



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) 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 Regulations”)

Chamber Ref: FTS/HPC/EV/23/2039

Re: Property at 5 Whinhill Road, Banff, AB45 1BX (“the Property”)

Parties:

Mrs Margaret Mair, 6 Meadowview Place, Turriff, AB53 4WL (“the Applicant”)

Mr Paul Smith, 5 Whinhill Road, Banff, AB45 1BX (“the Respondent”)

Tribunal Members:

Nicola Weir (Legal Member) and Tony Cain (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for recovery of possession of the property be granted.

Background

1. The application submitted on 20 June 2023, subsequently amended, sought an eviction order against the Respondent on the grounds of breach of the tenancy agreement (Ground 11 of the 2016 Act). The breach of tenancy claimed was primarily to do with the condition of the Property (clause 40) but the application also referred to other alleged breaches, namely an alleged failure by the Respondent to notify the Applicant promptly of damage to the Property (clause 37) and to seek permission from the Applicant to have any guest staying at the Property for a period of more than 7 days (clause 3), as well as rent arrears. Supporting documentation was lodged with the application, including a copy of the tenancy agreement, the Notice to Leave and proof of posting of same and the Section 11 Notice to the local authority.

2. A Notice of Acceptance was subsequently issued in respect of the application together with a Direction requesting evidence from the Applicant regarding the condition of the Property, in support of the eviction ground claimed. The Applicant's representative subsequently lodged in response to the Direction some photographs stated to show damage to the wallpaper, flooring and garden gate and the Respondent's failure to maintain the garden area.
3. No representations or other communications were received from or on behalf of the Respondent prior to the Case Management Discussion ("CMD").

Case Management Discussion

4. The Case Management Discussion ("CMD") took place by telephone conference call on 2 November 2023 at 10am and was attended by the Applicant, her legal representative, Mr Alan Duffil of Stewart & Watson solicitors and by the Respondent. Mr David Stewart of Aberdeenshire Council also joined the call and stated that he was attending in a supportive capacity on behalf of the Respondent, as he has been assisting the Respondent in recent months, initially in connection with financial issues, and later in respect of housing issues.
5. On behalf of the Applicant, Mr Duffil summarised the application and the reason for the eviction order sought. The Respondent confirmed that he was opposed to the application being granted and explained his position in respect of the various breaches of the tenancy conditions alleged by the Applicant. The Applicant also responded to some of the points made by the Respondent.
6. As there were several issues in dispute between the parties, both in respect of whether there have been breaches of the tenancy conditions by the Respondent and regarding the condition of the Property and in relation to the reasonableness or otherwise of an eviction order being granted, the Tribunal decided that an Evidential Hearing should be fixed. It also appeared to the Tribunal that further clarification of certain aspects of the case may be required, particularly from the Applicant or further evidence lodged in support of some of the breaches of tenancy claimed. It was confirmed that a Direction would therefore be issued specifying further information or evidence required, as well as requirements and timescales for the lodging of any further documentary evidence and concerning arrangements for any witnesses to attend the Evidential Hearing on behalf of the parties. It was decided that it was appropriate for the Evidential Hearing to take place by video conference. Parties were also asked to notify the Tribunal in due course should there be any changes in their positions regarding this application (or aspects of it) or if there were any other relevant developments.

Direction

7. Following the CMD, the Tribunal issued a Direction to parties in the following terms:-

“The Applicant and Respondent are required to provide:-

- 1) Photographs showing the condition of the interior and garden ground of the property at the commencement of the tenancy (if any), together with photographs showing all areas of the interior of the property which the Applicant claims have been damaged or not properly maintained by the Respondent and photographs showing the current condition of the garden ground;*
- 2) Any documentation or other evidence that the parties would wish the Tribunal to take into account when considering whether it is reasonable to grant an eviction order in respect of this application;*
- 3) A list of any other documentation upon which the parties wish to rely; together with numbered copies of any such documents; and*
- 4) A list of any witnesses that the parties intend to call to give evidence on their behalf at the Evidential Hearing fixed in respect of this application, and to make arrangements for the attendance at the Hearing of any such witnesses.*

The Applicant is also required to provide:

- 5) Any documentary evidence of the Applicant having notified the Respondent of the alleged breaches of his tenancy prior to the Tribunal application being submitted, such as letters, emails or screenshots of text messages;*
- 6) Written representations clarifying the basis for the Applicant’s claim that the Respondent is responsible for the upkeep of the garden ground and the damage to the garden gate, making reference to any applicable clauses in the tenancy agreement;*
- 7) Written representations clarifying the Applicant’s maintenance obligations in respect of the garden ground and garden gate at the property, in particular, whether said obligations are shared with a neighbouring proprietor(s), with reference to any relevant title conditions.*
- 8) The said documentation should be lodged with the Tribunal no later than 14 days prior to the Evidential Hearing.”*

Further Procedure

8. By letter dated 27 November 2023, the Applicant’s representative lodged 9 photographs stated to show the condition of the Property at the beginning of the tenancy. On 25 January 2024, the Applicant’s representative lodged a copy of Land Certificate BNF 2065 in respect of the Property, together with a

covering letter explaining the maintenance obligations therein in respect of the garden ground.

Evidential Hearing

9. The Evidential Hearing took place by video-conference call on 8 February 2024, commencing at 10am. In attendance were the Applicant, her legal representative, Mr Alan Duffil of Stewart & Watson solicitors and the Respondent who was accompanied again by Mr David Stewart of Aberdeenshire Council, in a supportive capacity only.

10. Following introduction and introductory comments by the Legal Member, it was established that both parties were maintaining their positions and wished to proceed with the Evidential Hearing. Neither party had any witnesses. There was discussion regarding the further photographs and documentation lodged on behalf of the Applicant, in partial compliance with the Direction and the Respondent confirmed he had received copies of same. The Applicant's representative confirmed that the Applicant had not provided him with any documentary evidence in respect of paragraph 5) of the Direction, namely any prior notification in writing to the Respondent regarding his alleged breaches of the tenancy conditions, nor any photographs showing the current condition of the Property. The Respondent was asked why he had not provided any photographs in support of his position, to which he responded that he had not had time.

11. Evidence of Applicant

The Applicant's representative took the Applicant, Mrs Margaret Mair, through her evidence. She also answered some questions from the Tribunal Members. She was referred to the tenancy agreement, with particular reference being made to Clauses 3 and 4, 5, 37 and 40 and confirmed that it had been signed by both parties in October 2022. These clauses are as follows:-

"3. No guests of the Tenant may occupy the Property for longer than one week without the prior written consent of the Landlord."

"4. If a person aged 16 or older, other than the Tenant or an occupant named in this Agreement, occupies the Property as that person's principle home, the Tenant will inform the Landlord in writing of that person's name and relation to the Tenant....."

"5. No pets or animals are allowed to be kept in or about the Property without the prior written permission of the Landlord. Upon thirty (30) days' notice, the Landlord may revoke any consent previously given pursuant to this clause."

"37. The Tenant will promptly notify the Landlord of any damage, or of any situation that may significantly interfere with the normal use of the Property."

"40. The Tenant will keep the property in good repair and condition and in good decorative order. The tenant will maintain and clean the stairs and other

common parts of the building in conjunction with the neighbouring proprietors, tenants and residents.”

In respect of clauses 3 and 4, Mrs Mair stated that Mr Smith had said that it was just him who would be living at the property. She was not told, and nor did she give permission for his partner to live there. She thought initially that his partner was just there sometimes and did not realise that she was there all the time until later. She did not have any communication with Mr Smith regarding this as their relationship had broken down. In response to questions from Tribunal Members, Mrs Mair stated that Mr Smith had told her previously, one of the times when she was at the property, that his partner was living there. She stated that her sister-in-law, who lives nearby, had also confirmed this, although Mrs Mair conceded that her sister-in-law had told her this around August/September 2023, once these proceedings were already ongoing.

As to clause 5, Mrs Mair confirmed that she was aware that Mr Smith had a cat and had agreed to this.

In respect of the damage clauses, Mrs Mair was referred to the photographs lodged showing the condition of the property when Mr Smith moved in. She confirmed that these photographs were taken in the weeks beforehand and that the property condition had been immaculate. The property had been empty for a couple of months after the previous tenant had moved out. The previous tenant was there for around one year and the property had been decorated before the previous tenant. However, the vinyl had all been replaced just before Mr Smith moved in. Mrs Mair was referred to the photograph showing the vinyl on the kitchen floor and she described how it had a split in it which Mr Smith accepted and had confirmed he had tried to stick down with glue to repair it. Mrs Mair was also referred to the photograph showing a section of kitchen wall. She confirmed that this damage had occurred in the course of the tenancy and that Mr Smith had said that his cat had done this. Mrs Mair was referred to another photograph of the interior and she stated that this showed bags of rubbish and general untidiness, whereas the property had been pristine before, as shown in the earlier photographs.

Reference was then made to the photographs showing the exterior or the property. In relation to the broken garden gate shown, Mrs Mair stated that if this had been caused by storm damage as Mr Smith had indicated, then she accepted that this was not his responsibility. However, he had not reported the damage to her which was a breach of clause 37 of the tenancy. Mrs Mair explained that the photographs showed how the garden was untidy and overgrown. She confirmed that, in terms of the property title, the garden ground at the back was shared with the upstairs neighbour, the side garden was the responsibility of the upstairs neighbour and the front garden was her sole responsibility. She conceded that the tenancy conditions did not mention anything about the tenant being responsible for garden maintenance and also that she had informed Mr Smith that she had a gardener employed to cut the grass. However, Mrs Mair said it was a verbal understanding between herself and Mr Smith that he would keep the garden otherwise tidy by weeding, etc.

She further explained that her gardener had let her down, so the grass did not get cut. Mrs Mair confirmed that the photographs referred to had been taken last year. She had not taken any photographs since. She had driven past the property in recent weeks but had not noticed what the condition of the garden was. She had, however, noticed that Mr Smith had put some kind of sticker on the front door, which he was not authorised to do.

Mrs Mair was then asked about the process leading up to her serving the Notice to Leave on Mr Smith. Reference was made to the copy Notice to Leave lodged with the Tribunal. She confirmed that she had served the notice on the basis of what she had seen at the property and that Mr Smith was not keeping it in good condition. The ground referred to in the Notice to Leave was breach of a tenancy condition (Ground 11). She confirmed that the copy Notice lodged is not signed and dated as this was just a copy and that she would definitely have signed and dated the one she sent to Mr Smith. She was referred to the postal receipts lodged which showed that she posted the Notice on 29 April 2023 and it was delivered by Royal Mail on 2 May 2023. The date stated in the Notice as the earliest date an application could be lodged with the Tribunal was 30 May 2023. It was confirmed that the Tribunal application was lodged on 20 June 2023. Mrs Mair stated that she had carried out an inspection of the property around a week to 10 days before she served the Notice to Leave. She had not known that she was allowed to take photographs but confirmed that it was at that inspection that she had noticed the various issues with the condition of the house, the damaged items and the smell from Mr Smith's cat. Mrs Mair explained that, after she had served Notice, she had sought legal advice and that it was her solicitor, Mr Duffil, who had advised her that she was entitled to take photographs. She later attended again at the property when she took the various photographs referred to above. She and Mr Smith did not discuss matters on this occasion but Mrs Mair said he knew she was not happy at what she had seen at the first inspection. Mrs Mair confirmed that no rent had been paid by Mr Smith since April 2023 and that there are now high rent arrears. She did not proceed with a rent arrears eviction because it was only after she had served the Notice to Leave that the rent arrears arose. Mrs Mair confirmed that she does not know anything about Mr Smith's financial circumstances but stated that it had been Mr Smith's boss that had initially paid his rent and deposit. She confirmed that, although Mr Smith's partner is also living at the property, she is not paying anything towards rent either. Mrs Mair stated that she considers it reasonable that she should be able to recover the property due to Mr Smith's breaches of the tenancy agreement. As far as she is aware, Mr Smith has not done anything to rectify the damage caused or the condition of the property. The arrears are also causing her financial hardship. No rent has been paid for nearly a year. She does not have a mortgage over the property and this is the only property she lets out. She intends to sell this property when she recovers it, rather than let it out again. Mrs Mair confirmed that the deposit paid at the outset of the tenancy was £425 and that she would be able to set this against the costs of rectification of the property. She does not know how much rectification would cost.

Mr Smith stated that he did not wish to ask Mrs Mair any questions.

Mrs Mair was then asked some further questions by Mr Duffil in re-examination. She reiterated that she had not really had discussions with Mr Smith regarding the condition of the property but that she had said to him that she was not happy about the damage to the kitchen wallpaper and vinyl when she first inspected. She confirmed that the décor and vinyl was in good order at the commencement of Mr Smith's tenancy. She said that she thought it would cost more than the £425 deposit to fix the issues with the condition of the property.

12. Following the conclusion of Mrs Mair's evidence, the Tribunal adjourned briefly for a comfort break. On re-convening, the Respondent, Mr Paul Smith, was invited to give his evidence. He then indicated that he did not now wish to give evidence on his own behalf and stated that he has issues with his mental health. The Legal Member asked him for clarification as to whether he is still wishing to oppose the application for eviction and suggested a brief adjournment in order that he could discuss matters with his support worker, Mr Stewart. Mr Smith agreed to do so and the Tribunal briefly adjourned to allow this discussion to take place. On re-convening, Mr Smith confirmed that he was now consenting to the eviction order being granted but was happy to answer any questions.

13. Evidence of Respondent

Mr Smith confirmed that he is 26 years old and not working currently. He has been signed off work since around March or April last year, due to his mental health issues. He used to work in construction. He is in receipt of Universal Credit and accepts that he has not been paying his rent. He is getting help from his GP and is being supported by Mr Stewart, who works for his local authority. He has been given advice relating to his housing situation from Mr Stewart and has made application for local authority housing. The Ordinary Member asked him what his preferred outcome would be in relation to the Tribunal proceedings. Mr Smith confirmed that he would prefer the order to be granted as he would prefer to move into local authority housing. As to the current condition of the property, Mr Smith confirmed that it is not immaculate but that the upstairs neighbour has been involved and the garden is now tidy. He reiterated that he does not want to challenge the evidence heard from Mrs Mair.

Mr Duffil had no questions for Mr Smith.

14. Summing-up

Mr Duffil requested that the eviction order be granted. There had been breaches of the tenancy conditions by Mr Smith. Mr Smith had referred to his mental health issues and had stated that it was his preferred option for an order to be granted. Mr Duffil stated that it was reasonable for the Tribunal to do so. He confirmed that the rent arrears now amount to around £4,000 and, although there is a deposit that the Applicant can recover at the end of the tenancy, it is unlikely that it would cover the costs of the necessary repairs, such as wallpapering, let alone the rent arrears. The current situation is already impacting on Mrs Mair's finances and, if an order is not granted, this will worsen in the immediate future. On the other hand, Mr Smith and his girlfriend are both

living in the property and could be contributing towards rent but they are not doing so. Mr Duffil submitted that it was credible for the landlord to expect the tenant to keep the garden tidy. It was apparent that Mrs Mair was concerned about the condition of the property deteriorating and that the rent was not in arrears at the relevant time, and this was why this ground was chosen. Mr Smith had also made it clear that a local authority house would now be a better fit for himself.

Mr Smith did not wish to add anything in summing up.

15. The Tribunal adjourned to discuss the application and, on re-convening, the Legal Member advised that the Tribunal required to consider matters further and would intimate their decision to parties in writing in due course.

Findings in Fact

1. The Applicant is the owner and landlord of the Property.
2. The Respondent is the tenant of the Property by virtue of a Private Residential Tenancy which commenced on 7 October 2022.
3. The Respondent is still in occupation.
4. The Applicant inspected the Property in or around March or April 2023 and noted that the condition of the Property had deteriorated since the commencement of the tenancy.
5. A Notice to Leave in proper form and giving the requisite period of notice (28 days) was served on the Respondent by Recorded Delivery/'signed for' post on 2 May 2023.
6. The date specified in the Notice to Leave as the earliest date the eviction Application could be lodged with the Tribunal was specified as 30 May 2023.
7. The Tribunal Application was submitted on 12 June 2023.
8. The Respondent was in breach of tenancy clause 37 in that he had not promptly notified the Applicant of damage to the Property, namely storm damage to the garden gate and damage to the wallpaper and vinyl flooring in the kitchen.
9. The Respondent was in breach of tenancy clause 40 in that he did not keep the Property in good repair and condition and in good decorative order in that he had damaged and not rectified the wallpaper and vinyl flooring in the kitchen.
10. The Respondent had not paid any rent in respect of the Property since April 2023.
11. The monthly rent is £425 and rent arrears now amount to around £4,000.

12. The rent arrears are impacting negatively on the Applicant's finances, such that she now intends to sell the Property when she recovers possession.
13. The Respondent has mental health issues and has been unable to work since in or around March or April 2023.
14. The Respondent is in receipt of Universal Credit.
15. The Respondent has support from the local authority in relation to his housing situation and has applied for local authority housing.
16. The Respondent did not give evidence to counter the Applicant's evidence as to the condition of the Property or his alleged breaches of tenancy.
17. The Respondent is no longer opposed to an eviction order being granted.

Reasons for Decision

1. The Tribunal gave careful consideration to all of the background papers including the application and supporting documentation, the photographs produced on behalf of the Applicant and the oral evidence of the parties at the Evidential Hearing.
2. The Tribunal found that the application was in order, that a Notice to Leave in proper form and giving the correct period of notice had been served on the Respondent and that the application was made timeously to the Tribunal, all in terms of the tenancy agreement and the relevant provisions of the 2016 Act.
3. The Tribunal considered that the ground of eviction, that the tenant had breached a term(s) of his tenancy agreement (Ground 11 of Schedule 3 to the 2016 Act, as amended) was satisfied in that the Respondent had breached clauses 37 and 40 of the tenancy agreement. The Tribunal was satisfied from the evidence of the Applicant, substantiated by the photographs lodged on her behalf, that the garden gate had been damaged and the Respondent had not promptly reported this to the Applicant (albeit that it was accepted by the Applicant that the damage may not have been caused by the Respondent). The Tribunal was also similarly satisfied that there had been a deterioration in the condition of the Property between the commencement of the tenancy in October 2022 and the Applicant inspecting the Property in March/April 2023. In particular, the Tribunal accepted that damage had occurred to the wallpaper and vinyl flooring in the kitchen and that the Respondent was responsible for this. The Tribunal did not consider that there was sufficient evidence presented by or on behalf of the Applicant regarding the alleged failure of the Respondent to upkeep the garden ground of the Property nor in respect of his partner residing with him at the Property without the Applicant's consent, to constitute breaches of clauses 3, 4 or 40 of the tenancy agreement.

4. As to reasonableness, the Tribunal was of the view that, had the Respondent continued to oppose the application, the issue of reasonableness would have been more finely balanced here. The Tribunal considered that, whilst there had been some breaches by the Respondent of the tenancy conditions established, the breaches were not particularly serious and considered that the Applicant should perhaps have sought to engage more with the Respondent in an effort to resolve issues prior to serving notice. On the other hand, the Tribunal noted that the Respondent had stopped paying rent around April 2023, around the same time notice was served by the Applicant, resulting in arrears now amounting to around £4,000. Although the Respondent had explained his mental health difficulties and the impact that this had had on his ability to work and pay rent, the Tribunal noted that he was in receipt of Universal Credit and presumably could have made some ongoing payments towards the rent during the intervening period, even of a limited amount. Although the rent arrears were not part of the ground for eviction, the Tribunal did consider the amount of arrears and time during which no rent had been paid to be a relevant factor in favour of granting the order, in terms of the Tribunal's consideration of reasonableness. In any event, given that the Respondent changed his position in the course of the Evidential Hearing and indicated that he no longer wished to oppose the application, the Tribunal considered that this had a significant bearing on its assessment of reasonableness. The Tribunal was initially concerned that the Respondent cited his mental health difficulties as the reason for his change in position. However, having given the Respondent an opportunity to seek advice from his support worker who was supporting him throughout the Evidential Hearing and the Respondent having done so, the Tribunal was satisfied that the Respondent had considered his position and understood what he was doing. In particular, the Tribunal noted that, having spoken to his support worker (who is from the local authority) the Respondent specifically stated that it was his preferred option for an eviction order to be granted as he now wished to move into local authority accommodation, which he had already applied for. Accordingly, the Tribunal determined that, in all these circumstances, it was reasonable to grant the eviction order sought by the Applicant.

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.

N Weir

Legal Member/Chair

24 February 2024
Date