

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) in respect of an application under 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 (Procedure) Regulations 2017 (“the Rules”)

Chamber Ref: FTS/HPC/EV/23/0581

Re: Property at Flat 1, 7 East Pilton Farm Crescent, Edinburgh, EH5 2GF (“the Property”)

Parties:

Pepper UK Limited, Harman House, 1 George Street, Uxbridge, London, UB8 1QQ (“the Applicant”) per their agents Alston Law / Moray Legal Limited, The Forsyth Building, 5, Renfield Street, Glasgow, G2 5EZ (“the Applicant’s Agents”)

Mr Marc Rendle and Mrs Jade Alvey or Rendle, Flat 1, 7 East Pilton Farm Crescent, Edinburgh, EH5 2GF (“the Respondents”) per their agents Granton Information Centre, 134-138, West Granton Road, Edinburgh EH5 1PE (“the Respondents’ Agents”)

Tribunal Members:

Karen Moore (Legal Member) and Angus Lamont (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the statutory process for eviction having been established, it is reasonable to grant the Order sought.

Background

1. By application received between 23 February 2023 and 29 March 2023 (“the Application”), the Applicant’s Agents applied to the Tribunal for an Order for eviction and possession of the Property based on the Ground 2 of Schedule 3 to the 2016 Act that the Property is being sold by the mortgage lender.
2. The Application comprised the following:
 - i) copy private residential tenancy agreement between the Respondents and Roy Fever, the secured debtor to the Applicant;

- ii) copy Notice to Leave in terms of Ground 2 of Schedule 3 to the Act;
 - iii) copy Notice under Section 11 of the Homelessness Etc (Scotland) Act 2003 to Edinburgh City Council being the relevant local authority;
 - iv) copy Notice in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”) that the Applicant has applied for a warrant to exercise remedies on default to Edinburgh City Council being the relevant local authority;
 - i) copy form BB notice to the occupier of the Property, being the Respondents, in respect of the 1970 Act calling- up procedures and
 - ii) copy extract Decree from Edinburgh Sheriff Court in favour of the Applicant granting power to sell the Property in terms of the 1970 Act.
3. Ground 2 of Schedule 3 to the Act states: *“(1)It is an eviction ground that a lender intends to sell the let property. (2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if (a)the let property is subject to a heritable security, (b)the creditor under that security is entitled to sell the property, (c) the creditor requires the tenant to leave the property for the purpose of disposing of it with vacant possession and (d)the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.”*
 4. The Application was accepted by the Tribunal Chamber and a Case Management Discussion (the “CMD”) was fixed for 15 June 2023 at 14.00 by telephone conference.
 5. Prior to the CMD, the Respondents’ Agents lodged written submissions which made certain preliminary pleas.

CMD

6. The CMD took place on 15 June 2023 at 14.00. The Applicant was represented by Mr. K. Young, advocate. The Respondents were present and were represented by Ms. N. McGourt of the Respondents’ Agents.
7. At the CMD, the Tribunal explained that its role is to determine if the Ground for the Order is satisfied, if the statutory procedure of the 2016 Act has been carried out properly and if it is reasonable to grant the Order. The Tribunal explained that the purpose of CMD as set out in Rule 17 of the Rules is to determine if any issues can be resolved, to identify any facts which might be agreed and to discuss the evidence needed at a Hearing. The Tribunal advised that as the Application is opposed a Hearing would be required.
8. At the CMD, the Tribunal firstly dealt with the Respondents’ preliminary pleas as follows:
 - i) The Tribunal explained that the application by a heritable creditor and not by a landlord and that the Applicant has a Decree granting power to sell.
 - ii) The Tribunal explained that private residential tenancy agreements are not subject to the Requirements of Writing (Scotland) Act 1995 and do not need to be witnessed, nor do they need to have a wet signature.

- iii) With regard to the Application not being signed and dated, the Tribunal explained that a wet signature is no longer required and that the date is taken as the date of receipt by the Tribunal Chamber and so this does not render the Application invalid.

CMD Discussion and Outcome

9. The Tribunal noted that the Respondents' Agent had submitted documentary evidence in respect of the Respondents' and their family's personal circumstances and noted that the Respondents may be able to purchase the Property themselves. The Tribunal also noted that the Respondents' Agent had submitted that the Applicant could sell without having vacant possession.
10. The Tribunal advised that the issues for the matters to be addressed and evidenced at the Hearing are:
 - i) The individual circumstances of the Parties and the impact of granting the Order on them;
 - ii) The likelihood of alternative accommodation being available to the Respondents;
 - iii) The prospect of the Applicant selling the Property with the Respondents remaining as sitting tenants and
 - iv) Any other matters which the Parties consider the Tribunal should have regard to in reaching a decision on reasonableness.
11. The Tribunal issued a Direction in respect of these matters.
12. The Applicant lodged Affidavit evidence and case materials prior to the Hearing.

Hearing

13. The Hearing took place on 25 October 2023 at 10.00. The Applicant was represented by Ms. Carey of the Applicant's Agents and by Mr. K. Young, advocate. The Respondents were present and were represented by Ms. N. McGourt of the Respondents' Agents.
14. On behalf of the Respondents, Ms. McGourt accepted that the Ground and procedure had been established and that the Respondents' opposition was based on reasonableness. She advised that she would argue that the Applicant had an alternative to eviction as they could sell to the Respondents.
15. Ms. McGourt made a motion to adjourn the Hearing to await the outcome of a Repairing Standards case which is at appeal. She explained that a First-tier Tribunal had held that the Applicant is a landlord for the purpose of the Housing (Scotland) Act 2006 and that the Applicant is appealing that decision. Ms. McGourt argued that, if Upper Tribunal rejected the appeal, it would mean that the Applicant is a landlord who can sell to the Respondents.

16. On behalf of the Applicant, Mr. Young advised that he opposed the motion to adjourn. With reference to productions lodged, Mr. Young advised that the appeal point is that the First-tier Tribunal misconstrued the Applicant's status as a heritable creditor in possession. He explained that the Applicant is a heritable creditor not yet in possession.

17. The Tribunal adjourned to consider the motion.

Evidence for the Applicant

18. Mr. Adnan Mushtaq, one of the Applicant's Senior Litigation Specialists, gave evidence in support of his formal witness statement. He confirmed the mortgage arrears and interest due by Mr. R. Fever, the debtor. Mr. Mushtaq confirmed that, although the Applicant considers each case on its own merits, the general position for marketing repossessed and advised that it is the Applicant's view that vacant possession is required to obtain the best price. He explained that marketing with a tenant is situ limited the market to investors only.

19. Mr. Mushtaq confirmed that the Applicant had made over 60 attempts to persuade Mr. Fever to remedy his default on the mortgage without success and explained that the repossession proceedings was raised as a last resort. He explained that the best possible price was essential to ensure that the maximum amount of the debt is repaid and to minimise negative equity.

20. In cross examination, Mr, Mushtaq stated that he did not if there had been negotiations with Stanley Gold, a possible investor. He stated that he knew that Mr. Fever had other mortgages with the Applicant but did not know if repossessed properties were lying vacant and unsold.

21. Mr. Mushtaq stated that until the properties were in the possession of the Applicant, the Applicant did not negotiate a sale but would consider a negotiated sale after it had possession. He understood that any sale before the Applicant is in possession is for the debtor to negotiate.

Evidence for the Respondents

22. Mr. Rendle gave evidence for the Respondents and explained that they had moved into the Property in October 2020 and has been paying rent to an agency which has now closed its business. He stated that rent due since March 2022 has been kept aside as the Respondents do not know to whom to pay it as they cannot get in touch with Mr. Fever. Mr. Rendle noted that Mr, Fever had stopped paying his mortgage to the Applicant before the he entered into the tenancy with the Respondents.

23. He explained that Mrs Rendle has resided in the Strada area of Edinburgh for thirteen years, that he and his wife are settled in the Property, that they have the care of Mrs. Rendle's son who has special or additional needs and that they also have residential contact with his own son.

24. Mr. Rendle stated that, in spite of their best efforts, he and his wife have been unable to find alternative accommodation in the Strada area. He maintained that many suitable properties lie vacant in the Strada area as Mr. Fever owns them. Mr. Rendle stated that he has tried to purchase the Property without success and that the loss of the right to live in the Property would affect his and his families health and livelihood. Mr, Rendle referred to letters of support lodged by the Respondents which set out that the family require to reside in the locality.
25. Mr. Rendle offered to pay the Applicant an equivalent of the price for the Property and the mortgage payments or more, if he could remain in the Property.
26. Mr. Rendle stated that he knew other families in the same position but only he had tried to fight this matter by contacting local MPs and MSPs and contacting the press.
27. In cross-examination, Mr. Rendle stated that he and his wife had been aware of the possible eviction action since around March 2022. He stated that he considered that he and his wife had sufficient income to afford to buy the Property.
28. In answer to questions from the Tribunal, and with regard to trying to secure alternative accommodation, Mr. Rendle stated that he had made contact with agencies in the Strada, Granton and Pilton areas but availability and price have meant that he and his wife has been unsuccessful in obtaining somewhere suitable. He explained that their joint income is too high for housing association or mid-market rent and the Council are unable to assist other than to arrange temporary accommodation at an excessive cost.
29. Mr. Rendle emphasised the pressing need for his family to be housed locally because of medical and social care support required for his stepson.

Summing up for Applicant.

30. Mr. Young summed up stating that no one had any doubt of the effect of the proceedings on the Respondents who were blameless, however, the Applicant is bound by Section 25 of the 1970 Act which states *“a creditor in a standard security having right to sell the security subjects may exercise that right either by private bargain or by exposure to sale, and in either event it shall be the duty of the creditor to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained.”* Therefore, the Applicant must test the market and the issue of best price is central to what the Applicant must do, Mr. Mushtaq having outlined the Applicant’s approach to this.
31. With reference to the Respondents’ personal position, Mr. Young stated that the Respondents are in a sound financial position.

Summing up for Respondents.

32. Ms. McGourt summed up by reinforcing the evidence of Mr. Rendle and stressing the difficulties the Respondents face in finding suitable affordable housing. She stressed

that the Respondents are fighting back to secure their rights and questioned why there was a reasonableness test if the Applicant was bound to market before selling.

Findings in Fact

1. From the Application, the various written submissions and productions lodged, the CMD and the evidence at the Hearing, the Tribunal made the following findings in fact:-
 - i) There is a private residential tenancy of the Property between the Respondents and Roy Fever;
 - ii) Roy Fever secured an interest-only mortgage on the Property;
 - iii) The Applicant acquired rights in that secured mortgage and its interest is registered in the Land Register for Scotland against the Property;
 - iv) Roy Fever failed to meet the mortgage payments and has incurred a significant debt to the Applicant;
 - v) The Applicant took debt recovery steps against Roy Fever without success;
 - vi) The Applicant raised a calling up action in Edinburgh Sheriff Court and was granted a Decree with a power of sale and ejection;
 - vii) The Applicant carried out the correct statutory process in that calling up action;
 - viii) The Applicant served a competent and valid Notice to Leave on the Respondents in terms of Ground 2 of Schedule 3 to the Act, intention to sell;
 - ix) The Respondents have not vacated the Property;
 - x) The Respondents have had around eighteen months to obtain alternative accommodation;
 - xi) The Applicant intend to sell the Property;
 - xii) The Applicant requires to sell the Property to repay the mortgage;
 - xiii) The Applicant is bound by the 1970 Act to advertise the Property before selling;
 - xiv) The Applicant is bound by the 1970 Act to achieve the best price for the Property;
 - xv) The Applicant is of the view that the best price will be obtained on the open market with vacant possession;
 - xvi) The Respondents have particular housing need in respect of location and house type;
 - xvii) The Respondents have been unable to secure accommodation which meets those particular housing needs at an affordable price and
 - xviii) The Respondents will be given assistance by the local authority but this will be at an increased cost in respect of rent.

Decision and Reasons for Decision

2. The Tribunal had regard to all the information before it and to its Findings in Fact.
3. The Tribunal noted that there was no opposition to the Application in terms of statutory competence and so this was not an issue which required to be addressed.
4. The Tribunal then considered if it could be satisfied that it is reasonable to issue an eviction order on the facts of the Ground 2.

5. The Tribunal had regard to the fact that the Applicant intends to sell the Property to repay the mortgage secured against it and requires vacant possession to do so. The Tribunal noted that when both the mortgage and the tenancy commenced, the Applicant had had an absolute right to terminate it on the proper statutory notice without a reasonableness test.
6. The Tribunal had regard to the fact that the Applicant is bound by the statutory calling up procedure and is bound by Section 25 of the 1970 Act to advertise the Property for sale and to obtain the best price. The Tribunal took the view that the Applicant's approach in marketing with vacant possession to ensure as wide a market as possible is the correct approach to achieve best price. The Tribunal took the view that this a reasonable commercial policy to meet a statutory obligation.
7. The Tribunal considered if the Applicant could be compelled to sell to the Respondents. The Tribunal took the view that there was neither an obligation on the Applicant to do so nor a right to the Respondents to insist on a sale to them.
8. The Tribunal considered if the Applicant could be compelled to retain the Respondents as tenants. The Tribunal took the view that there was neither an obligation on the Applicant to do so nor a right to the Respondents to insist on this. In any event, the Applicant is bound to sell.
9. The Tribunal had regard to the Respondents position. The Tribunal had sympathy and empathy for the Respondents and accepted that the Application has come about through no fault of the Respondents. The Tribunal accepted the difficulties which the Respondents face in trying to obtain secure accommodation which meets their particular housing needs at an affordable price. The Tribunal had regard to statutory protection available to the Respondents in respect of both the Scottish homelessness legislation which obliges the local authority to provide assistance and the Cost of Living (Tenant Protection) Scotland Act 2022 which has put in place an extended period before an eviction Order can be enforced.
10. The Tribunal considered the terms of Ground 2 of Schedule 3 to the Act which states:
“(1)It is an eviction ground that a lender intends to sell the let property. (2)The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if (a)the let property is subject to a heritable security, (b)the creditor under that security is entitled to sell the property, (c) the creditor requires the tenant to leave the property for the purpose of disposing of it with vacant possession and (d)the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.”
11. Having found that the Applicant is bound to market and sell the Property at the best price, having found that the Applicant's approach in respect of vacant possession is the correct one in respect of achieving best price and having found that there are

statutory protections available to the Respondents to protect them from homelessness, the Tribunal was satisfied that it is reasonable to issue an eviction order.

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

02 November 2023
Date