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 of the Private Housing (Tenancies) Act 2016

Chamber Ref: FTS/HPC/EV/22/2683

Re: Property at 36 Dalmahoy Crescent, Balerno, EH14 7BX ("the Property")

Parties:

Mr Nicholas Karl Hocking, Flat 10 28 Citypark way, Edinburgh, EH5 2FA ("the Applicant")

Ms Kirsty Donnelly, Solicitor, T.C Young, Solicitors ("the Applicant's Representative")

Mr Campbell Taylor, Ms Louise Drysdale, 36 Dalmahoy Crescent, Balerno, EH14 7BX ("the Respondents")

Mr Gordon Lindhorst, Advocate ("the Respondents' Representative")

Tribunal Members:

Martin McAllister (Legal Member) and Eileen Shand (Ordinary Member) ("the tribunal')

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order of eviction be granted against the Respondents.

Background

1. On 5th August 2022, the Applicant's agents submitted an application to the First-tier Tribunal for Scotland seeking an order of eviction.

2. The application disclosed that the Applicant is seeking eviction on Grounds 4 and 11 contained in Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 ("Ground 4 "and "Ground 11").

3. On 5th September 2022, the application was accepted for determination by the Tribunal.

4. A case management discussion was held on 24th November 2022 by audio conferencing. Subsequent to the case management discussion, a Direction was issued under Rule 16 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules"). This dealt with timing of submission of representations and other administrative matters.

5. Both parties submitted written representations.

6. A Hearing was held by video conference over two days on 21st February 2023 and 21st April 2023. Ms Donnelly and Mr Lindhorst provided representation and the parties were present. Oral evidence was heard from the Applicant and the Respondents.

The Law

7. Private Housing (Tenancies) (Scotland) Act 2016

Section 51

First-tier Tribunal's power to issue an eviction order

(1) The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

(2) The provisions of schedule 3 stating the circumstances in which the Tribunal may find that an eviction ground applies are exhaustive of the circumstances in which the Tribunal is entitled to find that the ground in question applies.

(3) The Tribunal must state in an eviction order the eviction ground, or grounds, on the basis of which it is issuing the order.

(4) An eviction order brings a tenancy which is a private residential tenancy to an end on the day specified by the Tribunal in the order.

Schedule 3

Ground 4: Landlord intends to live in property

4 (1) It is an eviction ground that the landlord intends to live in the let property.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months, and

(b) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of that fact.

(3) References to the landlord in this paragraph—

(a) in a case where two or more persons jointly are the landlord under a tenancy, are to be read as referring to any one of them,

(b) in a case where the landlord holds the landlord's interest as a trustee under a trust, are to be read as referring to a person who is a beneficiary under the trust.

(4) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2) includes (for example) an affidavit stating that the landlord has that intention.

Ground 11: Breach of tenancy agreement

11(1) It is an eviction ground that the tenant has failed to comply with an obligation under the tenancy.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) the tenant has failed to comply with a term of the tenancy, and

(b) the Tribunal considers it to be reasonable to issue an eviction order on account of that fact.

(3) The reference in sub-paragraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent.

8. Findings in Fact

8.1 Parties entered into a private residential tenancy agreement for the Property which commenced on 28th February 2019.
8.2 The contractual rent is £1500 monthly which is due to be paid on the first of each month.
8.3 The Respondents do not pay the rent on the first day of each month.
8.4 The Applicant served a notice to leave on the Respondents requiring them to vacate by 18th July 2022.
8.5 The Respondents still occupy the Property.
8.6 Edinburgh City Council was served with the appropriate notice in terms of the Homelessness etc (Scotland) Act 2003.

8.7 The Respondents and their family are established in Balerno where the Property is situated and where two of their children attend nursery school.
8.8 One of the Respondents' children has health issues.
8.9 The Applicant is a carer for his sister.
8.10 The Property is the former family home of the Applicant.
8.11 Prior to the commencement of the tenancy, there was no agreement between the parties that the Respondents would have the right to purchase the Property.

9. Findings in Fact and Law

9.1 The Applicant intends to live in the Property as his only or principal home for a period of at least three months.

9.2 The Respondents have failed to comply with clause 7 of the private residential tenancy agreement and have therefore failed to comply with an obligation under the tenancy.

Reasons

Matters not in Dispute

10. Parties entered into a private residential tenancy for the Property on 30th January 2019 with a commencement date of 28th February 2019. The monthly rental was and is £1,500.

11. The tenancy agreement set out various terms with regard to the tenancy including the date for payment of the rent which was stated to be on the first of each month.

12. A notice to leave dated 22nd April 2022 was served on the Respondents.

13. The appropriate notice under Section 11 of the Homelessness etc (Scotland) Act 2003 was served on the relevant local authority.

14. The Respondents are still occupying the Property.

15. The monthly rental is not paid on the rent due date of the first of each month.

16. During the tenancy, the monthly rent has been paid.

17. The notice to leave cited Ground 4 as a reason for the Applicant seeking possession of the Property. It states that the landlord intends to occupy the let property as his only or principal home for at least 3 months.

18. The Property had previously been the family home of the Applicant's parents and he had been brought up in it.

19. The notice to leave cited Ground 11 as a reason for the Applicant seeking possession of the Property and referred to breaches of various terms of the tenancy agreement:

> *"Clause 6: you failed to obtain written permission from the landlord before carrying out business from the Let Property.*
> *Clause 7: you have failed to make payments of rent on or before 1st of each calendar month.*
> *Clause 16: you have failed to take reasonable care of the Let Property, including failing to keep same adequately ventilated.*
> *Clause 27: you failed to obtain written consent from the landlord prior to undertaking internal decoration of and making alterations to the Let Property.*
> *Clause 34: you keep additional pets within the Let Property in excessive of what was permitted by the landlord.*
> *Clause 36: you have failed to ensure Housing Benefit or other equivalent benefits are paid direct to the landlord throughout the duration of the tenancy."*

Preliminary matters

20. The tribunal noted that, prior to the implementation of the Coronavirus (Recovery and Reform) (Scotland) Act 2022, if it found Ground 4 to be met an order for eviction would have been mandatory. A finding that Ground 11 was met would not have led to a mandatory order of eviction but was a matter of discretion. Eviction on the basis of grounds 4 and 11 are now discretionary and subject to a test of reasonableness. The tribunal's approach was to consider whether or not

the relevant grounds were met and, if either or both were, to then consider whether it would be reasonable to grant an order of eviction.

21. On 21st April 2023, Ms Donnelly sought to correct a particular piece of evidence which Mr Hocking had given on 21st February 2023 and which, on reflection, he determined not to have been accurate. Ms Donnelly had intimated this to Mr Lindhorst who raised no objection to the correction but stated that such evidence was not necessarily agreed. The tribunal allowed the correction. There is no requirement to provide the detail at this part of the Decision and the relevant evidence will be recorded in due course.

22. The tribunal considered it convenient to deal with Ground 11 before going on to consider Ground 4. In doing so, it dealt in turn with the alleged breaches of the tenancy agreement.

Clause 6 of the tenancy agreement.

23. The Respondents have an interest in matters equestrian and have a business called The Horse Empire Limited. They own horses and have them at premises in Currie which is not too far from the Property. Horses have never been kept at the Property and it was not part of the Applicant's case that they were. Mr Taylor gave some detail about the various services provided by the company including acting as a broker for the sale of horses, arranging loans of horses, rental of horses for particular periods of time and as a market place for horses and accessories.

24. The Applicant's concerns were that The Horse Empire Limited's registered office had, at one point, been stated to be at the Property and that also items of equestrian equipment such as saddles had been photographed at the Property and been advertised for sale on a website.

25. The tribunal had a copy of a print from Companies House which showed that the company had been incorporated on 14th June 2021 and that, on 2nd November 2021, its registered office had been changed from 36 Dalmahoy Crescent, Balerno to 3 3F1 Third Floor, Hill Street, Edinburgh.

26. The tribunal had copies of photographs which bear to be from the website of The Horse Empire and concerned the sale of three equestrian items including a saddle.

27. Mr Hocking said that it is clear from the background of two of the photographs that they had been taken in the Property. He said that he had never consented for the Property to be used as a warehouse to retail goods. Mr Taylor accepted that the photographs in question had been taken in the Property. He said that

there is no warehouse. He explained that the website provides a marketplace for people wanting to sell equestrian items. He said that he had been disposing of items including a saddle which was for one of his horses which had died.

28. Mr Taylor said that he had relied on others when the company was incorporated and that, when he discovered that the registered office had been recorded as the Property, he had changed it to a company accommodation address.

29. Mr Hocking said that, at the commencement of the tenancy, he had been aware of the Respondents having a horse share and a utility business but that he had never been advised that a trading entity would be run from the Property or that it would be used as "a company headquarters." Mr Hocking said that there may be insurance implications if a business was being run from the Property. Mr Taylor said that the utility business involves him visiting people in their homes and that no actual equestrian business was run from the Property.

30. Ms Donnelly's position was that the evidence supported a finding that clause 6 of the tenancy agreement had been breached and relied on the evidence of Mr Hocking and the documentary evidence which had been submitted.

31. Mr Lindhorst said that the Property lies in a residential area and it could be understood that carrying out a business from it could potentially cause problems for neighbours. He asked the tribunal to find that the circumstances before it relating to the application were quite different and that there was no evidence that a business was being operated from the Property. He said that the sale of a couple of items online would not in itself constitute carrying on a business and that the Respondents ran their equestrian business from two sites in Currie.

32. Mr Lindhorst questioned the Applicant with regard to whether or not the title provisions of the property he resides at permitted him to work from home. Mr Hocking said that he did not know but cited the fact that many people do so and that he owned the property in question.

33. Mr Lindhorst said that the registered address of the company had been wrongly stated to be at the Property and that, as soon as the error had been noted by the Respondents, it had been changed.

34. The tribunal considered the terms of clause 6 of the tenancy agreement: *"The Tenant agrees to continue to occupy the Let Property as his or her home and must obtain the Landlord's written permission before carrying out any trade, business or profession there."*

35. The tribunal accepted Mr Taylor's evidence on the matter. It accepted that the photographing of items at the Property for the purpose of online sale did not, in

itself, constitute a business. Lots of people sell items online. It is the case that many make a business of it and it is a matter of degree as to whether or not it would mean that a business is being run from a Property. Such a business could constitute a nuisance if, for example, it meant that many delivery vehicles called at a property. There was no evidence that this was the case in relation to the application.

36. The tribunal accepted Mr Taylor's evidence that the registered office of The Horse Empire Limited had, in error, been set at the Property and had been changed when he had been made aware of it. In any event, the tribunal considered it a moot point if a company registered office at a property would constitute carrying on a trade, business or profession and it was not addressed on the matter.

37. The tribunal did not find that the Respondents had been in breach of clause 6 of the tenancy agreement.

Clause 7 of the tenancy agreement.

38. The tenancy agreement was clear in its terms. Clause 7 stated that the first payment of rent was due on 26th February 2019 and that "*Thereafter payments of £1,500 must be received on the 1st of the month and then subsequently on or before the same date each calendar month thereafter."*

39. The evidence was that the rent to March 2019 was paid timeously and thereafter it was not paid on time. A rent statement had been lodged by the Applicant which showed that the rent was paid late in each month from April 2019. Sometimes the payment was made as late as the 24th of the month but that was after the Applicant employed a letting agent. The Respondents accepted that the rent had not been paid on the 1st of the month and their position was that it was paid as soon as they received their Universal Credit payment. The housing element of Universal Credit was part funding the rent. The sum paid by Universal Credit is £1200 and the balance of £300 is provided by the Respondents.

40. The Applicant's position was that the rent should have been paid direct to him by Universal Credit. The Respondents' position was that they tried to effect such payments but had been told that it would require an application to be made to Universal Credit by the Applicant but that he had told them that he was not prepared to do the work involved in doing that.

41. Ms Drysdale said that matters with the Respondent's benefits were complicated. She said that, prior to commencing the tenancy in respect of the Property, she and her partner had been in receipt of Housing Benefit but that this had

transferred to Universal Credit for the new tenancy. She said that the payment from Universal Credit was around the nineteenth of each month. Ms Drysdale said that the Applicant had transferred management of the tenancy to Northwood, a letting agent, and that it had raised no issue about the date of payment and accepted that it would be on or around the nineteenth of each month.

42. Mr Hocking said that his understanding was that he could only apply for the housing element of Universal Credit to be paid to him direct if there had been rent arrears for two months. He said that tenants could apply for this to be done and that the Respondents did not do this. He accepted that he had received monthly payments of rent since the commencement of the tenancy.

43. The tribunal considered that the matter was straightforward in as much as the rent was not paid timeously in accordance with the terms of the tenancy agreement. The Respondents were in breach of the tenancy agreement in that regard. The tribunal came to no view on whether or not the reasons for the housing element of Universal Credit not being paid direct to the Applicant was as a result of the Respondents' failure or that of the Applicant. The Respondents' position that the Applicant said that he was not prepared to do the work in this regard was not put to Mr Hocking by Mr Lindhorst in cross examination.

Clause 16 of the tenancy agreement.

44. The tribunal heard a considerable amount of evidence with regard to the alleged failure of the Respondents to properly care for the Property and the alleged failure of the Applicant to carry out necessary repairs to the Property.

45. The Applicant's position was that there had been a number of leaks at the Property although he accepted that not all were as a result of the Respondents' failure to take care of the property and report defects. He said that one significant leak had been caused by a nail being put through a pipe by a tradesperson instructed by him.

46. The Applicant said that the Respondents did not properly care for the garden. He cited in particular a bush which he referred to as a horizontal conifer and he directed the tribunal to a photograph of it and another photograph taken after it had been pruned by the Respondents. The Applicant referred to the bush as the signature piece of the front garden. The tribunal accepted that the bush was much diminished in appearance after it had been pruned. Mr Taylor said that there had been a heavy fall of snow and that snow lying on the bush had caused a branch to break. He said he had pruned it to prevent the bush becoming diseased. He said that clause 29 of the tenancy agreement required him to

maintain the garden in a reasonable manner and that this included *"pruning of plants."* He said that the particular bush is growing back and is now about two feet high. He said that he was sure that it would recover. Mr Hocking conceded that people can make mistakes when dealing with horticultural matters.

47. Mr Taylor said that Edinburgh City Council charged for the provision and collection of a brown bin which was used for garden refuse. He said that, at the commencement of the tenancy, the Applicant had undertaken to pay for this and had done so for a period after the start of the tenancy. He said that the Applicant had a contractor which dealt with lawn care and, in particular with eradication of moss. He said that, at the commencement of the tenancy, the Applicant said that he would continue with the arrangement and that he would pay for it. The Applicant's evidence was that the cost of the brown bin was to be met by the Respondents and that he did agree to pay for the lawn care but had told the Respondents that he may cancel the arrangement.

48. Both parties referred to what was described as a "handover document" in which various matters including the arrangements for gardening were set out. This document was not before the tribunal.

49. The Applicant directed the tribunal to photographs of the Property which a contractor instructed by him had taken. He said that this showed the condition of the Property and that the photographs had given him concern. It was also referred to an email which the contractor had sent. The contractor in question provided no evidence to the tribunal and it disregarded the email and photographs.

50. The Respondent's evidence was that necessary repairs were reported to the Applicant which were not dealt with or were dealt with inadequately. Mr Taylor referred to "constant leaks since the start of the tenancy." The application before the tribunal was not in respect of the requirement to maintain the Property to the repairing standard set out in the Housing (Scotland) Act 2006. The tribunal was not required to come to a view on whether or not the Applicant did comply with his obligations under the 2006 Act.

51. The Respondents stated that the Applicant had come to the Property when a contractor instructed by him had been working in the bathroom and that he had come into the Property without being invited. The Applicant corrected evidence which he had given earlier and confirmed that he had done so. He said that he entered the Property, spoke to the Respondents who were sitting in the living room, and proceeded to go upstairs to check on progress of the work to the bathroom.

52. The Applicant said that he had an emotional attachment to the Property as a consequence of it having been his family home and that it distressed him when he saw that it was not being properly cared for. He referred to his now deceased mother being particularly keen on the garden.

53. The tribunal did not consider that it had sufficient evidence that, on the balance of probabilities, the Respondents had failed to take care of the Property and keep it properly ventilated.

Clause 27 of the tenancy agreement

54. The Applicant's position was that the Respondents had carried out internal decoration and made alterations to the Property without his consent.

55. the Applicant had already given evidence with regard to the treatment of the horizontal conifer and his disappointment. He said that he would not have consented to it being pruned in the way it had been. He said that it had been trimmed to its roots. He said that the Respondents had also carried out changes to the internal décor of the Property and that he had not authorised this. He said that the decoration had not been in neutral shades which he may have approved of.

56. Mr Taylor said that the Respondents treated the Property as their home and hoped to do so for many years. He said that the Applicant had agreed that decoration could be done and that he would reimburse them for 15% of the costs of materials. He said that the work was started but that the Applicant did not like what had been done and that he and Ms Drysdale did no more decorating.

57. The tribunal did not consider that it had sufficient evidence, on the balance of probabilities, to support the Applicant's contention that the Respondents had failed to seek permission to decorate the Property or that it had carried out unauthorised alterations.

Clause 34 of the tenancy agreement.

58. Clause 34 states that the Respondents are entitled to keep one collie dog in the Property. Mr Taylor said that the dog subsequently died. The clause states that permission has to be obtained for any other animals or pets.

59. The issue for the Applicant was that the Respondents had a fish tank in the living room of the Property. He said that he had been at the Property when the Respondents had been moving it at the start of the tenancy and he accepted that he had been aware of a fish tank being taken in. He said that its presence *"probably went over my head."* He said that he did not consent to the presence of

the fish tank and that, given the leaks that there had been in the Property, he was uncomfortable about there being a tank containing water in the living room of the Property.

60. Mr Lindhorst submitted that the Applicant knew about the fish tank and raised no issues. He said that there was also a question of whether a fish was a "pet."

61. The tribunal accepted that Mr Hocking had been aware of the existence of the fish tank and had raised no issues at the commencement of the tenancy. In one view, a fish kept in a tank is a pet because it is not free. The tribunal determined that the matter was *de minimis* and that the existence of a fish tank did not constitute a breach of clause 34 of the tenancy agreement.

Clause 36 of the tenancy agreement.

62. The clause states that *"housing benefit will be paid directly to the landlord by the council."* No issue was taken by Mr Lindhorst in relation to the reference to housing benefit and the tribunal accepted that this reference was translated to Universal Credit and that the clause meant that the housing element of Universal Credit was to be paid direct to the landlord.

63. For the reasons previously stated, the tribunal came to no view with regard to the failure to ensure that the payment was made direct to the Applicant.

Summary of position in relation to ground 11.

64. The tribunal accepted that the rental payments had not been made on the first of each calendar month and that the Respondents were therefore in breach of the tenancy agreement and that a ground for eviction had been met. It noted that this was not a situation where there were or had been considerable arrears of rent. The rent had been paid on a monthly basis. The tribunal did not consider that it was reasonable, on balance, to make an order of eviction on what was a comparatively minor breach of the tenancy agreement.

65. The tribunal considered Ground 4.

66. The evidence of the Applicant was that he had lived and worked in Switzerland and had returned to Scotland in 2012 because his mother, who was living in the Property, was becoming frail and he also wanted to care for his sister. His mother subsequently died and he now owns the Property. He lives in a three bedroom flat nearer to the centre of Edinburgh than the Property because he previously needed to be fairly central as a consequence of work commitments. At the time he purchased the flat, he did work for the University of Edinburgh which required him to attend at their premises. He is an I.T. contractor. He now has a different

job and works exclusively from home. He said that he works from his bedroom which he said was not ideal. The flat does not have a garden.

67. The Applicant's sister has certain enduring health conditions. The evidence of the Applicant with regard to this was not challenged by the Respondents and, in respect for the privacy of the Applicant and his sister, there is no need for these to be detailed in this decision. The Applicant had lodged a document which confirmed that he has caring responsibilities for his sister and the principle of this was not challenged by the Respondents.

68. The Applicant said he had one brother who lives abroad and that his only other family members who could potentially assist with caring duties are cousins who live in the south of England.

69. The Applicant said that his sister is able to look after herself albeit with some support and that she stays in a flat which had been purchased for her by her mother. She has lived there since 2001/2002. The flat is in Currie which is around forty five minutes travel from the Applicant's flat. Mr Hocking said that he is always ready to go to his sister if she needs him or if he feels he needs to check on her. If he lived in the Property, he would be only five minutes or so away rather than forty five minutes.

70. The Applicant currently is available to his sister when she needs him and this could potentially be during the night. Mr Hocking said that he telephones his sister every night. He said that she visits him on a weekly basis and they go swimming. He said that she stays with him for a long weekend once a month. Mr Hocking said that his sister has a dedicated bedroom in his flat. He said that the other bedroom is used as a utility room and for drying clothes. He said that it also contains a rowing machine. He said that he *"is kept in the loop"* about his sister's health issues by health care providers.

71. The Applicant said that he pays for his sister to have weekend holidays with a befriender.

72. Mr Hocking said that one of the reasons he wants to live in the Property is that it would be more suitable for his sister when she visits. It is a house that she is used to because it was her family home, it has a garden and it has more space. He said that, in the future, his sister may need to stay with him on a permanent basis.

73. Mr Hocking said that he only owned the Property and the flat in which he lives. It was put to him that the representations of the Respondents were that he had a home in Switzerland and that Northwood, the letting agent, had informed them at

one point that mail had to be forwarded to Switzerland. Mr Hocking said that he could not understand this. He said that he is half Swiss and that between 2000 and 2012, he lived in Germany and Switzerland. He said that he rented a property in Switzerland and that, when he returned to Scotland in 2012, he had sublet it which was a common practice in Switzerland. He said that he gave up the lease in 2018 and referred the tribunal to documentation which he had lodged in relation to the subletting and termination of the Swiss lease.

74. Mr Hocking said that he used a Swiss email address and that this may have led to some confusion. He said that, since 2012, the only residences he has lived in had been the Property and the flat where he now is.

75. The Applicant denied that he was a property developer and that this was linked to his desire to recover the Property. The tribunal had before it documents relating to Dreamsmart Property Ltd which Mr Hocking said was a company which he had incorporated as a vehicle to purchase a flat in Liverpool in a development of student flats. He said that Aura Liverpool Limited, the development company, went into administration and that, from his investment of £30,000, he recovered £7,283 from the administration. The tribunal was referred to the accounts for Dreamsmart Property Ltd, copies of its bank statements and a letter from a firm of chartered accountants acting for the Administrators dated 11th January 2021 confirming payment to Mr Hocking of £7,283. The Applicant said that he had been *"burnt"* by the experience and *"would not be going there again."*

76. Mr Hocking said that he had found the Respondents as tenants by advertising online. He said that, after the Respondents had viewed the Property and indicated that they were interested in taking on the tenancy, he had prepared and sent them what he described as a screening document which was a questionnaire. The tribunal was referred to document 5/2 in the third inventory of productions for the Applicant. The Applicant said that this document was the completed questionnaire.

77. The Applicant said that, in his discussions with the Respondents prior to the tenancy commencing, he had stated that it could not be a "forever home" but that he anticipated that a lease of five years or so would be probable. He said that, when the Property was viewed by the Respondents, there was no firm discussion about them buying the Property. He said that he gave no commitment to sell the Property to them but may have said *"if it comes to selling, maybe you can make me an offer."*

78. Mr Hocking said that he did not think that it would have been feasible for the Respondents to purchase the Property as they were in receipt of state benefits.

79. Mr Hocking accepted that, at the commencement of the tenancy, the Respondents were looking for a family home that was long term.

80. The Applicant said that, in 2021, the Respondents had indicated that they would like to purchase the Property and had offered a price of £400,000. He said that the Property had not been placed on the market but that this figure was nowhere near its value. He said that a smaller house in the area sold for around £500,000.

81. The Applicant said that, at one time, he would have considered selling the Property but that his personal circumstances changed. He said that living in the Property would mean that he would have a better standard of living. It would allow him to have a dedicated home office which could accommodate the equipment which he required to have. He said that he might convert the garage to be a bespoke computer office. He said that, if he sold the Property, he would be subject to capital gains tax and that it would not be "financially sensible" for him to do so. Mr Hocking said that he also wanted *"out of the landlord business which was causing him angst."* He said that he had wanted to recover the Property in 2019 but that he had suspended this because of the pandemic as he did not think it right to proceed.

82. The Applicant said that living in the Property would enable him to provide a better quality of life for his sister and it would mean that he was within walking distance of where she stays in Currie.

83. Mr Taylor and Ms Drysdale were consistent in stating that it was a matter of agreement that they would be entitled to buy the Property. Mr Taylor said that he would not have left their previous tenancy if there was not the option to purchase as it would not have made sense to do so. They both referred to a conversation in the garden of the Property prior to commencement of the tenancy where they said the commitment to sell was made.

84. Ms Drysdale said that she had completed the screening document but she and Mr Taylor agreed that it reflected their joint responses. Reference was made to paragraph 13 of the document- *"Desired length of lease: we would be looking to stay long term, you had mentioned potentially selling in 5 or so years in which time potentially we may be in a position to buy it should the opportunity arise."*

85. Mr Taylor said that he got an email from Northwood, the letting agent, stating that Mr Hocking was emigrating and intended to sell the Property. He accepted that the email had not been lodged in evidence. He said that he got his solicitor to make a verbal offer for the Property at a price of £400,000 and the response was that the price was £550,000. He said that he suggested that a surveyor be

instructed to value the Property so that a price could be fixed. Mr Taylor said that no response has been received to that suggestion. Mr Taylor said that he understood from his solicitor that Mr Hocking had someone arranged to enter into a tenancy for the flat in which he was living. The matter of possible emigration was not put to Mr Hocking in cross examination.

86. Mr Taylor said that he thought a price of £400,000 was fair given the condition of the Property.

87. Mr Taylor said that he considered that there was a binding arrangement for the Property to be sold to the Respondents and when asked if the reverse would also apply, that they would be obliged to buy if required to by the Applicant he said *"I am not a lawyer, I have no idea."* Both Respondents confirmed that no written contract with the Applicant in connection with possible purchase of the Property was at any time entered into.

88. The Respondents said that the indicative offer of £400,000 was made without having specific discussions with a mortgage broker or lender in relation to the offer made. Mr Taylor said that *"he had not checked into funding."* The Respondents said that they had anticipated getting assistance from family members with regard to any deposit required. They agreed that, without knowing what loan could be made available, they did not know what family funds would require to be provided.

89. Mr Taylor said that, although he had not had a specific conversation with a mortgage broker in relation to submission of an offer of £400,000, he had previously had a general conversation. He said that he had discussed matters with his Universal Credit adviser and had a "five year plan" to allow him to purchase a property. Ms Drysdale, in relation to the offer for the Property, said that *"discussions were to be had with a mortgage broker."*

90. Mr Taylor said that he had business assets which could be sold to help finance a purchase.

91. Ms Drysdale and Mr Taylor were each referred to the screening document where it was stated that, at the commencement of the tenancy, their gross income was £42,000. Neither could state if this included Universal Credit payments.

92. The Applicant said that there are a number of housing developments not too far from the Property, with properties for sale, which could be suitable for the Respondents to buy.

93. The Respondents said that there were no suitable properties in the area which they could purchase since they needed five bedrooms. Ms Drysdale's evidence

was that she has widely extended the search area and had only found one suitable property for rent but that she did not view it because it turned out to be a "scam."

94. Mr Taylor said that he had lived for most of his life in the Balerno/Baberton Mains/ Currie area. He said that his parents live nearby and that they are of an age where he needs to provide support to them. He said that his daughters occasionally stay with these grandparents.

95. The Respondents provided details of their family unit. There is a twenty two year old who is in her final year at Edinburgh University and who commutes by car. There is a seventeen year old who is at college in Broxburn and who commutes by car. There is a six month old child and children aged four and five. The four and five year old children attend Dean Park Nursery School. The older child will go to Dean Park Primary School in August 2023. Ms Drysdale said that they both have a circle of friends in the area and that the five year old child will start school with children from the nursery school which she attends.

96. Ms Drysdale said that the four year old child has a particular health issue which has meant the supportive involvement of the health visitor and the nursery school. She said that the condition meant that specific arrangements have to made with regard to the food which is provided by the nursery school and that a previous nursery had not coped well with the demands on it. She said that she was confident that the positive relationship with the nursery would be mirrored by the primary school next year when the child moves up because the two schools are linked.

97. Mr Taylor and Ms Drysdale said that they wanted their family to remain in the area and that there were no other suitable properties if the order for eviction was granted. Ms Drysdale said that she would be "devastated" if she had to move from the Property. She spoke about the particular issues there would be for the two children at nursery, one in relation to ensuring the health issues were accommodated and the other starting school without friends from nursery.

98. Ms Drysdale said that an application for local authority housing from Edinburgh City Council had been made some years ago but that no offer had been made. She said that she had made no application to housing associations or other councils.

99. The Applicant's position is that he wants to recover possession of the Property to live in it. His evidence of his desire to do this to provide better care for his sister and to have a better working environment for himself was convincing. He was a

credible witness. It is accepted that a tenant in such a situation has difficulties in challenging a landlord's evidence that he wants to reside in a property. In this case, the Respondents had suggested that the Applicant was a property developer and that he intended to sell the Property. In support of this, they submitted documentation in relation to Dreamsmart Properties Limited. The tribunal accepted the Applicant's evidence on this matter which was supported by the company accounts and the letter from the Administrator of the development company in administration. The tribunal accepted that the Applicant's venture into property development in relation to a property in Liverpool was a one off.

100. The tribunal found that the Applicant intends to live in the Property as his only or principal home for at least three months. Before granting an eviction order, the tribunal requires to be satisfied that it is *"reasonable to grant an eviction order on account of that fact."*

101. The tribunal was assisted by Ms Donnelly and Mr Lindhorst who made submissions in relation to reasonableness.

102. Ms Donnelly asked the tribunal to accept the evidence of the Applicant in relation to his responsibilities for his sister. She said that the proximity of the sister's residence to the Property will assist him in this regard. She said that this has to be set against the evidence of the Applicant about the time it takes for him to travel to his sister from his current residence. She said that the Applicant's sister stays with him on a regular basis.

103. Ms Donnelly said that the Applicant's circumstances had changed and that he no longer required to live near to the centre of Edinburgh.

104. She said that the Applicant is not a commercial landlord and no longer wants to be in the letting business or be a property developer. She said that his unfortunate experience with the Liverpool development demonstrated this. She said that the situation he found himself in was "forcing' him to be a landlord.

105. Ms Donnelly invited the tribunal to find that the Respondents had not been in the position to buy the Property. She said that their evidence demonstrated that they were relying on family members for assistance but did not know how much would be required from them as a gifted deposit. She said that the Respondents also did not know with any certainty that mortgage funds would be available to them.

106. Ms Donnelly said Mr Taylor's evidence was that he had business assets to sell and she said that such assets could be sold now to finance another property.

She said that there was limited evidence that the Respondents had taken steps to find an alternative property.

107. Ms Donnelly said that it was not reasonable for the Respondents to be accommodated indefinitely by the Applicant when he wants to live in the Property and that, balancing matters, it would be reasonable for the order of eviction to be granted.

108. Mr Lindhorst said that the tribunal had to carry out a balancing exercise to decide if it was reasonable to evict the Respondents.

109. Mr Lindhorst said that the Applicant has currently somewhere suitable to live and that it was large enough to accommodate his sister when she stays because it has three bedrooms.

110. Mr Lindhorst said that the tribunal had no evidence that the Applicant had taken any steps to market the flat in which he is currently residing and that it was unfair to level criticism at the Respondents in respect of steps which they had taken to find another property.

111. Mr Lindhorst said that the Applicant's evidence was that, at some point in the future, he may require to provide more permanent accommodation for his sister. He said that there was no immediate need for such accommodation and that the Applicant could address it if and when it arose. He said that the sister currently has a flat where she lives.

112. Mr Lindhorst submitted that the fact that the Applicant had come to a decision that he no longer wanted to be a landlord was not sufficient to merit eviction of his tenants from their family home. He invited the tribunal to disregard the fact that the Applicant appeared to have a particular attachment to the Property. He said that the tribunal should consider that a landlord who enters into a tenancy agreement has *"parted company"* with the property when it becomes another person's home.

113. Mr Lindhorst invited the tribunal to accept the evidence relating to the Respondents' family situation, schooling issues and the particular health issues of one of the children. He said that the Respondents had intended the Property to be a long term family home.

114. Mr Lindhorst said that the Respondents had entered into the tenancy agreement with the understanding that the Property would be their long term family home. He said that their understanding that they would be able to buy the Property underlined their commitment to it.

115. Mr Lindhorst said that the Applicant had not produced evidence that there was suitable accommodation for the Respondents. He said that Mr Taylor's family live close by to the Property. He said that the eviction of the Respondents and their family would cause massive disruption to them.

116. Mr Lindhorst submitted that it would not be just and reasonable to grant the application.

Discussion

117. The tribunal required to carry out a balancing and weighing exercise to determine whether or not it was reasonable to grant the order of eviction.

118. From the submissions, there appeared to the tribunal to be four matters which required to be weighed: the circumstances of the applicant, the circumstances of the Respondents, the Applicant's emotional attachment to the Property/ desire to no longer be a landlord and the Respondents' position that they had an option to purchase the Property.

119. The tribunal considered it convenient to deal with the third and fourth matters first.

120. The tribunal agreed with Mr Lindhorst's submission that any emotional attachment to a property was not something which a landlord could rely on in relation to an application for an order of eviction. A landlord exposes a property to the rental market and, once a tenant has taken occupation, is no longer entitled to consider that the fact he/she may have an emotional attachment to it should somehow assist in having a tenant evicted. In this case, it was clear that the Applicant was attached to the Property but that did not enhance his application for an order of eviction.

121. The Applicant no longer wants to be a landlord. Private Residential Tenancy Agreements are without limit in term unlike their predecessors, short assured tenancy agreements. The tribunal considered that if a person disposes of his/her property by entering into a tenancy agreement, it would not be just to evict a tenant from a family home just because a landlord has decided that it no longer suits him/ her to be in the residential rental business.

122. The evidence of parties with regard to whether or not the Applicant had agreed to sell the Property diverged. The tribunal found the evidence of the Applicant in this regard to be credible and persuasive. It accepted that, at some point, the Applicant had thought about selling but that his views changed. His evidence that, prior to commencement of the tenancy, he had said something

along the lines that, if he was selling, the Respondents could make him an offer was credible.

123. The evidence of Mr Taylor and Ms Drysdale was not credible in this regard. It may be that they were naïve in thinking that a discussion such as was had at the outset of the tenancy was in some way binding and constituted a contract. Mr Taylor's evidence was that he would not have left the previous tenancy if there had been no certainty with regard to the option to purchase. Had that been the position, it seemed to the tribunal that the Respondents should have included an option to purchase in a formal contract. There was no ancillary evidence provided by the Respondents to support their position such as an exchange of emails. The tribunal did not find that the parties had an agreement with regard to disposal of the Property.

124. The tribunal considered that the "submission" of an "offer" of £400,000 was unusual given that the Respondents had no certainty of funding from a lender or in relation to the amount of deposit funds which would require to be provided by family members. The Respondents' credibility with regard to finance was not enhanced by neither of them being able to confirm if the sum for income which was in the screening document included Universal Credit payments.

125. The tribunal considered that paragraph 13 of the screening document prepared by Ms Drysdale was informative: *"Desired length of lease: we would be looking to stay long term, you had mentioned* ***potentially*** *selling in 5 or so years in which time* ***potentially*** *we* ***may*** *be in a position to buy it should the opportunity arise."* The boldening of words is by the tribunal. The tribunal considered that the paragraph in question is confirmative of the position that no option to purchase existed.

126. The Applicant wants to recover the Property to reside in it, to enhance his working environment and to better care for his sister. The tribunal accepted the Applicant's evidence that he intended to live in the Property. The tribunal noted the terms of an affidavit of the Applicant dated 2nd August 2022, a copy of which had been submitted to the Tribunal. Its existence evidenced that, since at least August 2022, the Applicant's intention had been to live in the Property. It noted that the Applicant's current residence has a bedroom in which his sister occasionally resides. It noted the distance that this property is from her flat compared with the comparative proximity of the Property. It accepted the Applicant's desire to enhance his working environment.

127. The Respondents were credible in setting out their family circumstances. Ms Drysdale was particularly convincing in giving information in relation to her child's

health issues and the welcome support from the nursery school which she is sure will carry on from the primary school once the child starts there. The Property is the family home of the Respondents and their family. The tribunal accepted that they may find it difficult to get suitable accommodation in an area where they are well established and where the children have a circle of friends.

128. Mr Taylor said that he had business assets which could be sold and the Respondents said that family members were prepared to offer financial support. It was not clear to the tribunal that the Respondents did have sufficient funds to purchase the Property when they made an offer to do so but they seemed to be confident that they would be able to get some funding for a purchase.

129. In coming to a determination, the tribunal considered the written and oral evidence, the written representations of parties and the submissions made by parties' representatives. In the balancing exercise carried out by it, the tribunal determined that it was reasonable to grant the eviction order.

130. The tribunal acknowledged that the Respondents will need time to find a suitable property and accordingly delayed execution of the order until 31st August 2023.

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.

Martin J. McAllister
Legal Member
4th May 2023