hearing—
 - (a) a party or a party's representative may conduct the party's case;
 - (b) the parties will be heard in such order and, subject to the provisions of these Rules, according to such procedure as the First-tier Tribunal determines; and
 - (c) a party may make representations, call witnesses, give evidence on his or her own behalf and cross-examine any witness called by another party.
- (5) The First-tier Tribunal may exclude from the hearing a person who is to appear as a witness until such time as that person gives evidence if it considers it is fair in all the circumstances to do so.

...

29. Hearing case in the absence of a party

If a party or party's representative does not appear at a hearing, the First-tier Tribunal, on being satisfied that the requirements of [rule 24\(1\)](#) regarding the giving of notice of a hearing have been duly complied with, may proceed with the application upon the representations of any party present and all the material before it.”

3. The Hearing on 11 February 2022 was fixed on 21 January 2022 following the Respondent's failure to attend a Hearing fixed for that day on account of alleged medical reasons. Notice of the Hearing having been fixed for 11 February 2022 was issued to the Respondent by email on 26 January 2022. As such, the Tribunal is satisfied that the full fourteen days' notice of the date of the Hearing on 11 February 2022 was provided to the Respondent as required by Rules 24 and 29.
4. On 10 February 2022, the Respondent emailed the Tribunal to say that he did not intend to attend the Hearing. He described his health as currently poor. He suggested that he was in no condition to attend the Hearing, albeit offered no

credible explanation as to how he knew, at 14.40 on the day prior to the Hearing, what his condition would be the following day. He enclosed a scanned Statement of Fitness for Work dated 7 February 2022, which suggested that the Respondent was unfit to work due to complications of diabetes. However, no explanation was provided as to why this would prevent him from joining a WebEx hearing from home. Crucially however, the Respondent stated: "I am NOT asking for a delay. I am rewording my submission and will send it in some time today. I will then be happy for Mr Upton to proceed in my absence". The Tribunal considered this statement to unequivocally confirm that the Respondent wished the Hearing to proceed without him.

5. That notwithstanding, the Tribunal considered whether in all of the circumstances it would be reasonable, and in accordance with the overriding objective in Rule 2 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 to deal with proceedings justly, to proceed with the Hearing in absence of the Respondent.
6. This Application originally called for its Case Management Discussion on 3 December 2021. At that time, the Respondent disputed that the tenancy agreement founded upon by the parties was the correct tenancy agreement. He wished an opportunity to prove that the produced agreement had been superseded. He also disputed whether it was reasonable to grant the order for possession. He wished to lodge and refer to video evidence. As such, a Hearing was fixed to take place by WebEx on 21 January 2022. The Respondent was Directed to lodge (i) a copy of the tenancy agreement upon which he founded, and (ii) all video evidence upon which he wished to rely by 7 January 2022. He did not do so.
7. On the morning of 21 January 2022, the Respondent emailed the Tribunal to indicate that he was on his way to the Accident and Emergency Department at the Queen Elizabeth University Hospital and would be unable to attend the Hearing. The Tribunal, of its own accord, adjourned the Hearing and assigned 11 February 2022 as a new date for the Hearing. The Tribunal directed the Respondent to lodge a medical certificate to confirm his treatment at Hospital on 21 January 2022 by 4 February 2022. The Respondent subsequently emailed the Tribunal with photographs of himself apparently in hospital wearing a medical gown and with a drip in his arm. Those photographs were undated. He did not lodge a medical certificate.
8. In all of the circumstances, having regard to the adjournment of the previous Hearing, the failure of the Respondent to lodge a medical certificate to vouch his claims of hospital attendance on the date in question, and the Respondent's own assertion that he wished the Tribunal to determine the Application today, the Tribunal determined that the Hearing should proceed in the Respondent's absence in accordance with Rule 29. In doing so, the Tribunal is to have regard to all of the material before it.

Late Productions

9. The second preliminary issue relates to the attempt by the Respondent to lodge documents by way of four emails to the Tribunal, one dated 10 February 2022 and the remaining three dated 11 February 2022.
10. In terms of Rule 22 of the Rules:-

“22.— *Lodging of documents etc.*

 - (1) Except as otherwise provided in these Rules, or as otherwise specified by the First-tier Tribunal, a party must send to the First-tier Tribunal no later than 7 days prior to any hearing notified under rule 24(1)—
 - (a) a list of any documents and copies of the documents that the party wishes to rely upon; and
 - (b) a list of any witnesses that the party wishes to call to give evidence.
 - (2) Before allowing a document to be lodged late, the First-tier Tribunal must be satisfied that the party has a reasonable excuse.”
11. The Respondent did not acknowledge that the documents were submitted late. He did not set out a cogent explanation for why they were being submitted late. In the circumstances, the Tribunal determined that no reasonable excuse had been provided by the Respondent to justify the late lodging of documents. Accordingly, the Tribunal refused to accept, although late, the emails of 10 and 11 February 2022 and any attachments thereto. The Hearing proceeded without regard thereto.

The Issues

12. In this Application, the Applicants seek an order for possession of a property let to the Respondent under an assured tenancy agreement. The Applicants contend that the tenancy agreement was dated 13 April 2016 and was for the period 13 April 2016 until 12 April 2017. They contend that the contractual tenancy agreement was brought to an end on 12 April 2021 by service of a Notice to Quit dated 7 January 2021. A Notice in terms of section 19 of the Housing (Scotland) Act 1988 (“the 1988 Act”) in form AT6 and dated 7 January 2021 was also served on the Respondent. In terms thereof, the Applicants gave notice to the Respondent of their intention to raise proceedings for possession of the Property under grounds 8, 11 and 12 of Schedule 5 to the 1988 Act. In short, they contended that (i) the Respondent was in rent arrears amounting to at least three months’ rent, (ii) the Respondent had persistently been late in paying rent, and (iii) some rent lawfully due from the Respondent was unpaid.
13. At the Case Management Discussion on 3 December 2021, the Respondent asserted three proposed defences:- (i) the tenancy agreement founded upon by the Applicants had been superseded; (ii) he was not in rent arrears because the Applicants were under obligation to make payment of reparation

to him for breach of contract and he was entitled to set off against his rent; and (iii) in any event, it was not reasonable to grant the order for possession.

14. The Respondent expressed his intention to lead evidence to establish that a different tenancy agreement bound the parties. However, he accepted that if the Tribunal found that the true tenancy agreement was the one produced by the Applicants in support of the Application, then the notices served on him were valid.
15. The Applicants' Representative submitted that a separate action for payment of rent arrears had been successfully pursued against the Respondent in circumstances where he had made the same allegations that the Applicants were under obligation to make payment to the Respondent and that he was entitled to set off those sums. The Tribunal had already determined that the Respondent's claim for abatement of rent due to breach of contract was unsupported by the facts. The Respondent's approach here was to attempt to run the same arguments twice. The Respondent accepted that the Tribunal had previously granted an order for payment of rent against him in favour of the Applicants, and that the said order remained unpaid. The Tribunal obtained a copy of the Written Decision in that case (FTS/HPC/CV/19/3710), in terms of which it appeared that the Tribunal had already heard the Respondent's claim for set off and determined that it was unfounded. A differently constituted Tribunal had already determined that the Respondent was in rent arrears and liable to make payment of £7,680 in respect thereof. The Respondent admitted that he had not done so. Against that background, the Tribunal considered that the Respondent's assertions of set off had no legal foundation. Accordingly, if the tenancy agreement founded upon by the Applicants was the true tenancy agreement between the parties, then grounds 8, 11 and 12 were satisfied.
16. Against that background, the Tribunal allowed the case to proceed to a Hearing to determine the following issues: (i) whether the tenancy agreement founded upon by the applicants is the true tenancy agreement; and (ii) if so, whether it is reasonable to grant an eviction order.

The Evidence

17. Evidence was led at the Hearing from Mrs Valerie West, the Applicants' letting agent, and Mr Mark Shepherd, the Applicants' son.

Valerie West

18. Mrs West is a Director of Indigo Square Property Limited ("Indigo"). Indigo are the letting agents instructed by the Applicants. Mrs West relied upon the documents lodged with the Application.
19. Mrs West described the property as a one-bedroom basement flat. The property has an unusual configuration in that, although the property is a basement flat, it has level access without needing to go down a staircase. The property has not been adapted for the Respondent. The property is near to a

bus stop, which has a service to the Queen Elizabeth University Hospital. However, Mrs West believed the journey to take in the region of 25-30 minutes. It was noted that the New Victoria Hospital is approximately a five minute walk away. Mrs West was aware that the Respondent had health issues, but was unaware of any specific treatment, clinic or service that he received or attended in the locality of the Property.

20. Mrs West advised that the property had been furnished when let, but that the Respondent had replaced most of the items with his own furniture without the consent of the Applicants. Her belief was that the Respondent had disposed of the Applicants' items without the knowledge or consent of the Applicants.
21. Mrs West advised that the Respondent continued to be in rent arrears. His arrears were, at the date of the Hearing, sitting at £14,080. Mrs West advised that the Respondent had not made any payments towards his rent since 2 November 2018.
22. Mrs West advised that the property market in the area of the Property is buoyant. She spoke to being aware of lots of properties available to rent in the area.

Mark Shepherd

23. Mark Shepherd is the son of the Applicants. He advised that his parents were elderly and that he helps them manage their lettings.
24. Mr Shepherd advised that the Respondent's continued occupancy of the Property was having a detrimental effect on his parents. In particular, it was negatively affecting their mental health. There are ongoing costs associated with the Property, including factoring, insurance and general maintenance. The Applicants do not, he said, have the available finance to cover those costs. Without payment of rent from the Respondent, the Applicants have had to finance these regular payments by altering their lifestyle and selling other properties. More recently, Mr Shepherd said that he had been financing these costs for his parents.

Assessment

25. The Tribunal considered both Mrs West and Mr Shepherd to be credible and reliable. They gave their evidence in a straightforward manner. There was no evidence presented to contradict what they had to say. In all of the circumstances, the Tribunal accepted their evidence.

Decision

26. In terms of the 1988 Act:-

“18.— Orders for possession.

- (1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.
- (2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.
- (3) [...]
- (3A) [...]
- (3B) Subsection (3C) applies where the First-tier Tribunal is satisfied—
 - (a) that Ground 8 in Schedule 5 is established, and
 - (b) that all or part of the rent in respect of which the tenant is in arrears as mentioned in that Ground relates to the period during which paragraph 4 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 is in force.
- (3C) Where this subsection applies, in considering for the purposes of subsection (4) (as applied in accordance with the modification made by paragraph 3(2)(b) of schedule 1 of the Coronavirus (Scotland) Act 2020) whether it is reasonable to make an order for possession against the tenant, the First-tier Tribunal is to consider the extent to which the landlord has complied with pre-action requirements before raising the proceedings for possession.
- (4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.
- (4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 8 in Part I of Schedule 5 to this Act or on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.
- (5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect

in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

- (6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—
- (a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and
 - (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.
- (6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.
- (7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.
- (8) In subsections (3A) and (4A) above—
- (a) “*relevant housing benefit*” means—
 - (i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or
 - (ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;
 - (aa) “*relevant universal credit*” means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;
 - (b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.

- (9) In subsection (3C), "*pre-action requirements*" means such requirements as the Scottish Ministers may specify in regulations.
- (10) Regulations under subsection (9) may in particular make provision about—
- (a) information to be provided by a landlord to a tenant including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy,
 - (b) steps to be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,
 - (c) such other matters as the Scottish Ministers consider appropriate.
- (11) Regulations under subsection (9) are subject to the affirmative procedure.

19.— Notice of proceedings for possession.

- (1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—
- (a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or
 - (b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.
- (2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.
- (3) A notice under this section is one in the prescribed form informing the tenant that—
- (a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and
 - (b) those proceedings will not be raised earlier than the expiry of the period of 28 days, two months, three months or, as the case may be, six months (whichever is appropriate under subsection (4) or (4A) below) from the date of service of the notice.
- (4) The minimum period to be specified in a notice served before 3 October 2020 as mentioned in subsection (3)(b) is—

- (a) two months if the notice specifies only Ground 9 in Part II of Schedule 5 to this Act,
 - (b) three months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without also specifying the ground referred to in paragraph (a))—
 - (i) Ground 1 in Part I,
 - (ii) Ground 15 in Part II,
 - (c) six months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without other grounds)—
 - (i) Grounds 2 to 8 in Part I,
 - (ii) Grounds 10 to 14 in Part II,
 - (iii) Ground 16 or 17 in Part II.
- (4A) The minimum period to be specified in a notice served on or after 3 October 2020 as mentioned in subsection (3)(b) is—
- (a) 28 days if the notice specifies only Ground 15 in Part II of Schedule 5 to this Act,
 - (b) two months if the notice specifies Ground 9 in Part II of Schedule 5 to this Act (whether with or without also specifying the ground referred to in paragraph (a)),
 - (c) three months if the notice specifies Ground 1 in Part I of Schedule 5 to this Act (whether with or without also specifying either or both of the grounds referred to in paragraphs (a) and (b)),
 - (d) six months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without other grounds)—
 - (i) Grounds 2 to 8 in Part I,
 - (ii) Grounds 10 to 14 in Part II,
 - (iii) Ground 16 or 17 in Part II.
- (5) The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.
- (6) Where a notice under this section relating to a contractual tenancy—
- (a) is served during the tenancy; or

- (b) is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy,

the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

- (7) A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.

Sch.5, Ground 8

Both at the date of the service of the notice under section 19 of this Act relating to the proceedings for possession and at the date of the hearing or the date of the case management discussion, whichever is the earlier, at least three months rent lawfully due from the tenant is in arrears.

Sch. 5, Ground 11

Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.

Sch. 5, Ground 12

Some rent lawfully due from the tenant—

- (a) is unpaid on the date on which the proceedings for possession are begun; and
- (b) except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings.”

- 27. Having heard the evidence, the Tribunal determined that the true tenancy agreement between the parties is the tenancy agreement presented by the Applicants with the Application. That being so, the Tribunal was satisfied that the notices upon which the Applicants rely are valid, being the Notice to Quit, the Form AT6, and the notice in terms of section 11 of the Homelessness etc (Scotland) Act 2003. The Tribunal was also satisfied that grounds 8, 11 and 12 were satisfied. The only matter remaining to determine is the reasonableness of granting the order.
- 28. Based on the evidence heard, the Tribunal determined that it was reasonable to grant the order for possession in this case. The Respondent is over £14,000 in rent arrears. He has paid nothing since 2 November 2018. He has made clear in his previous submissions to the Tribunal that he has no intention of paying rent. He continues to proceed upon the basis that he is due money from the Applicants when there has been no finding of liability for such sums, and no evidence led in these proceedings to support such a finding. The Tribunal was satisfied, based on the discussions at the Case Management Discussion, that the Applicants have sought to engage with the

Respondent but those attempts were unsuccessful. The Applicants have procured a payment order against the Respondent in respect of some of his arrears, and yet that remains unpaid. The Tribunal gave consideration to the extent to which the Applicants' actions could be said to be in compliance with the pre-action protocol. The Applicants' agents, Indigo Square, wrote to the Respondent on 9 August 2021 and again on 31 August 2021 seeking to engage with the Respondent. Both letters are produced with the Application. Those letters provide a clear explanation to the Respondent regarding his arrears, where he might seek advice, and a willingness to discuss a payment plan. In that respect, the Tribunal was satisfied that the Applicants had taken appropriate steps to meet the requirements of Regulation 3 of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020. The Tribunal accepted that the Property has not been adapted, that no evidence had been presented regarding why the Respondent needed to remain in the Property as opposed to moving elsewhere, and that the Applicants were suffering as a consequence of the Respondent's continued occupancy. Taking all of that into consideration, the Tribunal determined that it was reasonable to grant the order for possession. The Tribunal's decision was unanimous.

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.

Andrew Upton

Legal Member/Chair

11th February 2022

Date