



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) in relation to an application made under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/23/1196

Re: Property at 3 Baron Todd Road, Strathaven, ML10 6GQ (“the Property”)

Parties:

Mr Andrew Kerr and Mrs Susan Kerr, both 8 Threestanes Road, Strathaven, ML10 6DX (“the Applicants”)

Mrs Andrea Bryson, 3 Baron Todd Road, Strathaven, ML10 6GQ (“the Respondent”)

Tribunal Members:

George Clark (Legal Member) and Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be dismissed.

Background

1. By application, dated 7 April 2023 and received by the Tribunal on 14 April 2023, the Applicants sought an Eviction Order against the Respondent under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the Act”). The Ground relied on was Ground 1 of Schedule 3 to the Act, namely that the landlord intends to sell the Property. The application was amended on 26 May 2023 to include Ground 1A, namely that the landlords intend to sell the Property to alleviate financial hardship.
2. The application was accompanied by a partial and unsigned copy of what purported to be a Private Residential Tenancy Agreement between the Parties commencing on 1 February 2022. The rent was stated to be £1,000 per month, but the first payment of rent was not to be made until 1 April 2023. The Applicants also provided a copy of a Notice to Leave dated 9 January 2023 stating that Ground 1 was the reason for the Applicant seeking an Eviction Order and that an application to the Tribunal would not be made

before 4 April 2023. A covering letter also dated 9 January 2023 bore the signature of the Respondent, acknowledging receipt. The Applicant also provided a copy of an Estate Agents' letter of engagement dated 18 May 2023.

3. On 28 August 2023, the Respondent stated in written representations to the Tribunal that the Property had been the family home since 2018 but had been sold by her husband to the Applicants in February 2022, due to an ongoing court action against him, his intention being that it would be conveyed back to him after a short period of time. On 9 January 2023, Mr Kerr had turned up at the Property and had put pressure on her to sign a Notice to Leave. She stated that she had never signed a Tenancy Agreement with the Applicants.
4. On 1 September 2023, the Applicants made written representations to the Tribunal in which they confirmed that the Respondent has not paid any rent. They stated that their fixed-term mortgage over the Property ends in April 2024 and that, if they have not sold it by then, will revert to a Standard Variable Rate mortgage, the interest rate for which is currently 7.24%. Mr Kerr will be 62 in March 2024, and in June 2024, the interest-only mortgage on the Applicants' home will have to be repaid in full, as they will not be in a position to re-mortgage it. Accordingly, they must sell the Property. The situation is all the more concerning as the Respondent is not paying the rent and refuses to engage.
5. On 5 September 2023, in a Decision following on a request by the Respondent for a postponement of the Case Management Discussion scheduled for 3 October 2023, the Tribunal advised that it had concerns that the Property may have been the matrimonial home of the Respondent and her husband. The title stood in his sole name and he conveyed it to Mr and Mrs Kerr. If the Tribunal granted an Eviction Order and it transpired, as was alleged by the Respondent, that there was an agreement in the background that Mr and Mrs Kerr will re-convey the Property to Mr Bryson, there was a risk that the Respondent's rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 might be prejudiced.
6. The Tribunal also advised the Parties that it was not satisfied, from the documents produced thus far, that there is a landlord and tenant relationship between the Parties. The Applicants had not produced a copy of a Tenancy Agreement signed by the Respondent, and the Respondent has not paid any rent. The Tribunal would need to understand why the Tenancy Agreement did not provide for any rent to be paid for 14 months until 1 April 2023, by which time the Notice to Leave had been given.
7. On 25 September 2023, the Applicants provided written representations. They stated that, following a genuine attempt to help the Respondent, her son and her husband, they now found themselves having to apply to the Tribunal. They stated that the Respondent and her husband were being jointly sued in a court action and faced the potential of being made bankrupt and potentially homeless. The sale of the Property had provided them with the funds to settle the court action. The agreement with both the Respondent and her husband

was that the Applicants would purchase the Property in the short-term and that it would be bought back from them, hopefully within 6 months but within no longer than 12 months, following the sale of a piece of land. This would allow the Respondent and her son to stay in the Property. At the time, they understood from both Mr and Mrs Bryson that a divorce settlement was nearing completion and, as a result, the Applicants had not gone through any formalities or sought rental income. It later appeared, however, that the intended divorce settlement was in jeopardy and that the Applicants were now unwittingly caught up in a very lengthy divorce battle. They referred to the situation regarding their mortgage over the Property and over their own home. The money required to pay off the mortgage in their own home was now invested in the Property and hence the need to sell the Property. They added that the Respondent was at liberty to purchase it from them.

8. The Applicants did not agree with the Respondent's assertion that the purpose of the sale by Mr Bryson to them was to remove it as an asset at risk in relation to the court action, which they stressed was against both Mr Bryson and the Respondent. They stated that the Respondent had been fully aware of the arrangement, and that this was evidenced by texts and WhatsApp messages, copies of which they provided to the Tribunal. She was, they said, well aware that the purchase by them was to cover a short period of time.

Case Management Discussion

9. A Case Management Discussion was held by means of a telephone conference call on the morning of 3 October 2023. All Parties were present.
10. The Respondent confirmed that her husband had never lived in the Property, and it was, therefore, agreed that it was not a matrimonial home in terms of the 1981 Act. They had separated before he purchased it in April 2018. He had previously bought a smaller house for the Respondent and her son but had decided that it was not big enough for them, so had purchased the present Property.
11. The Applicants confirmed that they do not own any other rental properties and advised the Tribunal that they had registered as landlords whenever the arrangement regarding the Property was put in place, as they understood themselves to be landlords. They accepted that there had been no specific discussions with the Respondent and/or her husband regarding the terms of a lease, but they had regarded the arrangement as very short-term, with people they regarded as friends. When it became clear that there were issues between the Respondent and her husband which meant that the original arrangement to purchase the Property back from them would not materialise in the short-term, they decided that a formal lease was necessary to enable them to recover their own costs in respect of the Property. They had prepared a Tenancy Agreement and had delivered it to the Respondent, but she had refused to sign it.
12. The Respondent told the Tribunal that her husband had told her that the Property was being sold on a temporary basis but had not at that point told her that the purchasers would be Mr and Mrs Kerr. She declined to confirm whether

she was a joint defender in the court case which had been the reason for the sale to the Applicants. That court action related to a previous sale of a piece of land.

13. The Tribunal advised the Parties that, whilst a number of issues had been clarified at the Case Management Discussion, it was clear that there were significant areas of disagreement as to the facts. In particular, the Applicants were relying heavily on their assertion that the Respondent had been a co-defender in the court action and had been fully aware from the outset of the informal agreement amongst them all regarding the purchase and sale-back of the Property. The Tribunal remained to be persuaded that there is a landlord and tenant relationship between the Parties, and the Hearing would enable the Parties to present any further evidence and to provide any legal argument on this point. Both Parties would also have the opportunity to call witnesses in support of their respective positions.

14. The Tribunal was satisfied from the written submissions that the Applicants intend to sell the Property.

15. The Tribunal issued Directions to the Parties, requiring them:

(a) to provide any further documentary evidence that they wish the Tribunal to consider in relation to the Applicants' contention that the Respondent was aware from the outset of the details of the agreement regarding the sale of the Property to the Applicants and

(b) to provide any further documentary evidence that they wish the Tribunal to consider in relation to the question of whether a landlord and tenant relationship exists between them, together with an outline of any legal argument they intend to put forward on this point and copies of any authorities, including reported cases, to which they intend to refer.

16. On 22 December 2023, the Respondent lodged a copy of a handwritten statement from her mother regarding a meeting between the Respondent and the First-named Applicant of 9 February 2023, the gist of which was that the Respondent had signed a document under duress. She also provided copies of WhatsApp messages between her and her husband in March and April 2023 and of two letters from the Applicants' solicitors to her, dated 7 and 8 November 2023. The first letter advised the Respondent that the Applicants intended to raise the present proceedings, as they had purchased the Property on the understanding that the Respondent and her husband had virtually reached settlement of their divorce action and that "On that basis, they did not enter into a formal lease with you." The second letter advised the Respondent that the Applicants intended raising separate proceedings against her at Hamilton Sheriff Court if she did not, within the next 14 days, agree an arrangement with them regarding the sale of the Property.

17. On 3 January 2024, the Applicants provided a copy of the Heads of Agreement relative to the court case referred to in Paragraphs 12 and 13 of this Decision.

This document clearly shows that the Respondent was a co-defender in that action. They also provided copies of WhatsApp messages between the Parties from 20 December 2022 onwards, including one of 6 January in which the Applicants stated that they had reached the conclusion that they needed to issue a notice to quit. The Applicants also provided a mortgage statement in respect of the mortgage over their own house, indicating that its fixed term will expire on 31 July 2024, and a letter from their lenders regarding the mortgage over the Property which advised them that when their fixed-rate deal ends on 30 April 2024, their monthly payments will increase from £286 to £1,501. The Applicants stated that they are the heritable proprietors of the Property and wish to sell for good reason but are unable to do so as long as the Respondent remains in it, which she does “without right or title to do so. The Respondent is in occupation of the Property without permission.” The Applicant, Mr Kerr, denied that he had pressurised the Respondent to sign a document on 9 January 2023, that document having been an acknowledgement of receipt of the Notice to Leave.

The Hearing

18. A Hearing took place by means of a telephone conference call on the morning of 10 January 2024. The Applicants and the Respondent were all present.
19. The Applicants called as a witness the Respondent’s husband, Mr David Bryson. He confirmed that the Respondent had been a co-defender in the court action referred to in Paragraphs 12 and 13 of this Decision. The legal advice given to them shortly before the case was due to go to proof was that they should endeavour to settle. He had spoken with the Respondent in October/November 2021 about his concerns as to how they would raise the money. In November, the Applicants, who were good friends, had offered to help them out by buying the Property on a short-term basis, to allow Mr Bryson and the Respondent to settle the action and Mrs Bryson to remain in the Property with their son. On 6 January, the Respondent had come to Mr Bryson’s house. She said that she was in agreement with everything. The Applicants had done them a big favour in buying the house, thus enabling settlement of the court action on 4 February 2022. The arrangement was that he would buy the house back in 6-12 months and transfer it to the Respondent in full and final settlement of the divorce. In October 2022, he was in a position to pay it back, but the Respondent had become difficult, and, on 7 December 2022, she said that she was no longer accepting the house in full and final settlement.
20. Mr Bryson confirmed that it was understood that it was going to be a short-term arrangement, with no lease and that there had been no discussion at the outset as to rent.
21. Mr Andrew Kerr then gave evidence. He said that the Applicants understood at the time that the agreement regarding the house was not a standalone one and that it was part of a bigger picture whereby, as part of a divorce settlement, which he understood to be more or less agreed, Mr Bryson would eventually sign over the Property to the Respondent. He accepted that the matters were interlinked, to be completed simultaneously. By October 2022, they were still

quite relaxed, as they believed settlement was close to being achieved. Mr Kerr stressed that the Applicants had done this purely as a favour to help out friends and that they were looking for nothing in return. He said that they had decided in April 2023 that it was all falling apart with no prospect of the divorce matters being settled as they had expected, so drew up a tenancy agreement. He confirmed that the question of the level of rent had not been discussed. It was an attempt to cover their monthly costs.

22. Mrs Susan Kerr then gave evidence, in essence confirming what was in their written submissions. She added that the Respondent has been paying the factors' charges for the Property. The Applicants had bought the Property in good faith and the Respondent had no right or title to be there. The Respondent claimed that she had video evidence of the arrangement between her husband and the Applicants, so she was admitting that she knew about it all along.

23. The Respondent, Mrs Andrea Bryson, then gave evidence. She insisted that she had had no knowledge that the Applicants were the purchasers of the Property until a letter, addressed to them from the property factors, had arrived at the Property. She told the Tribunal that Mr Bryson had told her to pay the factors' bills, along with the Council Tax and utilities bills. It was not the Applicants who had told her to pay the factoring charges. She contended that she had basically been bullied in relation to the settlement of the court action and that the agreement regarding the sale had been entirely between the Applicants and her husband, who had simply told her that nothing would change and that he would pay the mortgage up front, so that the Respondent and her son could live in the Property. When she found out from the letter from the property factors that the Applicants were the purchasers and asked her husband why he had not told her sooner, he had said that they had not wanted it to be public knowledge. There had been a land sale in October 2022, when her husband was to have paid back the Applicants.

24. In cross-examination of Mrs Bryson, Mr Kerr stressed that there had been no question of the Applicants not wanting the transaction to be public knowledge. Their title was recorded in the Land Register and they had also registered as landlords, as well as making the entries in relevant Registers of Interest. He asked the Respondent if she recalled a TEAMS meeting with the family solicitors and receipt of an email of 4 February 2022 regarding the proposed settlement being reasonable. She answered both questions in the negative. Mrs Kerr asked the Respondent if she accepts that the Applicants are the legal owners of the Property and that she is currently living in the Property free of charge. She responded that she accepted that the Applicants are the legal owners.

25. The Tribunal told the Parties that it would have to determine whether a landlord and tenant relationship exists between the Parties as, if its finding is that there is no such legal relationship, the Tribunal has no jurisdiction to hear the application, which would have to be dismissed. That matter would be determined by the Tribunal, but, in the event that it did hold that there is a valid tenancy, the Tribunal would have to decide whether it was reasonable to issue an Eviction Order. The Tribunal had already decided that the Applicants intend

to sell the Property and they had provided evidence to support the statements they had made at The Case Management Discussion regarding the mortgage on their own house and the increase in the monthly payments on their mortgage over the Property from 30 April 2024. The Respondent told the Tribunal that she lives in the Property with her 14-year-old son, who attends a local secondary school. He is receiving counselling as a result of the separation of his parents and the prospect of losing his home and his local friends. The Respondent works locally. The Property has 4 bedrooms.

26. The Parties then left the Hearing and the Tribunal Members considered all the evidence, written and oral, presented to them.

Reasons for Decision

27. The Tribunal had to consider whether there is a Private Residential Tenancy in place between the Parties. The position of the Applicants was that there was a tenancy from February 2022, even though it was April 2023 before they provided the Respondent with a written Tenancy Agreement, which she had refused to sign. They stated that they had registered as landlords and that some payments, namely the factoring fees, were being made by the Respondent. The Respondent insisted that she had signed nothing, and that the arrangement had been made entirely between the Applicants and her husband.

28. The Tribunal noted that there had been no written agreement regarding the sale of the Property to the Applicants or the arrangement whereby the Applicants would be repaid the funds they had made available by purchasing it. There was no evidence presented to suggest that the Applicants had not acted in good faith, in an attempt to help out friends, but their situation has been seriously compromised by the fact that the terms of the deal were not committed to writing.

29. The Tribunal does not accept the Respondent's assertion that she had no knowledge of the arrangements, although she may not have known the identity of the purchasers at the time. The Tribunal's view was that it was inconceivable that she was not consulted and her consent obtained by her solicitors to the Heads of Agreement in relation to the court action referred to in Paragraphs 12 and 13 of this Decision, so she was aware of the need to find £250,000 to settle the case in February 2022. Following the Hearing, the Applicants sent the Tribunal copies of a series of emails from early February 2023, to which they had referred in evidence, all of which concerned the ongoing negotiations between solicitors to settle the Court action and all of which included the Respondent as an addressee.

30. The Tribunal accepted that the Respondent might not have been party to or been told by her husband the full details of the deal he arranged with the Applicants, but in her written submissions of 28 August 2023, she stated that "I was instructed by David Bryson that this was happening in a threatening manner which I have written and video evidence of the so-called deal between both parties David Bryson and Andy & Susan Kerr." Her use of the phrase "this was happening" indicates that she was aware before the sale transaction took

place. The Tribunal was satisfied, on the balance of probabilities, that she was aware that the intention was to release funds to settle the court case, to allow her to remain in the Property with her son and that it would be transferred back later as part of a divorce settlement. She wanted the title to be transferred to her absolutely, but her husband wished the Property to be placed in trust for their son. This became an irreconcilable issue and the Applicants then realised that the deal they thought they had was falling apart.

31. It was at that point that the Applicants began to send messages to the Respondent, beginning on 20 December 2022, expressing their concern about the situation and advising her that they intended to sell the Property. On 9 January 2023, Mr Kerr delivered a Notice to Leave and obtained the Respondent's signature by way of acknowledgement and in April 2023, the Applicants endeavoured, unsuccessfully, to set up a written Private Residential Tenancy Agreement.
32. The Tribunal considered very carefully all the evidence presented by both Parties. It had sympathy for the position in which Mr and Mrs Kerr had found themselves, but decided that the Parties had not in fact entered into a tenancy agreement. Mr Bryson had stated in evidence that it was intended to be a short-term arrangement with no lease and that there had been no discussion at the outset as to the rent to be charged. The Applicants stated in evidence that rent was not discussed before they drew up the tenancy agreement. There does not appear to have been any discussion with the Respondent at any time regarding the terms of any proposed lease.
33. A tenancy agreement is a contract and, as such, requires *consensus in idem*. In other words, the parties have to be in agreement as to its terms. The principal terms of a valid lease are agreement as to the parties, the subjects let and, crucially, the rent to be paid. In the absence of any of these, there is no contract. No evidence was led to indicate that anybody suggested a lease to the Respondent before the sale of the Property to the Applicants or before Mr Kerr delivered a Notice to Leave on 9 January 2023 and, when they produced a Tenancy Agreement for her to sign, there had been no discussion about rent or duration. This, combined with the fact that the Respondent refused to sign it, clearly indicates that there was no *consensus in idem* and, therefore, no contract between the Parties. The Tribunal's view was fortified by the statement of the Applicants in their submissions of 3 January 2024 that the Respondent remained in the Property "without right or title to do so. The Respondent is in occupation of the Property without permission." That is entirely inconsistent with the assertion that the Respondent is their tenant. The Applicants had pointed out, in support of their argument that a verbal lease was in place from February 2022 and that the Respondent had been paying the factors' fees, but the Tribunal accepted the evidence of the Respondent that it had been her husband, not the Applicants, who had told her to pay the factoring fees. In any event, the written Tenancy Agreement that they asked her to sign did not require her to pay them, so the written agreement did not reflect the verbal agreement on which the Applicants sought to found.
34. The Tribunal makes no comment on the status of the Respondent's ongoing

residence in the Property, other than that it is not as a tenant. That is a matter that may have to be referred to a sheriff in the event that the Applicants wish to seek alternative redress.

35. Having decided that there is no Tenancy Agreement between the Parties, the Tribunal has no jurisdiction to hear an application for an Eviction Order under Section 51 of the Act. The application is, therefore, dismissed.

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.

George Clark

Legal Member/Chair

10 January 2024
Date