



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/19/3320

Re: Property at 3 Howgate Street, Dumfries, DG2 7AE (“the Property”)

Parties:

Mr Douglas Brotherston & Mrs Carol Brotherston, Kinmount Hotel, Carrutherstown, Dumfries, DG1 4LD (“the Applicants”)

Mr Peter Ray, 3 Howgate Street, Dumfries, DG2 7AE (“the Respondent”)

Tribunal Member:

Nicola Irvine (Legal Member); Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicants are entitled to recover possession of the property.

Background

- [1] The Applicants made an application to the Tribunal on 12th October 2019 for an eviction order in terms of Section 51 of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”) and Rule 109 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules and Procedure) Regulations 2017 (“the 2017 Rules”).

- [2] This dispute previously came before the Tribunal on 18th December 2019 at a Case Management Discussion (“CMD”), following which a Note summarising the CMD was issued to parties, setting out what matters were agreed and what issues were to be determined at a Hearing.
- [3] A Hearing was assigned for 12th March 2020 and was heard at the Cairndale Hotel, Dumfries. Both parties were present and were represented by their respective solicitors.

The Hearing

- [4] Mrs Colledge on behalf of the Applicants and Mrs Raymond on behalf of the Respondent advised the Tribunal that neither party required to call any witnesses other than the parties themselves.
- [5] There was one preliminary matter, namely the Applicants’ motion to have a List of Documents received although late. The List contained one document (number 15), namely a copy complaint and summary of evidence in relation to criminal proceedings against Douglas Brotherston.
- [6] Mrs Raymond indicated that it was not clear to her what evidential value there could be in relation to this document, since the author of the summary of evidence has not been cited to give evidence before the Tribunal.
- [7] Having heard submissions, the Tribunal allowed the List of Documents to be lodged although late.
- [8] Prior to hearing any evidence, the Tribunal reminded parties of the issues to be resolved, namely:-
1. Whether there is a valid Private Residential Tenancy between the parties;
 2. Whether the Tribunal has jurisdiction to determine this matter;
 3. Whether the Notice to Leave served on 9 September 2019 is valid;
 4. Whether the Notice to Leave was validly served;
 5. Whether the Applicants are entitled to sell the property; and
 6. Whether the Applicants intend to sell the property for market value, or at least market it for sale within 3 months of the Respondent ceasing to occupy it.
- [9] Evidence was led from both Applicants and the Respondent. A summary of their evidence is contained below. It was agreed that a further date would

be assigned for the Tribunal to hear oral submissions and a date was to be identified. However, in light of the restrictions introduced as a result of the pandemic, parties have asked the Tribunal to consider written submissions and to issue a decision.

Summary of evidence

Carol Brotherston

- [10] Mrs Brotherston is 50 years of age and resides at the Kinmount Hotel (“the hotel”), Carrutherstown. The Respondent was known to the Applicants as a customer of the hotel.
- [11] The Applicants own property at 3 and 6B Howgate Street and at 29 Lockerbie Road. The Applicants instructed Your Move estate agents with a view to selling the property at 3 Howgate Street (“the property”). Mrs Brotherston referred to the letter from Your Move dated 15th April 2019 (Applicants’ Document 5) which confirms that instruction.
- [12] In or around April 2019, the Respondent told the Applicants that he had been house sitting for missionaries who had returned home. The Respondent told the Applicants that he was soon to be homeless. The Applicants considered the Respondent to be a friend of theirs. The Respondent asked if he could stay at the property owned by the Applicants. The Respondent knew that the Applicants intended to sell the property. The Respondent persuaded the Applicants to allow him to move in.
- [13] The parties agreed that the Respondent could live at the property for 3 months and the Respondent made a payment of £1,050, representing 2 months’ rent at £350 per month and a deposit of £350. The parties did not agree on a commencement date because at that stage the property was not yet suitable for occupation. The Respondent gave Mrs Brotherston a cheque for £1,050 at the beginning of May 2019. The Applicants did not lodge a deposit in a regulated tenancy deposit scheme.
- [14] Before the Respondent could move into the property, Mr Brotherston had to undertake work to prepare the property. Mr Brotherston spent 3 weeks preparing the flat for occupation by the Respondent. Whilst that work was being undertaken, the Respondent stayed at the Kinmount Hotel from 18th April 2019. He did not pay for his stay the hotel. An invoice was issued to the

Respondent (Applicants' Document 8) covering the period 18th April 2019 to 13th May 2019, totalling £390. After the invoice was issued, the Respondent told her that he did not want to pay £15 per night for staying at the hotel and indicated that he was prepared to pay £11.29 per night. The Applicants issued an amended invoice totalling £293.54 (Applicants' Document 9) to reflect the sum that the Respondent indicated he would pay. The Respondent has still not paid the invoice.

- [15] The Respondent advised Mrs Brotherston on 21st May that he had bought some furniture for the property at a cost of £500 and he hoped that she would buy it from him; Mrs Brotherston refused to do so. There was no agreement that the property was to be a furnished let.
- [16] The Respondent took entry to the property on 22nd May 2019. Mrs Brotherston banked the cheque for £1,050 after the Respondent took entry. The parties did not sign any documentation before the Respondent took entry to the property. There was a discussion about the term of the tenancy and the Respondent accepted that he could only live at the property for 3 months.
- [17] Mrs Brotherston told the Respondent that Your Move would require access to the property in order to take photographs so that a marketing brochure could be prepared. The Respondent indicated at the outset that he would allow access for that purpose. In the event, the Respondent did not allow access and therefore no marketing brochure was prepared.
- [18] Mrs Brotherston was referred to Applicants' Document 13 which is a letter to the Tribunal dated 5th December 2019 from the Respondent's previous solicitor. The letter states that the Respondent continued to pay rent. Mrs Brotherston did not accept that and her evidence was that nothing further was paid by the Respondent beyond the cheque for £1,050 which was given in May 2019.
- [19] Mrs Brotherston prepared a lease document (Applicants' Document 2) and delivered this to the Respondent on 4th June 2019. The Respondent was not prepared to sign that document because it was an old-style tenancy agreement. Applicants' Document 2 shows handwritten notes made by the Respondent. The Respondent took no issue with the rent clause; there is

nothing in the document to suggest that the property was let on a furnished basis.

- [20] Mrs Brotherston prepared a new style private residential tenancy agreement (Applicants' Document 6) and sent this to the Respondent with a covering letter dated 13th August 2019 (Applicants' Document 10). The Applicants sent that letter along with a residential tenancy agreement because they were trying to fix what had gone wrong at the beginning. The start date on that tenancy agreement was 22nd August 2019. The reason for that is that the template used by Mrs Brotherston would not allow her to enter an earlier start date.
- [21] On 7th September 2019, Mr Brotherston changed to lock on the door to the property. A Police officer told Mr Brotherston that he would have to provide a new key to the Respondent and suggested that the key be delivered to the Police Office. Both Applicants attended at Loreburn Street police office and left the Notice to Leave together with a new key to the property. Both of these items were handed to the Police Officer. The Applicants also hand delivered a copy of the Notice to Leave through the letterbox at the property and attached a copy of the Notice to the door of the property. There could be no doubt that the Respondent had received the Notice to Leave because it was attached to the new set of keys which the Respondent uplifted from the Police Office. The Notice to Leave was not served by recorded delivery or sheriff officer.
- [22] On 12th September 2019 Mr Brotherston was cautioned and charged in respect of having changed the lock at the property.
- [23] The Applicants intend to sell the property at 3 Howgate Street. They cannot do so at present because the Respondent has refused to leave. The consequence of that is that the Applicants have had to market their family home for sale, because they are in financial difficulty; they are unable to meet all of their outgoings. Mrs Brotherston is concerned that she and her husband may face bankruptcy if they cannot sell the property. If the Tribunal grants an order for eviction, the Applicants will market the property at Howgate Street for sale.

- [24] The Applicants do not know if the Respondent has other accommodation available to him; the Applicants intimated an intention to raise these proceedings to the local authority.
- [25] The Applicants own and rent out 2 other properties on which they have mortgages and in which there are paying tenants, and they are registered landlords.

Douglas Brotherston

- [26] Mr Brotherston is 54 years old and lives with his wife at Kinmount Hotel, Carrutherstown. The Applicants own the property at 3 Howgate, Dumfries. The Respondent took occupation on 22nd May 2019. The Applicants told the Respondent that they intended to sell the property but that he could rent the property for a period of no more than 3 months. The Respondent was aware of that. The Respondent was considering a townhouse property in Castle Street and indicated to Mr Brotherston that he might not even rent the property for as long as 3 months. The agreement was that the Respondent would pay rent of £350 per month and would make an advance payment equivalent to 2 months' rent plus £350 in respect of a deposit.
- [27] The agreement between the parties was that the property was to be let on an unfurnished basis. The only items in the property at the start of the tenancy were a washing machine, fridge, television stand, a wardrobe and a chest of drawers. The Respondent was happy to take entry to the property and told Mr Brotherston that he had items in storage which he would use until he found a suitable townhouse.
- [28] Although there is no signed tenancy agreement, the parties agreed the terms, namely that the monthly rent was £350, there was a deposit payable of £350 and the term of the tenancy was for no longer than 3 months.
- [29] Mr Brotherston did not personally hand the Notice to Leave to the Respondent. He left the Notice along with a new key at Loreburn Street Police Office on 9th September 2019. The Respondent was able to gain access to the property without delay so Mr Brotherston was confident that the Respondent had collected the key and Notice to Leave from the Police. Mr Brotherston and his wife had a copy of the Notice to Leave hand delivered

through the letterbox at the property and a copy was fixed to the door of the property.

- [30] The Applicants wish an order for eviction so that they have vacant possession and can sell the property. The Applicants wish to sell the property as soon as the Respondent leaves because the Applicants are in financial difficulty.

Peter Ray

- [31] Mr Ray is 67 years old and lives at the property at 3 Howgate Street, Dumfries. He first met the Applicants at the end of 2017 when he moved to Dalton.
- [32] In February 2019, he became aware that the Applicants owned the property at 3 Howgate; Mr Brotherston told him that the previous tenant had let the Applicants down. Mr Ray was told that the property was a furnished rental property. At that point, Mr Ray was house sitting in Dalton for missionaries. He had been living in Dalton for approximately 18 months and was given 2 months' notice that he had to leave the property. Mr Ray asked the Applicants whether anyone had a flat to rent and they mentioned that they owned property at Howgate Street and Lockerbie Road. Every time Mr Ray was at the hotel between February and March, he pursued the Applicants to reach agreement about a tenancy.
- [33] As Easter 2019 approached, he was in talks with the Applicants and was under the impression that one or other of the properties would be made available to him. Mr Ray attended at the hotel the day before he moved out of his property in Dalton and at that stage, nothing had been agreed with the Applicants. Mr Ray was told by the Applicants that neither property was suitable to move into and Mrs Brotherston suggested that he move into the hotel. The Applicants told him that the work would be completed in the property within 3 days. In the event, Mr Ray stayed at the hotel for 5 weeks. Mr Ray took occupation of the property on 22nd May 2019 and was only informed by the Applicants 24 hours before moving into the property that it was available. There was no agreement about rent. There was a discussion about rent being £350 per month but that was on the basis of a furnished property; Mr Ray would expect the rent to be less than £350 per month for

an unfurnished property. There was no agreement about the term of tenancy.

- [34] A lease of 3 months would not have been suitable for Mr Ray, particularly since the property was not in fact furnished. Mr Brotherston suggested to Mr Ray that he should buy furniture for the property and that the Applicants would reimburse him. Mr Ray purchased a number of pieces of furniture but was later told by the Applicants that they were not prepared to reimburse him. Mr Ray was interested in finding another property and did not know how long it would take to find a suitable property but envisaged it would take longer than 3 months.
- [35] Mr Ray gave the Applicants a cheque for £1,050 on 2nd May 2019, having considered that he should not stay at the hotel without paying; he expected that the cheque would be set off against the cost of him staying at the hotel. The Applicants told him that the cost of the hotel was equivalent to the cost rent, and was chargeable on a nightly basis. Mr Ray did not accept that the payment of £1,050 represented 2 months rent of £350 per month and a deposit of £350. Mr Ray did not wish to enter into a tenancy agreement unless it was on a proper footing.
- [36] Applicants' Document 2 was posted to Mr Ray at the end of June 2019. Mr Ray met with Mr Brotherston in mid-July to discuss the document and Mr Brotherston made handwritten annotations. Mr Ray did not sign this document because it was inadequate. Mr Ray suggested a number of amendments to the document.
- [37] Mr Ray sent a letter to the Applicants dated 1st August 2019 (Respondent's Document 2) because the parties had not reached agreement.
- [38] Applicants' Document 6 is the second lease sent to Mr Ray by the Applicants. Mr Ray received that document by post in August 2019. The terms of the document do not reflect the discussion that Mr Ray had with Mr Brotherston.
- [39] Mr Ray collected the Notice to Leave (Respondent's Document 11) from the Loreburn Street Police Office at the same time he collected a new key. He could not recall whether a copy of the Notice to Leave was also posted through the letterbox at the property but commented that if there had been

a copy, he would have disregarded it as it was identical to the notice he collected from the Police Office.

[40] Mr Ray was aware that the Applicants wished to sell the property. He was prepared to allow an agent access to the property to take photographs. If the Applicants had sold the property quickly, Mr Ray would have negotiated with them or would have moved out of the property.

[41] Mr Ray instructed JHS Law. With reference to Applicants' Document 13, Mr Ray did not advise his solicitor that he continued to pay rent. With reference to the third paragraph of that letter, Mr Ray did not tell his solicitor that the payment of £1,050 represented advanced rent and a deposit.

[42] Mr Ray considers that there was no lease at all between him and the Applicants. He accepted in cross examination that he is occupying the property and is not paying rent. The Applicants denied Mr Ray every opportunity to reach agreement about the terms of a tenancy agreement.

[43] **Findings in fact**

1. There was an unwritten Private Residential Tenancy between the parties in respect of the property which commenced on 22nd May 2019.
2. The rent payable was £350 per month.
3. The Respondent paid £1,050 which covered rent for a period of two months and a deposit of £350.
4. The Notice to Leave was validly served on the Respondent.
5. The Applicants intend to market the property for sale within 3 months of recovering possession.

Reason for decision

[44] The Tribunal listened carefully to the evidence of the parties and took account of the written submissions on behalf of both parties. Where there was a conflict in the evidence of the Applicants and the Respondent, the Tribunal preferred that of the Applicants. Taking each of the issues in turn, the reason for the Tribunal's decision is as follows:-

[45] Tenancy agreement

The first issue for the Tribunal to consider was whether there was a valid private residential tenancy in operation. It was a matter of agreement between the parties that there was no written tenancy agreement. However, the Private Housing (Tenancies)(Scotland) Act 2016 makes it clear that a written agreement is not required. The Respondent gave evidence that there was no tenancy agreement. The Tribunal noted that the Respondent made a report to Police Scotland about his “landlord” having changed the locks at the property, a matter for which the Second Applicant was charged with an offence. The Applicants’ position was that they allowed the Respondent to occupy the property on the basis that the parties agreed a monthly rental charge of £350. The Applicants’ position was that £1,050 paid by the Respondent represented two months’ rent and a deposit of £350. The Respondent gave evidence that he expected the cheque to be set off against money he owed for staying at the hotel. It is noted that the Respondent’s former solicitor wrote to the Tribunal of 5th December 2019 and amongst other matters advised that the Respondent “made the payment of £1,050 prior to entering the property, on the understanding that that was to be taken in part by way of a deposit and part to advance payment of rent.” Although the Respondent advised that he did not instruct his solicitor to write in those terms, the Tribunal found the Respondent’s explanation about that lacked credibility. The Tribunal preferred the evidence of the Respondents in respect of the agreed rent. The Respondent appeared to view the relationship between the parties as one of landlord and tenant. He was unable to tell the Tribunal on what legal basis he occupied the property if not as a tenant. The Tribunal found that there was a valid private residential tenancy agreement in place, governing the Respondent’s occupation of the property.

[46] Jurisdiction

On the basis that the dispute between the parties relates to a private residential tenancy agreement governed by the 2016 Act, the Tribunal was satisfied that it has jurisdiction to make a decision on the present application, in terms of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

[47] Notice to Leave

The Notice to Leave followed the prescribed form and set out the ground upon which the Applicants sought to recover possession. There was no evidence led and no submissions were made on behalf of the Respondent inviting the Tribunal to find that the Notice to Leave was not valid. The Tribunal has considered the terms of the Notice to Leave and was satisfied that it is indeed valid.

In relation to service of the Notice to Leave, the Tribunal accepted the evidence of the Applicants that they hand delivered a copy of the notice through the letterbox at the property, taped a copy of the notice to the door of the property and they left a copy at the local Police station. The Respondent accepted that he had collected the notice from the Police office on 9th September 2019. The Tribunal was therefore satisfied that the Notice to Leave was served on the Respondent.

[48] Ground for eviction

The Tribunal accepted the Applicants' evidence that they intend to market the property for sale as soon as they have recovered possession. They are the heritable proprietors of the property and are entitled to sell it. The Applicants produced documentation indicating their intention to sell the property shortly before the Respondent moved in. The Applicants provided an explanation about the circumstances surrounding their decision to sell. They also gave evidence of financial hardship suffered by them and the need for them to sell the property. The Tribunal was satisfied that the Applicants' intend to market the property for sale within 3 months of recovering possession.

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.



Legal Member/Chair

28th July 2020
Date