



**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/22/3762**

**Re: Property at 32 Mill Road, Linlithgow, EH49 7QW (“the Property”)**

**Parties:**

**Mr Ken Ritchie, 132 The Henge, Glenrothes, Fife, KY7 6XX (“the Applicant”)**

**Ms Vicky Sutherland, 32 Mill Road, Linlithgow, EH49 7QW (“the Respondent”)**

**Tribunal Members:**

**Andrew Upton (Legal Member) and Helen Barclay (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it was not reasonable to grant an eviction order and refused the Application.**

**Findings in Fact**

1. The Applicant is the landlord, and the Respondent the tenant, of the Property under and in terms of a Private Residential Tenancy Agreement.
2. In or around 2020, the Respondent reported water ingress through the roof to the Applicant’s letting agent. The roof was not repaired until 2022.
3. The relationship between the Respondent and the Applicant’s letting agent broke down during 2020.
4. The Respondent has, in the past, behaved improperly towards the Applicant’s letting agent, including by speaking in an aggressive and abusive manner towards employees of the letting agent.

5. The letting agent has had difficulties in arranging access to the Property due to a lack of cooperation and flexibility by the Respondent, and notwithstanding the giving of appropriate notice in accordance with the terms of the tenancy agreement.
6. There was previously damp within the Property. There is still evidence of that damp in several rooms of the Property at the junction between the wall and the ceiling. That damp was caused by water ingress from the roof issues.
7. There was previously dampness in the back bedroom of the Property that was rising from the foot of the rear elevation. That damp was addressed by the Respondent digging away soil that was resting against the external rear elevation.
8. The Respondent previously failed to keep the garden tidy in accordance with her contractual obligations. As at 26 September 2023, the garden was sufficiently tidy as to comply with the contractual obligations.
9. The Respondent and her partner had purchased approximately 100 Christmas trees in pots. The trees had been kept in the front garden pending replanting on land belonging to the Respondent. The trees at the Property had significantly reduced in number by 26 September 2023.
10. The Respondent lives in the Property with her partner, Jason Pepperton-Taylor, and her two daughters, aged 7 years and three months respectively. She also has a dog, which is nervous around unfamiliar people.
11. The Respondent is in employment as an engineer, but is currently on maternity leave.
12. The Respondent has access to support from family and friends for childcare purposes.
13. The Respondent is not operating a business from the Property.
14. The Respondent does not have any other pets.
15. The Respondent enjoys living at the Property, and does not intend to cause damage to the Property.
16. The Respondent's eldest daughter attends a local primary school.
17. The Respondent is in rent arrears, in respect of which the Tribunal previously granted a time to pay order. The Respondent has kept to the terms of the time to pay order.
18. The Respondent was late paying her rent in July 2023 due to her own oversight, but paid the missing rent within two days of being made aware of

her missed payment. Beyond that, the Respondent has not accrued any additional arrears since the time to pay order was granted. The rent arrears continue to decrease.

19. The risk that the condition of the Property will deteriorate is low.
20. The Respondent's ability to be flexible and allow access to the letting agent and contractors will be improved by her being home more often and making better use of her support network.

### **Findings in Fact and Law**

1. In all of the circumstances, it is not reasonable to grant an eviction order.

### **Statement of Reasons**

1. This Application called for a Hearing on 26 September 2023. The Applicant was represented by Mrs Johnstone of Northwood Central. The Respondent was personally present.
2. Prior to the Hearing, the Tribunal attended an inspection of the Property. The purpose of the inspection was to view the Property and assess its condition ahead of the Hearing. The Tribunal noted the condition of the garden during the inspection as well. It noted that there were a number of Christmas trees in pots in the front garden. It was explained that approximately 100 Christmas Trees had been purchased in pots, and that they were being planted elsewhere once they had outgrown the pots. Most of the trees had already been planted.
3. This is an application for an eviction order. The Applicant has given notice to leave to the Respondent on the basis that she is in rent arrears. It is a matter of agreement that the Applicant is the landlord, and the Respondent the tenant, of the Property under a Private Residential Tenancy Agreement, and that the Respondent is in rent arrears. A payment order in respect of those arrears was previously granted, and a time to pay order was made by the Tribunal. The only outstanding question was whether it was reasonable to grant the eviction order. The Hearing focused on the determination of that question.

### The Evidence

*Anne Johnstone*

4. Mrs Johnstone spoke of her interactions with the Respondent. She explained that she, along with her fellow Director Mr McHugh, now personally dealt with the Respondent due to the Respondent's abusive manner on the telephone with staff.

5. Mrs Johnstone explained that the Applicant's primary concern was that the Respondent was not looking after the Property and that its condition would deteriorate as a result. She spoke of repeated difficulties in obtaining access to the Property for inspections and repairs. She spoke of the Respondent's lack of flexibility in arranging for contractor attendance. She explained that contractors who had attended previously now refuse to go to the Property. The principal reason for that was the Applicant's demand that contractors fit around her diary, making it impossible for contractors to plan their other work. She said that gaining access had been difficult, notwithstanding the Respondent was now on maternity leave as opposed to being at home.
6. Mrs Johnstone accepted that certain issues, such as the roof repair, had taken longer than they should have. In that regard, she said that the pandemic had played a part, but also asserted that the Respondent's refusal to allow access, or to keep to appointments, had also contributed to that delay. In that respect, Mrs Johnstone said that certain repairs could be attended to if it suited the Respondent. She drew comparisons between the garage door repair, which has been outstanding for some months, and the shower repair which was completed within days. There is also an outstanding repair required to the back door of the property due to (i) the locking pins jamming, and (ii) the Respondent having broken the key in the secondary lock. She explained that parties were waiting for a date from the contractor for that repair.
7. Mrs Johnstone spoke of there being concerns about the Respondent breaching her tenancy agreement. She referred to the chest freezers in the garage containing more meat than would ordinarily be expected for personal consumption. She spoke about having found a cat in the garage when there was no permission to keep a cat.
8. In essence, the thrust of Mrs Johnstone's evidence was that the Respondent had a lack of respect for the Property, the letting agent, and the terms of the Tenancy Agreement.
9. Under questioning from the Tribunal, Mrs Johnstone accepted that the roof repair should have been completed earlier, though reasserted that both the pandemic restrictions and the Respondent herself contributed to the delay. Mrs Johnstone also accepted that, whilst there was evidence to suggest that the presence of damp and moisture in the Property was due to the Respondent's use of the Property, the period of water ingress through the roof was likely a significant factor. Mrs Johnstone also accepted that the Property appeared to be in much better condition now than it had previously. For example, the walls were dry, there was less clutter affecting airflow, and the garden had been tidied with dog mess having been cleared up.
10. Finally, Mrs Johnstone spoke about the Respondent's rent arrears. She confirmed that the Respondent had made all payments of rent and towards the time to pay order since the time to pay order had been granted. She spoke of one missed rent payment in July 2023, but confirmed that following a 7-day

demand letter being issued to the Respondent it was paid within two days. Everything was up to date in that regard.

*Vicky Sutherland*

11. The Respondent gave evidence in this matter. She resides at the Property with her partner, Jason Pepperton-Taylor, and her two daughters. Her eldest daughter is seven years old, and attends a local primary school. She is in primary three. Her youngest daughter is a few months old.
12. The Property is an older bungalow of stone construction with wet-cast render externally. It has two bedrooms, one reception room, a kitchen and a bathroom. There is a substantial standalone garage to the rear. There is ample garden ground. The windows are single-paned glazing. Several rooms displayed signs of historic water ingress from the roof and chimney, which had been addressed. The Respondent spoke of previous rising damp at the rear elevation which had dried up following certain digging out works that the Respondent undertook.
13. The Respondent has family and friends living locally. Her mother lives in Larbert. Her brother lives nearby in Linlithgow. There are other women who live nearby and whose children attend the same primary school as the Respondent's daughter (referred to by her as the "school mums") with whom she is friendly. The Respondent accepted that this was a support network who could be called upon to assist her if necessary with, for example, short-term childcare.
14. The Respondent is an engineer. She has qualified as a gas safe engineer, but is currently on maternity leave following the birth of her second daughter. She met Mr Pepperton-Taylor at a training event. He works in Milton Keynes, and stays in hotels during the week whilst away for work. He returns to the Property at weekends and is now living there as his only or principal home. The Respondent would like to have him added to the Tenancy Agreement as a tenant.
15. The Respondent's salary amounts to £2,400 per month before tax. However, she is currently assessing whether she will go back to full-time employment at the end of her maternity leave, or whether she would look at hybrid or part-time working, or not go back to work at all. She spoke of childcare costs being at least £1,000 per month in respect of full-time working commitments, and how she was unsure at the moment of the benefit of working full-time as a consequence.
16. The Respondent advised that her current employer requires two weeks' notice of any planned absence. She suggested that this makes arranging access for inspections and repairs difficult because the Letting Agent only provided 48 hours. She said that she had asked for more notice but wasn't getting that. When asked why she had agreed to access being given on 48 hours' notice

prior to entering the tenancy, the Respondent said that her circumstances had been different. She had been working as a chef at the time, which was a different working pattern. She did not accept that she had been difficult to deal with when arranging access. She claimed that it was not her fault that she had limited time to allow access due to a combination of work and child commitments. Her dog does not like people and gets stressed by strangers being present, so the Respondent needs to be present when inspections and works take place.

17. The Respondent denied that she is operating a business from home. She explained that she previously kept pigs (not at the Property), but that she required to slaughter them. The pigs were large, and the meat in the chest freezer is for personal use. As regards the cat, the Respondent advised that she did not own a cat. There was a local cat that her daughter had fed and which had continuously returned to the Property, but she was not keeping it. The Respondent raised various concerns about the Applicant's compliance with gas and electrical safety requirements. However, given that these proceedings focus on whether it is reasonable to grant an eviction order, as opposed to whether the Applicant had met the requirements of the repairing standard, the Tribunal did not make further enquiries in respect of those allegations.

### *Assessment*

18. In general terms, the majority of the evidence presented by both parties was consistent. Where it appeared to start to diverge, the reality was that the evidence was actually consistent, but viewed through the prism of each side prejudiced by their prior dealings with each other. For example, the letting agent's claim that the Respondent was not allowing access in breach of her obligations was met by an assertion that the Respondent had told the letting agent that she needed extra time to make arrangements with her work. Those are opposite sides of the same coin. The evidence amounts to a finding that the letting agent had given sufficient notice of a requirement for access and that the Respondent had not complied with her contractual obligations, albeit she had offered an explanation as to why she could not do so.
19. However, in the limited cases where the evidence of Mrs Johnstone and the Respondent conflicted, such as in relation to whether the Respondent had made access difficult for contractors, the Tribunal preferred the evidence of Mrs Johnstone. Whilst the Respondent was evidently discontent with how she felt she had been treated by the letting agent, the Tribunal was content that the letting agent had followed the requirements of the tenancy agreement and that Mrs Johnstone had accurately stated the reasons for contractors refusing to attend. The Respondent's bare denial of making access difficult lacked credibility, though the Tribunal felt that the Respondent had perhaps failed to appreciate that her choices and actions were causing such difficulty.

### Decision

20. The determination of reasonableness is the exercise of a judicial function. The leading authority on the reasonableness of granting an eviction order is *Barclay v Hannah*, 1947 S.C. 245, which related to a tenancy subject to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933. Section 3 of the 1933 Act provided that ejection of a tenant could not occur unless it was reasonable. In that respect, the requirements of the 1933 Act are analogous to the reasonableness requirement in the 2016 Act, and the decision in *Barclay v Hannah* is relevant to the Tribunal's function.
21. At page 249, Lord Moncrieff said: "*It is expressly enacted... that an order for the ejection of a tenant such as is here applied for is not to be made unless the Court considers it reasonable to make such an order. That enactment thus charges the Court with a judicial duty to consider the whole of the circumstances in which the application is made.*"
22. The Tribunal's function is the same. It requires to consider the whole circumstances of the case, assess the likely impact of granting an order on both parties as well as the likely impact of not granting the order, and then determine on balance whether it is reasonable to grant the order.
23. In undertaking that assessment and reaching a decision, the Tribunal is exercising a judicial discretion. In *Jenson v Fappiano*, unreported decision of Sheriff Welsh QC at Edinburgh, 2015SCEDIN6, Sheriff Welsh observed (at paragraph 11) that judicial discretion: "*is always constrained by a number of settled equitable principles. 1. Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment. 2. The result produced must not be disproportionate... 3. A decision based on judicial discretion must be fair and just*".
24. Having considered the whole circumstances of the case, the Tribunal determined, by the finest of margins, that it is not reasonable to grant the eviction order in this case. Whilst the Tribunal accepted the evidence presented by Mrs Johnstone that the Respondent had previously not been keeping the Property in an appropriate condition, it was apparent at the Property inspection that the Respondent had made a considerable effort to address any concerns. The garden had been tidied, and the internal walls were dry and clean. In fairness to the Respondent, much of the internal dampness was likely caused by the ingress of water through the roof for the significant period that the leak went unrepaired. Whilst the Tribunal is satisfied that the letting agent complied with the requirements of the tenancy agreement as regards requesting access for repairs, the Tribunal's view was that the Respondent's failure to allow access resulted from a combination of (i) her own failure to seek assistance from the support network that she had available to her, and (ii) her willingness to be flexible being affected by her historic dissatisfaction with the roof repair. In both respects the Respondent's failure reflected an immaturity of thought as opposed to a desire to prevent the Property being kept properly. More recently, the Respondent had made payments as they fell due under the Time to Pay Order, and had made the aforementioned effort to dry, clean and tidy the Property. It was clear to the

Tribunal that she was fond of the Property, and had a genuine desire to keep it in reasonable condition in accordance with her tenancy obligations. In that respect, the Tribunal felt that the Applicant's concerns around the potential deterioration of the Property condition were not supported by the evidence.

25. Further, insofar as there was any real risk of the Respondent not keeping the Property in the contractually required condition, that risk was obviated by the Tribunal making clear to the Respondent that its decision here was not clear cut. The Tribunal's findings are that the Respondent has not acted as she should have. For example, when reasonable access is required in accordance with notice given under the tenancy agreement, her obligation is to make arrangements to allow that access. That means that she should draw on her support network to assist. She cannot be prescriptive in a manner that obstructs the completion of reasonably necessary works. She should behave civilly in all of her interactions with the Applicant and his letting agent. The Tribunal's decision is, in part, based on its view that the Respondent's behaviour in the future will reflect the warning that this decision represents. If the Tribunal is faced with a similar Application in the future where the Respondent's behaviour has not been modified, the outcome may well be different.
26. Other factors which led the Tribunal to conclude that it is not reasonable to grant the order include, in particular, the upheaval that eviction would cause to the Respondent's eldest child, in relation to her schooling, and the risk to the wellbeing of the Respondent's youngest child from potential homelessness. The negative impact on the Respondent and her dependants of granting the order was in excess of the likely negative impact on the Applicant of not granting the order, particularly where the Respondent was actively repaying outstanding sums in addition to rent as it falls due, and the concerns about the condition of the Property were otherwise addressed.
27. The Tribunal hopes that this decision affords parties a fresh start in their landlord/tenant relationship.

## **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.**



Andrew Upton

18 October 2023

Legal Member/Chair

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Date

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