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 under Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/21/2028

Re: Property at 7 Ledi Road, Mansewood, Glasgow, G43 2BJ ("the Property")

Parties:

Mr George Ford, Helen Flannigan or Ford, 66 Priorwood Road, Newton Mearns, Glasgow, G77 6ZZ; 9 Ledi Road, Glasgow, G43 2BJ ("the Applicants")

John Anunobi, Ameze Anunobi, Nnamdi Anunobi, 7 Ledi Road, Mansewood, Glasgow, G43 2BJ ("the Respondents")

Tribunal Members:

Yvonne McKenna (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an Eviction Order would not be issued against the Respondents.

Background

1. This is an application lodged by the Applicants with the Tribunal on 20 August 2021 under Rule 109 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure)Regulations 2017 ("the Rules"), seeking eviction under Ground 3 of Schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 (the 2016 Act).

2. Ground 3 is that the landlord intends to refurbish the Property.

3. The Applicants lodged with the application the following;-

- The Tenancy Agreement showing a start date of 27 September 2018

- Notices to Leave dated 28 September 2020 providing that the application will not be submitted to the Tribunal for an eviction order before 31 March 2021
- Intimation of Notice to Leave, to each Respondent sent by First Class Recorded Delivery Post on 28 September 2020 along with Royal Mail Track and Trace confirming the Notices to Leave were each signed for dated 29 September 2021.
- Section 11 Notice to Glasgow City Council dated 2 September 2021 together with confirmation of delivery.
- Letter dated 22 June 2021 from Southside Park Limited to the Second Applicant setting out recommended works to be carried out at the Property.

4. A copy of the application and supporting documents were served on the Respondents by Sheriff Officer dated 30 September 2021. Both parties were informed that a Case Management Discussion (CMD) would take place by telephone conference on 2 November 2021 at 10am and that they were required to participate.

5. The Respondents lodged written representations on 19 October 2021 along with an Inventory of Productions. This comprised of a number of e-mails between the Second Respondent and the Applicant's Representative between 18 September 2019 and 17 August 2020 and an email from a neighbour Mr Amish Sayed dated 26 February 2021 to the Second Respondent offering the use of his house and bathroom facilities until works at the Property have been completed.

The Case Management Discussion (CMD) 2 November 2021

6. The application called for a CMD at 10am on 2 November 2021 by teleconference. The Applicants were not present but were represented by their solicitor Mr Scott Stevenson from Clarity Simplicity Limited. The Respondents were not present and were represented by Ms Claire Cochrane solicitor from Govanhill Law Centre.

7. Given the dispute between parties the case was continued to a full Hearing on 7 December 2021 and the Tribunal issued directions to parties regarding further procedure.

The Hearing on 7 December 2021

8. Due to complications caused by the COVID-19 pandemic the Hearing took place by teleconference with the parties and the Tribunal members dialling in from separate locations. Both Applicants participated and gave evidence. They were represented by Ms Gaughan solicitor .Two of the Respondents participated namely John Anunobi and Nnamdi Anunobi. They were represented by Ms Claire Cochrane solicitor.

9. The Tribunal went over the further paperwork which had been lodged since the CMD.

10. The Applicants had lodged a Timeline of Events and a further copy letter to the Second Applicant from Southside Park Limited dated 22 June 2021 which added a paragraph stating that the works contemplated at the Property would take approximately 6 weeks to complete.

11. .The Respondents had lodged an e-mail dated 22 November 2021.

12. Opening remarks were made by both solicitors following which evidence was led.

13. The Applicants' solicitor Ms Gaughan said that extensive refurbishment works are required at the Property which made it entirely impracticable for the Respondents to reside there and wholly reasonable for the eviction order to be granted. In terms of the 2016 Act Ground 3 introduces a 3 part test. The Coronavirus Scotland Act inserted a further test of reasonableness. Her intention was to lead evidence to satisfy the tribunal that all 4 parts of the test were met in which case the order for eviction should be granted.

14. The Respondents' solicitor, Ms Cochrane, said that she invited the Tribunal not to grant the order for eviction on the basis that Ground 3 has not been met in full particularly as the works required are not refurbishments but required essential repairs. In addition it is not impracticable for the Respondents to remain in the Property given their neighbour's position to allow the Respondents the use of his amenities. Even if the conditions of Ground 3 are met it is not reasonable to grant an eviction order as the landlord has failed to carry out works in a reasonable timeframe and now extensive works are required. It is not fair and reasonable for the Respondents to be punished in being evicted taking into account the difficulties the Respondents have had in sourcing alternative accommodation.

Evidence for the Applicant

Mr George Ford

15. Mr Ford is the legal owner of the Property along with his sister Mrs Flannigan. They inherited the Property when his mother died. His mother lived there all her life except for her last two weeks. He said that after his mother died that rather than the strain of placing the Property on the market that they decided to rent it out. The Respondents are their first tenants.

16. Regarding the issue at the Property which requires refurbishment he said that on 26 November 2019 Brand and Campbell builders gave the Applicants an estimate. This estimate provided for the bath to be taken out together with the supports for the bath. He said that the estimate provided for the steel bath to be lowered. He himself had questioned whether this approach would work as it provided for the steel bath to rest on a concrete floor.

17. He said that once the bath was taken out there would be a “wee while” when tiling and plastering was carried out before things would be back to normal. He said that the bathroom required a full complete refurbishment with at least one wet wall being applied, ceiling work, and a new bath.

18. Other than that he did not know what other refurbishments were required as he would need to check the Property thoroughly.

19. He referred to a letter dated 22 June 2021 regarding works required. This letter had been lodged as a production and was a letter to his sister from Southside Park Limited, a building company. The letter stated;-

“Further to your recent request to visit the above premises to assess the problem with water leaking from the shower/bath area we noted that the Living room wall has been affected with dampness.
My recommendations are as follows;-
Remove all sanitary ware and tiling cut back to wall plaster at the affected areas.
Put in a dehumidifier in bathroom and living room until walls are totally dried out.
Re plaster wall in bathroom and living room.
Refit sanitary ware and shower. We would recommend using wet wall panels at shower area and tiling to remainder of the walls in the bathroom.
We would also recommend installing a fan in the bathroom for ventilation to the outside to alleviate condensation then seal all areas with good quality bathroom silicone.
The works would take approximately six weeks to complete as the walls need to dry out before any tiling and wall coverings are applied.”

20. His evidence was that he had obtained this letter in June 2021from a registered building company as soon as his solicitor told him it would be required by the Tribunal. He said that the building company had been recommended to the Applicants and had attended the Property and made this recommendation. He said that he intended to fit a bath with a shower above it.

21. He described the Property as having 4 rooms downstairs with a kitchen and a bathroom. A further 2 bedrooms are upstairs in the attic conversion. There is only one bathroom in the Property.

22. He said that it was unreasonable for the Respondents to remain in the Property when these works were carried out and he envisaged the work taking longer than 6 weeks. When he was asked if it would be practicable he said that he did not think, “that it would be legal at all”.

23. In relation to the position of the neighbour Mr Sayed helping out he said that Mr Sayed is a long-term neighbour of his family. He said that he got along with him and described Mr Sayed as extremely polite and courteous. He accepted that Mr Sayed had offered the Respondents the use of his bathroom and possibly the use of his house for some time. He said that Mr Sayed lives at 5 Ledi Road which is the other half of the building attached to the Property and is a semi-detached bungalow. He said that he did not consider this arrangement to be practicable or suitable.

24. He said that repairs were in terms of the Tenancy Agreement intimated to Countrywide who were the Letting Agents, and referred to a Timeline of Events in relation to issues requiring attention in the Property.

    - On 21 May 2019 Brand and Campbell builders had been instructed to attend to various issues following an inspection by the Letting Agents which had he said been their only inspection of the Property. These various works were completed and issues rectified.
    - In August 2019 there were a lot of complaints regarding dampness. Mr Ford said that he arranged for a microbiologist, Mr Payne to attend and he repaired seals in the bathroom area. No follow up report was provided by Mr Payne. Mr Payne concluded that the grout and sealant were coming out and not remaining in place and this was getting worse.
    - Again on 19 and 23 September 2019 the seals were repaired and the issue remedied.

25. His evidence was that each time an issue was reported that on every occasion someone attended at the Property and attended to the repair. The missing grout and sealant were rectified on at least 4 occasions. He said that on at least 2 previous occasions the dampness dried out thoroughly. He accepted that this had not been a permanent repair. In October 2020 he became aware the issues in the bathroom had not been resolved and therefore reports were required and eviction sought.

26. Mr Ford's position was that it is not nice to evict the Respondents but that proper access was required over a prolonged period of time to the Property. In addition other aspects will need to be inspected and checked over.

27. In cross examination he accepted that he had seen two photographs of dampness in the living room wall at the Property which were sent in November 2019. He was aware at that time that work was required. He accepted that no further work had been carried out.

28. He said that he had asked Brand and Campbell builders to attend which they did on 26 November 2019. They recommended removing the bath panel, lowering the bath, removing the sealing and re-sealing, removing the failed sealant and re-grouting tiles in the shower area. He is a retired engineer and he questioned the efficacy of having a steel bath on a concrete floor. He accordingly had no faith in Brand and Campbell and ignored their recommendations. He said that when he spoke to Countrywide that they agreed with Mr Ford's interpretation that this would not solve the problem and that Notice to Leave was required.

29. He said that he had then lost faith in Brand and Campbell who are the Letting Agent's appointed contractors. They had estimated the costs involved to be around £510.

30. He said that he decided to issue the Notice to Leave on 28 September 2020. Originally, the Respondents had, "seemed to agree to leave the Property". It was only when Mr Ford was advised to take legal advice that he obtained a

written assessment for the works required. This was when he realised the extent of the works required. He accepted that the letter from the builders Southside Park Limited of 22 June 2021 does not include a quotation. He said that they have not agreed a cost but that he thinks, "it might be quite expensive." He said that the work cannot start until he is in possession of the Property. There is only a verbal agreement that Southside Park Limited will carry out the work. He said that he does have a very good idea of the costs. It is a repair that has to be done as the depreciation over the past 3 years is considerable. Apart from the dampness he said that there have been 2-3 occasions of extreme condensation caused by the Respondents.

31. He had not considered the option of provision being made with the building company to reconnect services when work is ongoing.

32. The last occasion when he had been in the Property was around 26 March 2020.

33. He has not found letting out the Property a pleasant experience.

Mrs Helen Flannigan

34. Mrs Flannigan is the joint owner of the Property with her brother. Her mother had owned the Property for 72 years before she died. The Property was in a very good condition at the commencement of the tenancy. There were no issues with water leaking or anything of that nature.

35. She said that the main issue at the Property has been water seeping through the dividing wall between the bathroom and the living room. She said that the Applicants have done their best to dry this out with the tenants in situ. If the issue is still ongoing it requires to be repaired.

36. Her view is that it is not practicable to undertake the required works with the Respondents residing in the Property. She said that there is only one bathroom and if there are no services and, "with a young lady in her teens living there it would not be suitable to inconvenience her to that degree".

37. Regarding the offer from Mr Syed for the Respondents to use his amenities she said that this was not practicable. She said that she would not want to do that and she considered, to walk down the Respondents' path 20 feet then up the neighbour's path 20 feet in the middle of the night, "would be dreadful".

38. Her position was that each time the issue of the leak and dampness was raised that it was addressed "most definitely". She said that she was at a loss to understand why the grout and sealant would not stay in place. She said that as her brother had explained that the lowering of the bath was not an answer to the problem and therefore that they had lost faith in Brown and Campbell.

39. She had brought in Mr Payne as a Consulatant.She had instructed him to get rid of the mould and dampness. This had proven to be very difficult when the

Respondents were living in the house. It had taken some time for the wall in the living room to dry out. A desiccant and a fan were supplied but Mr Payne said that he attended around 5 times as this was being switched off by the Respondents. This had been the Applicants' attempt to sort the problem out. She said that Mr Payne is a Water Consultant. He had checked the shower and knew how to attend to the problem so they had let him continue with the works.

40. She had considered that the Respondents would leave the Property after the Notice to Leave was served. She believed this as she had not heard anything different until after the deadline date in the Notice.

41. She had arranged for someone to commence the work required at the Property on 1 June 2021 but the tenants had asked to remain in April 2021 after the notice expired. Then they asked for May 2021 so the Applicants have not been able to arrange a start date for the necessary work.

42. She said that basic work was required in the bathroom including a new suite and a wet wall as tiling had not been highly successful.

43. She said that the issue had started 6 months after the Respondents moved in. Obviously from the last photographs she had seen the issue had started again. She said that for 3 people to be in a shower is quite crowded.

44. Mrs Flannigan's position was that she would not stay in the Property when the required works took place nor would she expect anyone else to do so. She considered it to be "highly unfair" for the Respondents to have to go to the next door neighbour's house to use the bathroom. She said that the Respondents had been served Notice to Leave in September 2020 and that they were in accommodation before they took over the tenancy at the Property. She said that she was sure that there must be something somewhere for them to go as there were so many places available for rent. She found it difficult to understand why there were no alternatives.

45. The Applicants did not lead any witness evidence from the builder who had provided the latter of 22 June 2021.

Evidence for the Respondent

Mr John-Lawrence Anunobi

46. Mr Anunobi stated that he has been a tenant at the Property for 3 years and 3 months precisely. He is in gainful employment as a self-employed private hire taxi driver.

47. His position was that there has been a problem with water leaking from the bathroom since August 2019.There had been dampness in the living room walls since around May 2019 but his family had not first of all understood the origin of the dampness.

48. His first contact with this problem was with the Letting Agents Countrywide. The protocol in place was difficult to manage. An on-line portal was used by Countrywide for the reporting of repairs. Then the Letting agents would require the landlord to provide permission for the repair work. He described this as a very cumbersome and time-consuming process. This was particularly the case as sometimes Mr Ford travels abroad for 6 months so as a tenant he had found this process very frustrating. He said that the Applicants have “no clue” how to manage a property. He said that it would have been better to rent the Property and to let the tenants and the Applicants’ agents Countrywide manage repairs.

49. He made reference to the fact that Mrs Flannigan resides at No 9 Ledi Road but that any time he had approached her she said that she was not the owner of the Property and the house belongs to her cousin and it appeared that she did not want to help them.

50. With respect to a microbiologist attending on 3 occasions between 19 August 2019 and 23 September 2019 he said that the man who attended was a family friend of the Applicants whom he knew as “Les”.He said that he came to the Property every month but that he did not have a clue what he was doing. He said that he is not a professional. Les added sealant but this did not address the problem in the bathroom. Mr Anunobi described this as akin to applying “sticky tape” to stop a leak. There has been a need for the job to be done properly.

51. As their Landlord had not approved any works the problem was not rectified. He said that the dampness issue remained and that he received the Notice to Leave on 28 September 2020.

52. He disputed after receiving notice that he had ever agreed that he would leave the Property.

53. Between that time and the current time, i.e. for the 15 months that have elapsed he said that he personally has, every 3 months, taken a brush and re-painted the walls and added sealant.

54. He said that now it appears the landlords want to carry out the required repairs. He said that the works required are a necessary repair and not a refurbishment. Mr Anunobi does not want to lose the Property. He believes that if the landlords are honest and genuine in their intentions that the required works could be carried out in 2-3 weeks. He stated that a professional is required to carry out an independent assessment. He questioned why he received a Notice to Leave and the letter from the builder is dated 22 June 2021 a period of 9 months afterwards.

55. Even if the required works take a period of 6 weeks he will be able to continue to reside with his family at the Property as they have been offered the assistance from Mr Sayed.

56. Mr Sayed lives very close to the Property. He is a close family friend and the Anunobi family are at his home almost every day. They would be happy to take up his offer to use his facilities when work is carried out at the Property. The two houses are joined together and only 10 steps apart. That arrangement would be practicable while required works were completed.

57. The family have looked for alternative accommodation but have not sourced anywhere suitable. His 27 year old son Nnamdi Anunobi cannot climb stairs as he has a disability. The family require a bungalow with a ground floor toilet, bedroom, living room and kitchen. Sourcing any accommodation during the pandemic has been difficult. A 4 bedroom property would be required as, in addition to himself, his wife and his 2 sons (including Nnamdi Anunobi), his 15 year old daughter also resides at the Property. She is currently in her 4th year at a local High School where she is undertaking exams. She already suffers from anxiety and moving house even if alternative accommodation were to be sourced would disrupt her schooling.

Mr Nnamdi Anunobi

58. Mr Nnamdi Anunobi is a joint tenant and has lived in the Property for 3 years and 3 months. He is 23 years old and unemployed.

59. He said that he was aware of work being required to fix a leak inside the Property for a long time. He said that it looks bad

60. Regarding his own disabilities he said that he suffers from muscular dystrophy and sickle cell anaemia. Although not reliant on a wheelchair, he is unable to climb stairs. In the whole time he has lived at the Property he has never once been upstairs.

61. He has not required any special adaptations in the bathroom and manages to get in and out of the shower without assistance.

62. He would be able to access his neighbour's property very easily. He regularly attends there for 6 hours at a time. This includes during the nighttimes and he described being there on occasion at 5 am talking to his neighbour Mr. Sayed.His disabilities would not prevent him having almost immediate access to his neighbour's facilities.

Mr Amash Syed

63. Mr Sayed is the Respondents' neighbour. He lives next door. He has offered the Respondents the use of his bathroom while works are carried out at the Property.

64. The properties are semi-detached and the 2 front doors are a distance of 20-30 feet apart. He does not anticipate any problems in allowing the Anunobi family access and said that he is happy to provide them with a spare set of

keys so they can all access his home whenever they please. He described them as very good people and that he was very close to his neighbours.

65. If the required works take 6 weeks he is prepared to allow them full access during that period and said that this would definitely not be a problem.

66. He is aware of Nnamdi Anunobi's health issues. He would not have any difficulty using Mr Sayed's bathroom as this is on the ground floor.

67. Parties then proceeded to make submissions to the Tribunal

Applicants' Submissions

68. The Applicants' solicitor Ms. Gaughan submitted that under the 2016 Act the Tribunal should issue an eviction order if it finds one of the grounds named in Schedule 3 applies. Under Schedule 3, Ground 3(1) it is an eviction ground that the landlord requires to carry out significantly disruptive works to, or in relation to, the let property. The Applicants require to carry out significant works to the property. There has been water leaking from the bathroom which has affected the walls at the Property and created a damp issue. The landlords have consulted a local building company who have advised that the sanitary ware must be removed and the wall taken back to the brick. The builders must thereafter work to remedy the damp issue and the walls then require drying which can take weeks. Furthermore a fan must be installed in the bathroom and the whole bathroom refitted. The builder has estimated this work will take 6 weeks to complete. She invited the Tribunal to look at the test for eviction in 4 parts in terms of Ground 3.

69. In relation to the first part of the test she invited us to accept the evidence of George Ford and Helen Flannigan that they intend to refurbish the Property together with the report from Southside Park Limited Builders. She submitted that there was no dispute that the works are required.

70. She submitted that the Respondents cannot argue that the works required are not so extensive as to say that they are not impracticable, but still maintain that the works are essential.

71. She said that the legislation did not define an intention to "refurbish". She referred to the case of *Josephine Marshall Trust V Charlton* 2020 SLT 409. She submitted that this authority indicated that the landlord is not precluded from having the requisite intention, by the existence of a repairing standards enforcement order. She submitted there was nothing to say that refurbishments could not also include essential repairs.

72. She submitted that the second part of the test as set out in Ground 3 is that the landlords are entitled to refurbish. The Applicants as proprietors of the Property are entitled to carry out the required works and indeed have an obligation to do so.

73. The third part of the test is that it would be impracticable for the tenant to continue to occupy the Property given the nature of the refurbishment intended by the landlord. These works cannot be carried out whilst the Respondents remain living in the Property. The bathroom will be out of use for 6 weeks without taking into consideration building delays. It is impracticable for the Respondents to be without a bathroom for what a reputable builder has suggested would be for a 6 week period. During that period she further submitted that the use of the living room would be hindered. Although Mr Sayed has offered the use of his property during this period this cannot be considered as practicable.

74. She submitted that the Tribunal in another case *Guthrie V Brownlee* EV/18/1817, 7/1/2019 had concluded in a similar case with a similar set of circumstances following a hearing that replacing laminate flooring, removal of wallpaper and skim plastering and replacement of the toilet and bath meant that it was impracticable for the tenant to continue to occupy the property and eviction was granted on that ground.

75. The fourth part of the test she submitted was in relation to the reasonableness of the Tribunal granting the order for eviction. She submitted that the refurbishments required to be completed and that it would be wholly unreasonable for the tenants to remain in situ whilst they were carried out. The Applicants are under an obligation to provide suitable accommodation to their tenants and therefore the reasonableness test for eviction was met.

Respondents' Submissions

76. Ms Cochrane invited the Tribunal to refuse the application for eviction order. She submitted that the test for granting eviction was not met and the reasonableness test was not satisfied.

77. She submitted that the Applicants had failed to establish that they had fully formed the intention to refurbish the Property. She submitted that Schedule 3 (3) (b) of the 2016 Act suggested that evidence was required which tended to show that a contract was entered into regarding the refurbishment contemplated. In this case there is no contract. There is only a letter. It has no pricing/start date and falls short of what is required. It is also dated 9 months after the Notice to Leave was served.

78. Having considered the case referred to by the Applicant, *Josephine Marshall Trust V Charlton* she submitted that this case be distinguished. The case was dealt with in relation to the 1988 Act Ground 6. In the present case we have the 2016 Act making reference to an intention to refurbish. There is no explicit reference to an intention to carry out repairs. The works that are required are essential repairs.

79. She submitted that the reference to "refurbish" means works closer to improvements and not works to keep the Property in a tenantable condition.

80. Even if these works are refurbishments and satisfy the definition in the 2016 Act it is not impracticable for the Respondents to continue to remain in the Property. They have demonstrated an absolute willingness to remain in the Property. They have reached an arrangement with a neighbour to use his facilities. It is not a matter for the Applicants to say this is not appropriate. The landlords' position that this is inconvenient therefore is irrelevant. As all 3 Respondents are happy with the arrangement with Mr Sayed, Schedule 3 (2) (c) of the 2016 Act is not met.

81. Ms Cochrane sought to distinguish the case of *Guthrie V Brownlee* as in that case the Respondent did not defend the action and explain how he could remain in the property practicably. In the present case there is a very close neighbour with whom the family regularly spend lengthy periods of time who is providing a key and the use of his bathroom facilities.

82. In the event that the the Tribunal does not accept her position on these matters, Ms Cochrane submitted that the test of reasonableness is not met. The First Respondent provided detailed evidence regarding the repairs carried out at earlier stages. Despite that, water has continued to leak for over a 2 year period. This is contrary to section 44 of the 2016 Act and the Tenancy Agreement. On the balance of probabilities the works required are more extensive than if they had been carried out in December 2019. If a landlord neglects repairs, then relies on the fact that extensive works are required and to evict the tenant on this basis, then the tenant is being punished for this. This could not have been Parliament's intention.

83. The Applicants' representative has said that it cannot be suggested that the works are essential but not so extensive that they are not impracticable. That analysis is not agreed with. The works are essential to meet the repairing standard. It is not contradictory to stipulate that and choose to remain in the Property while essential repairs are carried out.

84. The Respondents have evidenced they have attempted to source alternative suitable accommodation and have been unable to do so

Findings in Fact

85. The Applicants and the Respondents entered into a Tenancy Agreement in respect of the Property which has a commencement date of 27 September 2018.

86. The Applicants are the landlords and the Respondents are the tenants in terms of the tenancy.

87. A valid Notice to Leave dated 28 September 2020 has been served on the Respondents by the Applicants.

88. The Notice to Leave intimated that proceedings for removal would not be raised prior to 31 March 2021 .

89. The Applicants presented an application to the Tribunal on 20 August 2021.

90. The Notice to Leave intimated that the Applicants were seeking recovery and possession of the Property on the ground that they intended to refurbish the Property.

91. The Notice in terms of Section 1 of the Homelessness Etc. (Scotland) Act 2003 has been intimated to the relevant Local Authority.

92. The Applicants used Countrywide as Letting Agents.

93. In August 2019 the Respondents first intimated that there was a water leak into the living room from the bathroom in the Property to the Applicants' Letting Agents, Countrywide, via their online repair reporting portal .

94. Attempted repairs took place between August 2019 and September 2019

95. These repair works did not remedy the defect

96. The Respondents sent an e-mail to Countrywide dated 17 August 2020 stating that if the repairs were not rectified then rent would be withheld.

97. The Landlords are entitled to carry out the contemplated works.

98. There is no concluded contract regarding refurbishment/repairs at the Property. No price has been agreed. No start date has been identified for the works to be carried out. No intention to carry out the required works has been established.

99. It is not impracticable for any contemplated works to be carried out whilst the Respondents continue to occupy the Property.

100. The Respondents' neighbour Mr Amish Sayed lives directly adjacent to the Property. He has offered the Respondents the use of his accommodation during the period of time that works take place. He lives alone. He has offered the use of a key to the Respondents to allow for entry.

101. The Third Respondent Mr Nnamdi Anunobi is disabled. He has muscular dystrophy and sickle cell anaemia. He is unable to climb stairs.

102. The Respondents have attempted to source alternative suitable accommodation and been unable to do so.

103. It would be unreasonable to grant an eviction order to allow the works to be carried out.

Reasons for Decision

104. The Tribunal require to have regard to the law in relation to the application.

The 2016 Act section 51 states

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 or must 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 to the 2016 Act as amended by the Coronavirus (Scotland) Act 2020 sets out the eviction grounds. In relation to ground 3 it states;-

"Landlord intends to refurbish

3(1) It is an eviction ground that the landlord intends to carry out significantly disruptive works to, or in relation to, the let property.

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

(a) the landlord intends to refurbish the let property (or any premises of which the let property forms part),

(b) the landlord is entitled to do so,

(c) it would be impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord. and

(d) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.",

(3)Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(a) includes (for example)—

(a) any planning permission which the intended refurbishment would require,

(b) a contract between the landlord and an architect or a builder which concerns the intended refurbishment.

105. The Tribunal took as a starting point the requirements of the condition set out in Schedule 3(1). This allows an eviction order to be granted if the landlord intends to carry out significantly disruptive works to or in relation to the Property. Paragraph 3 (2) sets out the circumstances in which the Tribunal can find that which is set out in 3(1) to apply.

106. The first question the Tribunal asked itself therefore is whether it has been established that, "the landlord intends to refurbish the let property." The Tribunal need to look at the whole phrase and not simply whether the works are properly categorised as "refurbishments" or "repairs". The word "refurbish" is not defined in the 2016 Act. Its ordinary everyday meaning in terms of the Shorter Oxford English Dictionary defines "refurbish" as "brighten up, clean up; renovate, restore, redecorate." "Renovate" in turn means, "repair, restore by replacing lost or damaged parts; make new again."

107. The Tribunal considered the case of *Josephine Marshall Trust V Charlton*. This case dealt with Ground 6 of Schedule 5 to the 1988 Housing (Scotland) Act which set out grounds of possession of houses let on assured tenancies. The Inner House rejected the argument that the existence of a repairing standard enforcement order under the Housing (Scotland) Act 2006 was a legal constraint on the landlord, such that it could not be regarded as having the intention to demolish the property. Accordingly the statutory ground was established.

108. In the present case there is no repairing standard enforcement order. The Respondents have not sought one from the Tribunal. Even in the event of a repairing standards order being in place this would not appear on the face of it to preclude the landlord from having the requisite intention.

109. The Tribunal considers that the works contemplated would be able to satisfy the definition of refurbishment.

110. However the Tribunal require to consider the issue of the landlords' intention to refurbish. In the *Josephine Marshall Trust V Charlton* case the Inner House referred in turn to the case of *Cunliffe V Goodman* (1950)2 KB 237 where the question was whether, in the context of section 18(1) of the Landlord and Tenant Act 1927, the defendant had proved that the plaintiff

"intended" to pull down the premises concerned.Asquith LJ stated that this was a matter of fact (p253);

"An intention" to my mind connotes a state of affairs which the party "intending"….does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect to being able to bring about, by his own act of volition."

His Lordship continued that ,not only, must achievement of the intention be within the person's reasonable control, if it is conditional or qualified pending receipt of further information or advice as to whether the project is worthwhile, it remains in the realm of contemplation, not intention within the meaning of the statue.

This position was re-examined by the Supreme Court in S Franses Ltd V Cavendish Hotel (London) Ltd (2019) AC 249 and approved.

111. In subsequent cases, it has been established that the landlord has to prove that it has an intention, which is both "genuine" and "firm and settled".

112. In the current case it has not been established that there is an intention to refurbish the Property. The Applicants as landlords have produced only a letter from a building company setting out what works are required. It does not provide any quotation. There is no settled contract in respect of the works being carried out. There is no agreed costing / programme of works/ project plan or start date. There does not appear to be work imminently commencing.

113. The Tribunal also noted that the letter from the building company was only obtained after the Applicants had sought legal advice and is dated 22 June 2021. It was certainly not to hand when the Notice to Leave was served on 28 September 2020 and seems to have been an afterthought on the Applicants' part. The test set out in 3 (2) (a) is not met.

114. The other authority relied upon by the Applicants, *Guthrie V Brownlee* dealt with a situation where the tenants did not appear and challenge the Ground 3 application. In that case it is clear that estimates for the works required were provided and the case pre-dated the introduction of the Coronavirus legislation which introduced the reasonableness test.

115. The Tribunal must then have regard to 3(2) (b) The Tribunal consider that the landlord is entitled to refurbish the Property and the test set out in 3 (2) (b) is met.

116. Thereafter the Tribunal have regard to 3(2) (c) The Tribunal do not consider that the test set out in 3 (2) (c) is met. The Tribunal consider that it is practicable for the works to be carried out whilst the Respondents remain in situ. They are willing to do so and they have a generous offer from their neighbour to use his amenities for the duration.

117. Finally there is the added issue of the reasonableness or otherwise of granting the eviction order being 3(2)(d).Even if the Tribunal are wrong about the requirements of the legislation or how it has been applied in this case in relation to Ground 3 (2) (a)(b) and (c) , then in any event, the Tribunal has considered the reasonableness of granting the eviction order .The Tribunal is not satisfied it would be reasonable to grant the eviction order having weighed up the position of both the Applicants and the Respondents.

118. The Applicants state that the work is required and that they would not consider it appropriate for the Respondents to remain in situ. They have stated they intend to have the work carried out but have not provided a start date or costings for the same. They are unsure even if the order were to be granted whether they would intend to re-let the Property or not. They have not carried out the repairs to the Property efficiently or in a reasonable timescale with the net result that more extensive works are required.

119. On the other hand the Respondents gave evidence that they had tried to source alternative accommodation and had been unable to do so. They have resided in the Property for 3 years and 3 months. Evidence was provided that the family composition was a married couple (the two first named Respondents) and their 3 children, being 2 adult sons and a daughter. One of the adult sons is the third tenant and Respondent. He has a disability namely muscular dystrophy and sickle cell anaemia . The family's daughter is currently studying at a local school where she is taking exams. She is already stressed in relation to the same. The Respondents require a property with 4 bedrooms in the locality to allow her to continue with her schooling with a downstairs bedroom, living area, kitchen and toilet facilities. They have been unable to find accommodation.

120. They are willing to remain in the Property whilst work is carried out and have the offer from their neighbour who is also a close family friend to use his premises.

121. The Tribunal have also had regard to the fact that essential repairs have failed to be properly carried out since 2019 which calls into question how serious the Applicants are about addressing the underlying issue quickly, or indeed at all. It is telling that the Applicants have not visited the Property, or done anything to try to make things happen with the Respondents in situ, or to discuss with their tenants what they could do to assist them. They simply instructed Notices to Leave to be served on 28 September 2020 after receiving intimation on 17 August 2020 that rent would be withheld if the complaint was not addressed. Even though they thought the Respondents were leaving they did not organise the work to be commenced. The Respondents have continued to pay full rent for the Property which the Applicants, it would appear, have failed to bring up to the repairing standard for over 2 years.

122. It is unreasonable for the eviction order to be granted in all the circumstances.

Decision

The Tribunal decided that the requirements of Ground 3 of Schedule 3 to the 206 Act had not been met and that an eviction Order would not be issued against the Respondents.

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.

Yvonne McKenna	**7 December 2021**
Legal Member/Chair	**Date**