



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

Chamber Ref: FTS/HPC/EV/21/3001

Property at 53 Inshes Crescent, Inverness, IV2 3SP (“the Property”)

Parties:

Innes Maree Bungalows Limited, Clava House, Cradlehall Business Park, Inverness, IV2 5GH (“the Applicant”)

Dr Agata Drywa, 53 Inshes Crescent, Inverness, IV2 3SP (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member)

Tony Cain (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an eviction order should be granted against the Respondent in favour of the Applicant.

Background

1. On 2 December 2021, the Applicant lodged an application seeking an eviction order on ground 12 of Schedule 3 of the 2016 Act. A copy private residential tenancy agreement (PRT), Notice to leave with email to the Respondent dated 28 May 2021, arrears letters and rent statement were lodged in support of the application.
2. A copy of the application was served on the Respondent by Sheriff Officer on 22 December 2021. Both parties were advised that a case management discussion (“CMD”) would take place by telephone conference call on 26 January 2022 at 2pm. On 11 January 2022 the Applicant’s representative lodged an updated rent statement and arrears letter. A further updated rent

statement was lodged the day before the CMD.

3. The CMD took place on 26 January 2022 at 2pm. A related application under Chamber reference CV/21/2599 (“the CV application”) was also discussed. The Applicant was represented Ms Smith, letting agent. The Respondent participated.

Summary of discussion at the CMD

4. Ms Smith advised the Tribunal that the Respondent recently made a payment of £200 to the rent account which reduced the sum showing on the updated statement from £5880 to £5680. Dr Drywa advised the Tribunal that she did not dispute that the sum of £5680 was outstanding. She said that intended to pay it and explained that she had contracted COVID 19 which led to her being ill for a long period of time and unable to pay her rent. She indicated that she would like some time to obtain assistance from the tenant hardship fund and apply for universal credit. Ms Smith advised the Tribunal that she wanted the applications to proceed as the Respondent had been the subject of a previous Tribunal order for payment of rent arrears and a right of entry application.
5. The Tribunal proceed to discuss the application with the parties. Dr Drywa confirmed that she had received the Notice to Leave by email. However, she had not had the opportunity to take advice on the application and could not comment on the notice or its validity. She confirmed that she wanted to obtain advice. She had been unable to do so because of health issues. Ms Smith confirmed that she wanted to proceed with the CMD as the Respondent had blamed COVID 19 for the previous rent arrears. She said that the Respondent was simply seeking to delay matters. The Respondent advised that she could provide medical evidence.
6. Following a short adjournment, the Tribunal determined that the CMD should be continued to allow the Respondent to obtain advice from a solicitor or housing advisory service on the application. The Tribunal also determined that the application should proceed to a hearing. The Tribunal noted that the issues to be determined at the hearing were -
 - (a) Was the Respondent served with a valid Notice to leave?
 - (b) Is it reasonable that an order for eviction be granted?
7. As the Respondent had not disputed the level of rent arrears, the Tribunal indicated that it could make a decision on the CV application. At the request of the Ms Smith, the Tribunal agreed to continue consideration of this application to the hearing.
8. The parties were notified that a hearing would take place on 27 April 2022 by telephone conference call. Prior to the hearing the Applicant lodged an updated rent statement showing arrears of £8200 on 11 April 2022. The Respondent did

not lodge any documents. The hearing took place on 27 April 2022 at 10am. The Applicant was again represented by Ms Smith and the Respondent participated.

The Hearing

9. At the start of the hearing Ms Smith advised the Tribunal that the Respondent had paid the arrears of £8200 by bank transfer that morning. She said that she was waiting for confirmation from the Applicant that the sum was in his account. Following a short adjournment, Ms Smith confirmed that the payment was showing as cleared funds in the account. She withdrew the related CV application, as this was no longer required, but indicated that the Applicant still sought an eviction order against the Respondent.

The Applicant's evidence/submission

10. Ms Smith said that the Applicant still wanted to evict the Respondent as the arrears had only been paid because of the threat of eviction. Until this morning the arrears had exceeded 3 consecutive months. In her opinion the Respondent was playing the system. She offered the same excuses in relation to the previous payment application and then produced a lump sum to clear the arrears. The Applicant has concerns about the condition of the property. The garden has not been maintained and the locks have been changed. The arrears started in November 2020 and the Respondent has not paid her monthly rental since that date. The Applicant is a limited company, but Mr McLean is the sole director. He is of retirement age and has cancer. He wants to move into the property as it is close to the hospital. The company only own two rental properties. There have been tenancy related problems over and above the rent arrears. The insurance was previously revoked because access was not provided for the EICR and gas safety certificate. Access was then obtained for these to be carried out in March 2021, but the annual gas safety check is again overdue. In March 2021, it was noted that the condition of the property was poor and there were boxes everywhere, preventing the contractors from accessing parts of the property. Ms Smith pointed out to the Tribunal that the tenancy agreement is in Dr Drywa's sole name, even if her partner lives there. She also referred the Tribunal to the monthly reminder letters which were lodged. She said that these were emailed every month to the Respondent by Mr McLean. He also sent her a detailed letter in compliance with the pre action requirements regulations on 21 May 2021, which was also lodged with the application.

The Respondent's evidence/submission

11. Dr Drywa advised the Tribunal that the rent was not paid due to her being unemployed. She contacted Mr McLean two weeks ago and asked him to accept a lesser sum in settlement of the arrears, but he refused. She then managed to put together the whole sum due and this was paid this morning. In response to questions from the Tribunal Dr Drywa said that her partner has a

job, and she is currently looking for work. She said that the tenancy started in September 2019 and the monthly rent was paid until November 2020. Initially she lived at the property alone. She was unable to confirm when her partner moved in but said that it was at least 6 months ago. She advised the Tribunal that she lost her job early in 2020. She had savings so was able to continue to pay her rent until November 2020. The lump sum paid in July 2021 was borrowed from her parents. Her partner is a self-employed electrician and also works as an audiologist. In response to questions about whether she made a claim for benefits, she said that she had not done so. She wasn't sure whether she was eligible and didn't think about making a claim. Her focus has been on getting a job so that she can pay her rent.

12. Dr Drywa advised the Tribunal that she contracted COVID 19 in October 2021. She was ill for a month and then developed long COVID. She was not admitted to hospital but attended her GP and a COVID clinic. She is in the process of recovering and her health is better. She is currently looking for a job. As she has a PhD in biology, she is hoping to obtain a job in that field but intends to work as a delivery driver in the short term so that she can pay her rent, as this work is easier to find. In response to questions about the payment of £8200, Dr Drywa said that her partner moved his savings from Poland, and these were used to pay the arrears. The savings were only transferred this morning. There is some of the money left which can be used for the rent payments. In response to a question from Ms Smith she confirmed that she is residing at the property. She said that the locks were changed because there was a forced entry to the property by the police, following a false allegation of illegal activity. They damaged the door and broke the lock, so this had to be replaced. After the police raid, they were visited by a health and safety inspector about the boxes. These contain her belongings, including her books. Some of the boxes are away and she is arranging storage of the remainder of them. Otherwise, the property is in good condition. There are items in the garden which will be removed. Dr Drywa said that she had not been able to provide access when previously requested because she went to Poland to see a specialist due to the waiting list in Scotland. She was only there for a week or two. She said that she had spoken to the landlord this morning about the gas safety inspection, and this will be carried out next week.

13. Dr Drywa concluded by saying that she wanted to stay in the property and would undertake to pay her rent every month from now on. She has some of the money from Poland to do this and hopes to be working shortly. Her partner is in work. In response to questions from the Tribunal she confirmed that she had received the monthly rent reminders, copies of which had been lodged by the Applicant, and the "Pre Action-Requirements letter" which was emailed to her on 21 May 2021. She said that she had not seek advice in relation to the arrears on receipt of that letter but focused on getting the money together.

Findings in Fact

14. The Applicant is the owner and landlord of the property.
15. The Respondent is the tenant of the property in terms of a tenancy agreement dated 11 September 2019.
16. The Respondent is due to pay rent at the rate of £840 per month.
17. The Respondent stopped paying the monthly rent charge in November 2020.
18. The Respondent paid the rent arrears owed to the Applicant for the period 11 November 2020 to July 2021 on 9 July 2021.
19. The Respondent only made one payment to the rent account between 11 July 2021 and 11 April 2022, the sum of £200 paid on 11 January 2022.
20. The Respondent owed the sum of £8200 in unpaid rent on 27 April 2022. She paid this sum to the Applicant prior to 10am on 27 April 2022.
21. The Applicant sent a Notice to Leave by email to the Respondent on 28 May 2021. The Respondent had been in arrears of rent over three consecutive months on that date.
22. The application was lodged with the Tribunal on 2 December 2021. The Respondent had been in arrears of rent over three consecutive months on that date.

Reasons for Decision

23. The application was submitted with a Notice to Leave, together with a copy of an email which establishes that the Notice was served on the Respondent on 28 May 2021. The Notice states that an application to the Tribunal will be made on ground 12, rent arrears over three consecutive months. Part 4 of the notice indicates that the earliest date that an application to the Tribunal can be made is 30 November 2021. The application to the Tribunal was made after expiry of the notice period. The Tribunal is satisfied that the Applicant has complied with Section 52(3), 54 and 62 of the 2016 Act. The Applicant also submitted a copy of the Section 11 Notice which was sent to the Local Authority. The Tribunal is satisfied that the Applicant has complied with Section 56 of the 2016 Act.
24. Section 51(1) of the 2016 Act states, "The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy, if, on the application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies." Ground 12 of Schedule 3 (as amended by Schedule 1 of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020) states "(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months. (3) The First-tier Tribunal may find that

the ground named in sub-paragraph (1) applies if – (a) for three or more consecutive months the tenant has been in arrears of rent, and (b) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order.”

25. Paragraph 3B states that, when considering whether it is reasonable to issue an eviction order, the Tribunal “is to consider the extent to which the landlord has complied with pre-action requirements before applying for the eviction order.” This provision applies where “all or part of the rent in respect of which the tenant is in arrears as mentioned in that eviction ground relates to the period during which paragraph 5 of schedule 1 of the Coronavirus (Scotland) (No 2) Act 2020 is in force”. This Act came into force on 7 May 2020. Regulation 4 of the Rent Arrears Pre-Action Requirements (Coronavirus) Scotland Regulations 2020 specifies the pre-action requirements which apply to the 2016 Act. These include the provision of clear information relating to the terms of the tenancy agreement, the level of the arrears, the tenant’s rights in relation to eviction proceedings and how the tenant can access information and advice.
26. Sub-Paragraph (4) states, “In deciding under sub-paragraph (3) whether it is reasonable to issue an eviction order, the Tribunal is to consider whether the tenants being in arrears of rent over the period in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.” These are defined in sub-paragraph (5) and include housing benefit and universal credit.
27. The Tribunal noted that the Respondent made a bank transfer to the Applicant shortly before the start of the hearing. This payment extinguished the arrears of rent. As a result, the hearing proceeded in relation to rent arrears which no longer exist. The Tribunal firstly considered whether the payment by the Respondent meant that the eviction ground could not be established. The Tribunal noted the following: -
 - (a) The Coronavirus legislation temporarily repealed the mandatory aspect of ground 12. As a result, the application is being considered only in relation to the discretionary aspect of the ground, as narrated in paragraphs 24 to 26. The repealed part of the ground stated that the Tribunal “must” grant an eviction order if (a) **at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits**, the tenant – (i) **is in arrears of rent** by an amount equal or greater than the amount which would be payable as one months rent under the tenancy **on that day**, and (ii) has been in arrears of rent (by any amount) **for a continuous period, up to and including that day**, of three or more consecutive months...” (Emphasis added by the Tribunal). These words (or similar words referring to rent being due on the day of the CMD or hearing) are absent from the discretionary aspect of the ground, which is the only part of the ground currently available.
 - (b) There is no reference in the current aspect of ground 12 to rent being owed on the day of the hearing or to a minimum amount of rent arrears which must exist. The only stipulation is that the tenant “has been in arrears over three

consecutive months". It is not disputed by the Respondent that she paid no rent from November 2020 until 9 July 2021 and from 11 July 2021 until 27 April 2022 (except for a small payment of £200 in January 2022).

28. Although not directly relevant, the Tribunal noted that there are three rent arrears grounds in the Housing (Scotland) Act 1988 for assured tenancies which started before 1 December 2017. The mandatory ground (ground 8) requires "three months rent lawfully due" to be in arrears at the date of service of the AT6 notice and at the date of the CMD or hearing, whichever is the earlier. In contrast, one of the discretionary grounds (ground 11), only requires the tenant to have "persistently delayed paying rent", whether or not any rent is outstanding when the application is lodged. This ground can therefore be relied upon even if there are no arrears when the application is being determined.
29. In the absence of any provision in the current version of ground 12 which requires there to be rent arrears at the date of the hearing the Tribunal is satisfied that this eviction ground can apply in circumstances where the arrears have been paid off before the hearing. In this case, there had been three consecutive months of arrears at the date of service of the notice to leave, the date on which the application was lodged, the date of the CMD (when arguably the Tribunal first considered the application on its merits) and the morning of the hearing. The Tribunal concludes that the first part of the eviction ground has been established.
30. The Tribunal proceeded to consider whether it would be reasonable to grant the order.
31. **Pre-Action Requirements.** The Respondent confirmed that she received the monthly rent reminder letters from the Applicant which were lodged with the application and prior to the hearing. She also agreed that she received the "pre action requirements" letter by email on 21 May 2021. The rent reminders are very brief template letters, some parts of which do not appear to have been completed. However, they do provide a handwritten list of missed payments, the total sum outstanding and details of organisations which can provide advice to the tenant. The letter emailed on 21 May 2021 is a more detailed document. It provides the landlords contact details and confirms that a payment plan can be discussed. It provides details of the monthly rent and the total sum outstanding. It states that an eviction order may be sought if the rent arrears are not addressed and refers to the availability of relevant benefits and the organisations which provide advice. A Scottish Government information leaflet was attached together with a template income and expenditure form. The Tribunal is satisfied that the Applicant has complied with Paragraph 3B in relation to pre action requirements.
32. The Respondent advised the Tribunal that although she received the correspondence referred to in paragraph 30, she did not seek advice. Furthermore, she did not apply for universal credit or any other relevant benefits or make enquiries as to her eligibility, although she stated at the CMD that she

intended to do so. She may have been ineligible, particularly if her partner was working, but did not take any action to establish whether this was the case. The Tribunal is satisfied in the circumstances that the rent arrears are not due to a delay or failure in the payment of relevant benefits.

33. The Tribunal noted the information provided about the Applicant's circumstances. However, a limited company and its directors are separate legal entities and the director's own personal circumstances did not appear to be relevant to the issue. Furthermore, no evidence was submitted regarding Mr Mclean's status in the company or his medical condition. The Tribunal also noted that access for inspection and repair may have been an issue, but no evidence was provided about the condition of the property.
34. In assessing the issue of reasonableness, the Tribunal had regard to the following-
- (a) The length of time that the Respondent has been in arrears of rent and the failure by the Respondent to meet her monthly contractual obligation throughout that time.
 - (b) The unsatisfactory explanation put forward for the non-payment of rent. From the evidence provided, it appears that the Respondent has been unemployed since early 2020. However, she did not apply for universal credit or seek advice as to her eligibility for benefits, even after the CMD when she claimed that she intended to do this. She has only recently started to look for work, saying that she has been ill and therefore not fit. However, she said that she contracted COVID 19 in October 2021. This was a year after she stopped paying rent and at least 18 months after losing her job. No medical evidence was lodged although she was advised at the CMD that she should consider providing this.
 - (c) The failure by the Respondent's partner to contribute to or pay the rent. He is not the joint tenant and therefore not liable for the rent in terms of the tenancy agreement. However, has resided in the property for at least 6 months and is in employment. His presence in the property may have affected the Respondent's eligibility for means tested benefits (had she applied for them) as he would be expected to contribute to the rent.
 - (d) The lack of any explanation for the savings in Poland not being available until the morning of the hearing when they were used to clear the arrears.
 - (e) The fact that the Respondent has been able to travel to Poland to obtain medical treatment while claiming that she did not have the resources to pay her rent.
 - (f) The Respondent's promise/undertaking to resume her monthly rental payments. The Respondent advised the Tribunal that she now has the resources to make the payments. However, she has offered assurances to the Applicant in the past. She provided no documentary evidence to vouch the

existence of further savings, her partners income, or her job prospects.

(g) The lack of any evidence to suggest that the Respondent (or anyone in her household) is vulnerable.

35. Having regard to the factors outlined in paragraph 33, the Tribunal is satisfied that it would be reasonable to grant the eviction order.

Decision

36. The Tribunal determines that an eviction order should be granted against the Respondent.

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.



Josephine Bonnar, Legal Member

27 April 2022