



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/22/4228

Property : 17 Silverlaw, Annan DG12 5EQ (“Property”)

Parties:

James Hawkins, 22 Vestaneum, Crosby on Eden, Carlisle CA6 4PN (“Applicant”)

Jackson Boyd Lawyers, Centenary House, 69 Wellington Street, Glasgow G2 6HG (“Applicant’s Representative”)

Liam Ogilvie and Laura Hannah, 17 Silverlaw, Annan DG12 5EQ (“Respondent”)

Tribunal Members:

**Joan Devine (Legal Member)
Ahsan Khan (Ordinary Member)**

Decision

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

Background

The Applicant sought recovery of possession of the Property. The Applicant had lodged Form E. The documents produced were: a Private Residential Tenancy Agreement dated 28 April and 1 May 2019 (“Tenancy Agreement”); Notice to Leave under Section 50(1)(a) of the Private Housing (Tenancies) (Scotland) Act 2016 (“2016 Act”) dated 12 October 2022 (“Notice to Leave”); copy email dated 12 October 2022 attaching the Notice to Leave; rent statement as at November 2022; notification to the Local Authority in terms of Section 11 of the Homelessness Etc. (Scotland) Act 2003 with covering email dated 25 November 2022 and communication to the Respondent regarding arrears dated 7 September 2022. The Respondent lodged a written submission on 7 February 2023. On 14 February 2023 the Applicant’s Representative intimated that the Applicant wished to amend the Application to include ground 12A.

The Applicant's Representative served a further Notice to Leave dated 10 February 2023 by email on 10 February 2023 on the basis of ground 12A.

Case Management Discussion ("CMD")

A CMD took place before the Tribunal on 1 March 2023 by teleconference. The Note of the CMD states that the issues to be further considered by the Tribunal at a Hearing were :

1. Whether the Respondent received the final page of the Notice to Leave or not.
2. Whether the Respondent is entitled to retain rent payments as a result of alleged breaches of the tenancy agreement by the Applicant and whether the Respondent has properly done so.
3. Whether the Tribunal should allow the Application to be amended by the Applicant to include additional ground 12A.
4. Whether the Tribunal should consider it reasonable to grant an eviction order having regard to the circumstances of the case.

A hearing was fixed for 6 June 2023 to take place in person at Glasgow Tribunals Centre.

Postponement Request

By emails dated 30 May and 1 June 2023 the First Respondent sought a postponement of the Hearing. The reason given was that his solicitor required to consider the documentation further and was not available to attend on the date assigned. The Applicant objected to the postponement for the reasons set out in the email from the Applicant's Representative's email dated 5 June 2023. The Tribunal asked the First Respondent to confirm the identity of his solicitor and the date on which he was instructed and stated this information was required to allow the Tribunal to reach a decision on the postponement request. The First Respondent responded by email to the Tribunal dated 5 June 2023 received at 5.16pm. In that email the First Respondent did not state the identity of his solicitor or state the date on which the solicitor was instructed. In the email the First Respondent stated that he had withheld rent as the Applicant had not carried out necessary repairs to the Property. He said that he could no longer cope with the stress. He said *"I have never had to fight to get any repairs done but you don't know me Hawkins he's petty man and loves drama and I'm completely done with all this 3 years of arguing with band now this yours all need to back off because your putting me on edge again its only 3 years ago I got over a mental breakdown and I'm almost back there I can't sleep because your all this and it has to stop."*

Hearing

A Hearing took place on 6 June 2023 at Glasgow Tribunals Centre. The Applicant was in attendance with his wife, Alison Hawkins. The Applicant was represented by John McKeown of the Applicant's Representative. There was no appearance by or on behalf of the Respondent. In advance of the Hearing the Applicant's Representative lodged an inventory of productions containing productions number 1 to 33.

The Tribunal considered the postponement request and the opposition thereto and determined not to grant the postponement request. The Tribunal considered rule 28 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. The decision to postpone a hearing is a matter for the discretion of the Tribunal and may only be granted on cause shown. Where a party applies for a postponement they must show good reason and produce evidence of any fact or matter relied upon in support of the postponement request. The Tribunal requested evidence in support of the postponement request in that they sought confirmation of the identity of the solicitor for the Respondent and the date on which they were instructed. The Respondent was unable to provide this information. In all the circumstances the Tribunal refused the postponement request and proceeded to consider the issues identified at the CMD as follows :

Whether the Respondent received the final page of the Notice to Leave served on 12 October 2022. Mr McKeown told the Tribunal that he had prepared and served the Notice to Leave. He referred to production 1 which was a copy of the signed Notice to Leave and production 2 which was a copy of the sent email serving the Notice to Leave. He said that he had signed the Notice to Leave electronically, created a pdf of the document and then attached it to the email servicing the Notice to Leave. He noted that the email address to which it was sent was the email address identified in the Tenancy Agreement for communications.

The Tribunal then considered whether to allow the application to be amended to include ground 12A as a ground for eviction. The Applicant's Representative lodged a statement of rent arrears as at May 2023 which showed the arrears to be £5,990. He said that the payment of rent had been erratic since September 2021 and nothing had been paid since September 2022. The Tribunal determined to allow the application to be amended in terms of section 52(5)(b) of the 2016 Act to include ground 12A which is that the tenant has substantial rent arrears (equivalent to six month's worth of rent).

The Tribunal noted that at the CMD and in their written submission the Respondent had said they were withholding rent as there were outstanding repairs. The specific repair issues identified in the written submission were : (a) no oven for a year; (b)

heating thermostat broken for a year; (c) broken fridge; (d) garden overgrown; (e) boiler not serviced; and (f) presence of mould and Property not decorated

The Tribunal noted that the retention of rent is an equitable remedy and the Tribunal has to be satisfied the remedy is being exercised in good faith. The Tribunal noted that this is demonstrated by the tenant placing the funds to one side to allow the rent to be paid once the repairs have been carried out. The Tribunal asked if the Respondent had notified that Applicant that funds were being set aside for payment of rent. Mr McKeown said that no such notification had been received. He referred to production 11.2 which was a letter from the Applicant's Representative to the Respondent in which the question was specifically asked. He said that the response received was a phone call from the First Respondent to Mr McKeown on 24 May 2023. He lodged a file note of the call.

As regards the oven the Tribunal asked when an issue with the oven was notified to the Applicant. Mr McKeown said that there had been no notification. He referred to production 16 which was a copy email from the First Respondent to the Applicant dated 28 April 2023 which attached a copy undated text message regarding the oven. Mr McKeown said that this text had never been received by the Applicant. He referred to production 31 which was a record of all texts between the Parties and which he said contained no reference to the oven.

The Tribunal noted that Dumfries and Galloway Council had inspected the Property. Reference was made to their findings set out in a letter which was production 13 and 14. The Tribunal noted this made no reference to the oven. Mr McKeown referred the Tribunal to productions 6 and 9 which were letters from the Applicant's Representative to the Respondent dated 3 and 27 April 2023 in which access was requested for contractors to attend to checking the boiler; inspecting the thermostat; completing the EICR and inspecting the oven and fridge.

As regards the heating thermostat the Applicant told the Tribunal that this was notified in October 2021. He had Watsons Plumbing attend the Property and heard nothing further. He thought the repair had been attended to. Mr McKeown told the Tribunal that the issue with the thermostat had been repaired. He referred to productions 19.1, 20 and 22. He also noted that access had been requested to repair the thermostat per productions 6 and 9. The Applicant said that while the contractor, Watson Plumbing, were at the Property they attended to all plumbing issues being the thermostat, a leak in the kitchen, replacement of taps and provision of gas safety certificate.

As regards the fridge, Mr McKeown said that the need for a repair had not been notified before the CMD. He referred to productions 6 and 9 where access had been requested.

As regards the garden being overgrown the Tribunal asked if this was dealt with in the Tenancy Agreement. It was noted that section 29 stated that the Tenant will maintain the garden in a reasonable manner. In those circumstances, it was not the responsibility of the Applicant.

As regards the boiler, Mr McKeown referred to production 23 which was a gas safety certificate dated 10 May 2023 which noted that the boiler had been serviced and was safe to use.

As regards mould, Mr McKeown noted that this was identified at the inspection by the local authority. Reference was made to productions 13 and 14. Black mould was noted in the bathroom and whilst the Respondents had reported mould in the bedroom, this had been cleaned and very little evidence was present at the time of the inspection. Mr McKeown referred to production 11 which was a letter from the Applicant's Representative to the Respondent dated 22 May 2023 in which the Respondent stated the intention to address issues raised by the local authority.

The Tribunal then turned to the question of whether it would be reasonable to grant an order for eviction. Mr McKeown told the Tribunal that only the Respondents live in the Property. There are no children living with them. He was unaware of any relevant disabilities of the Respondents or adaptations of the Property. Mrs Hawkins thought the Respondents were aged in their thirties. Mrs Hawkins said the Second Respondent had worked in a shop at the start of the tenancy. Mr McKeown said that the First Respondent had an oven cleaning business which appeared to have gone into liquidation but he may now be operating it as a sole trader. He said there were no benefits being paid to assist with the rent. Mr Hawkins said that he did not own any other rental properties. The Property had belonged to his late mother. He was undecided whether to re-let the Property or sell if he obtained vacant possession.

Findings in Fact

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent had entered into a Tenancy Agreement dated 28 April and 1 May 2019 ("Tenancy Agreement").
2. A Notice to Leave was served by email on 12 October 2022 .
3. The Notice to Leave stated that an application for an eviction order would not be submitted to the Tribunal before 12 November 2022.
4. The Notice to Leave served on 12 October 2022 included page 4.
5. Notification was provided to the Local Authority in terms of Section 11 of the Homelessness Etc. (Scotland) Act 2003 on 23 November 2022.

6. At the date of making the Application, the Respondent had been in rent arrears for three or more consecutive months.
7. A further Notice to Leave was served by email on 10 February 2023 on the basis of ground 12A, substantial rent arrears.
8. At the date on which the Applicant sought to amend the Application to include ground 12A as a ground for eviction, the Respondent had substantial rent arrears.
9. The Respondent had not notified to the Applicant a requirement to repair the oven in the Property until after service of the Notice to Leave and this Application.
10. The requirement to repair the oven in the Property was not identified by Dumfries and Galloway Council at an inspection of the Property carried out by them in advance of them issuing their letter to the applicant dated 5 May 2023.
11. Repairs required to the heating thermostat were carried out on or about 16 May 2023.
12. The Respondent had not notified to the Applicant a requirement to repair the fridge in the Property until after service of the Notice to Leave and this Application.
13. The Applicant had requested access to the Property for contractors to attend to repairs required to the oven and fridge.
14. In terms of section 29 of the Tenancy Agreement, the Respondent is responsible for maintaining the garden at the Property in a reasonable manner.
15. A gas safety certificate dated 10 May 2023 stated that the boiler in the Property had been serviced and was safe to use.

Findings in Fact and Law

1. The Notice to Leave dated and served on 12 October 2022 was valid.
2. The Respondent is not entitled to withhold rent due to a failure by the Applicant to carry out repairs to the Property.

Reasons for the Decision

The Tribunal determined to make an Order for possession of the Property in terms of Section 51 of the 2016 Act.

In terms of section 51 of the 2016 Act, the Tribunal may 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.

In the Application the Applicant stated that they sought recovery of possession of the Property on the basis set out in Grounds 11 and 12. Ground 11 states :

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

Ground 12 states :

"(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months."

On 14 February 2023 the Applicant sought the permission of the Tribunal to amend the Application to include Ground 12A states :

"(1) It is an eviction ground that the tenant has substantial rent arrears."

Ground 12A goes on to state that the Tribunal may find the ground established if the cumulative amount of the arrears equates to or exceeds an amount that is equivalent of 6 months' rent under the tenancy.

The Tribunal determined to allow the inclusion of ground 12A in the Application in terms of section 52(5)(b) of the 2016 Act. A statement of rent arrears was lodged at the Hearing which showed that the arrears exceeded an amount that is equivalent to 12 months rent under the tenancy.

The defence put forward by the Respondent at the CMD was firstly that page 4 of the Notice to Leave was not served and secondly that the Respondent was entitled to withhold rent as the Applicant had failed to carry out necessary repairs at the Property.

Having heard from Mr McKeown, who served the Notice to Leave, the Tribunal determined that page 4 had been included. The Notice to Leave was therefore valid.

As regards withholding rent, there was nothing before the Tribunal to suggest that the Respondent had put sums aside to meet the rent once the repairs were carried out. The evidence placed before the Tribunal did not indicate that the need for repairs had been notified to the Applicant in advance of the service of the Notice to Leave and the raising of this Application. Since the issues were raised the Applicant had requested access to address the outstanding repairs. Both the thermostat repair and the boiler service had been carried out by the date of the Hearing. The Tribunal accepts that there may be outstanding repair issues but the Applicant has sought, and not been afforded, access to address those issues. In any event, the nature of the outstanding

repairs is not such that the Respondent would be entitled to withhold a sum equivalent to 12 month's rent.

The Tribunal determined that grounds 12 and 12A have been established. The Application is therefore unaffected by the Cost of Living (Tenant Protection) (Scotland) Act 2022.

The Tribunal noted the submission for the Applicant as regards whether or not it would be reasonable to grant an order for eviction and, in the absence of a submission from the Respondent, determined that it was reasonable to issue an eviction order.

Decision

The Tribunal grants an order for possession of the Property.

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.

Joan Devine

**Joan Devine
Legal Member**

Date: 6 June 2023