



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 in terms of Rule 109 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Chamber Ref: FTS/HPC/EV/23/3625

Re: Property at 8 Urquhart Close, Invergordon, IV18 0QB (“the Property”)

Parties:

Mr Robert Mackay, 4 Stratherrick Park, Inverness, IV2 4JS (“the Applicant”) per his agents, Ledingham Chalmers LLP Kintail House, Beechwood Business Park, I, Inverness, IV2 3BW (“the Applicant’s Agents”)

Mr David Vermaak, 8 Urquhart Close, Invergordon, IV18 0QB (“the Respondent”)

Tribunal Member:

Karen Moore (Legal Member) and Mary Lyden (Ordinary Member)

Decision.

The Tribunal, having found the Ground for eviction had been met and being satisfied that it is reasonable to grant the Order, grants the Application and makes an Order for eviction.

Background

1. By application received between 12 October 2023 and 26 October 2023 (“the Application”), the Applicant’s Agents applied to the Tribunal for an Order for eviction and possession of the Property based on Ground 1 of Schedule 3 to the 2016 Act. The Application was accepted by the Tribunal Chamber and a Case Management Discussion (the “CMD”) took place on 29 February 2024 at 14.00 by telephone conference.

2. The outcome of the CMD was that a Hearing of evidence was fixed in respect of:
 - i) Intention to sell. What steps has the Applicant taken to sell the Property following the lapse of the Scottish Government Offer? Does the Scottish Government have an ownership interest or is it restricted to a share of the equity in the Property? What is the Scottish Government's power, if any, to insist that the Property is sold with vacant possession?
 - ii) Intention to sell to alleviate financial hardship. What is the extent of the Applicant's financial hardship?
 - iii) Rent due and unpaid. What sums have been paid in rent, to whom were these paid and on what dates? Were demands for rent made by the Applicant? To what extent were the pre-action requirements met in respect of the rent claimed as due and owing? What is the current extent of rent due?
 - iv) Reasonableness. What facts and circumstances do the Parties wish the Tribunal to take into account in reaching a decision on reasonableness?

3. The Tribunal issued a Direction in respect of the evidence required at the Hearing. The Parties complied with the Direction and submitted documentary evidence and further submissions supporting their positions.

Hearing

4. The Hearing took place on 19 July 2024 at 10.00 by telephone conference call. The Applicant, Mr. Mackay was not present and was represented by Ms. V. Leslie of the Applicant's Agents. Mr. Vermaak, the Respondent, was present and was not represented.

5. Prior to the start of the Hearing, the Tribunal confirmed with the Parties that they were content to proceed with the Hearing in the absence of Mr. Mackay and to treat his written statement of 4 July 2024 as his evidence. The Parties confirmed their agreement.

6. Also, prior to the start of the Hearing, the Tribunal also confirmed with Ms. Leslie that the Application was proceeding on Ground 1, landlord's intention to sell, only and confirmed with the Parties that there was no opposition to or dispute of the Applicant's intention to sell the Property. The Parties confirmed their agreement.

7. There was a brief adjournment to ensure that the Parties had all of the submissions and documents lodged.

8. The Tribunal then heard evidence with the Parties being given an opportunity to cross examine and the Tribunal members also asking questions of them.

Evidence for the Applicant

9. Ms. Leslie set out four strands to Mr. Mackay's position.
10. Firstly, she explained that the Property was owned by Mr. Mackay alone and had been financed in part with assistance from the Scottish Government by way of a shared equity agreement. With reference to the Minute of Agreement with the Scottish Government, she explained that not only was Mr. Mackay entitled to sell the Property, he was contractually obliged and bound to sell it. Ms. Leslie advised that after Mr. Mackay and his wife separated, Mrs. Mackay left that Property and had entered into a tenancy arrangement with Mr. Vermaak, all without Mr. Mackay's knowledge. Ms. Leslie explained that the terms of the Scottish Government shared equity agreement are such that the Property should be the main home of Mr. Mackay's wife or himself and that it cannot be rented to a third party. Accordingly, Mr. Mackay is in breach of the agreement and the breach triggers a payment event requiring payment of the Scottish Government's share of the equity. Therefore, Mr. Mackay must sell the Property to make the payment. Ms. Leslie stated further that the Property must be sold on the open market and with vacant possession to achieve the best price.
11. Secondly, Ms. Leslie stated that Mr. Mackay had a pressing financial need to sell. With reference to the productions and to Mr. Mackay's statement, Ms. Leslie explained that there is a mortgage secured against the Property and that Mr. Mackay relied on the rental income to meet the mortgage repayments. She pointed out that Mr. Vermaak has not paid rent since February 2023 and that Mr. Mackay has had to meet the costs out of his own pocket. He has not been able to do so fully and has had to arrange a reduced payment with his lender, leaving him with around £7,000.00 in mortgage arrears and under threat of repossession. Ms. Leslie stated that Mr. Mackay has had to change job to a lower paid job to support and care for his terminally ill mother. Further, he has a contractual obligation to make payment of a lump sum to his wife as part of their separation agreement. Ms. Leslie explained that Mr. Mackay has rent of £600.00 per month, council tax, utility outlays and general living costs and is in a dire financial position which will only worsen if Mr. Vermaak continues to reside in the Property and continues to fail to pay rent. She explained that the burden on Mr. Mackay is that he cannot move on and try to purchase a home for himself.
12. Thirdly, Ms. Leslie stated that Mr. Mackay has not been able to access the Property to assess its condition and to assess if work is required to achieve the best price. With reference to the productions, she stated that

Mr. Vermaak's complaints of a broken window and a faulty heating pump were not made known to Mr. Mackay until January 2023 and that no clear indication of the nature of the heating pump fault was given. Ms. Leslie stated that Mr. Mackay's concern was that he had no idea of the condition of the Property in respect of disrepair and so had no idea of the effect of any disrepair on its value.

13. Ms. Leslie's fourth point led on from the repairs issue as the longer that Mr. Vermaak remained in the Property without allowing access for repairs, the greater the potential for the Property to drop in value due to disrepair.

14. In respect of general matters. Ms. Leslie noted that, although Mr. Vermaak's written representations stated that he and his family required a five bedroom property, the Property has three bedrooms, one of which Mr. Vermaak uses for storage. Ms. Leslie pointed out that Mr. Vermaak's written representations stated that he was paying a monthly storage bill and stressed that this was not a matter related to the tenancy or an obligation on Mr. Mackay.

Evidence for the Respondent.

15. In his evidence, Mr. Vermaak stressed that he did not oppose Mr. Mackay's intention or entitlement to sell the Property but simply and had no suitable alternative accommodation for his family. Mr. Vermaak accepted that he had not paid rent since February 2023 and accepted that, although he stated he was withholding rent due to the heating pump fault, he was not holding the rents aside for Mr. Mackay. He stated that he did not fully oppose the Application as he was aware that he and his family would have to remove from the Property but stated that he had no alternative accommodation and did not want to be homeless.

16. With regard to his personal circumstances, as noted in the written representations, Mr. Vermaak confirmed that he resides with his wife, her parents who are in poor health and his four children. He advised that he is the only income earner. Mr. Vermaak explained that his family and he moved from South Africa to the United Kingdom in 2017 on ancestral visas for Mr. Vermaak to take up key post as a senior procurement officer with the NHS. Mrs. Vermaak is not entitled to work and home-schools their children. Mr. Vermaak's in-laws have a small pension credit and the family is not entitled to any further benefits or state assistance. Mr. Vermaak confirmed that he has been seeking private sector rented accommodation but cannot afford the deposit or rents on the size and type of properties required for his family. He explained that the local authority has not been able to assist with a suitable property. In addition to the arrears of rent, Mr. Vermaak stated that he has a

considerable amount of personal debt and has had to resort to pay day loans. He advised that his family is hopeful that an ongoing application to the Home Office for residency will be decided favourably in early course.

Findings in Fact

17. From all of the information before it, the CMDs and the Hearing, the Tribunal made the following findings in fact: -

- i) There is a private residential tenancy of the Property between the Parties which began around January 2023;
- ii) A valid Notice to Leave was issued by the Applicant to the Respondent;
- iii) The Respondent has not paid rent since February 2023 and has accrued rent arrears in excess of £12,000.00;
- iv) The Property is subject to a secured mortgage;
- v) The Applicant relies on regular payment of the full rent to finance the mortgage on the Property;
- vi) The Applicant is in mortgage arrears of around £7,000.00;
- vii) The Property is subject to a shared equity Minute of Agreement with the Scottish Government;
- viii) The Applicant is in breach of the Minute of Agreement which has triggered an obligation to sell the Property and to pay the Scottish Government its share of the equity in the Property;
- ix) The Applicant is entitled to sell the Property and intends to sell the Property when vacant possession is obtained to remedy the breach of his obligations to the Scottish Government;
- x) The Applicant has further financial commitments and obligations;
- xi) The Applicant requires to sell the Property to meet these further financial commitments and obligations;
- xii) The Applicant intends to sell the Property at the earliest opportunity;
- xiii) The Respondent reported repairs at the Property to the Applicant;
- xiv) The Applicant has been unable to gain access to attend the Property to investigate the repairs;
- xv) The Respondent asked the Applicant to reduce the rent because of the required repairs;
- xvi) The Applicant declined to reduce the rent;
- xvii) The Respondent resides at the Property with his wife, her parents and their four school aged children;
- xviii) The Respondent's in-laws are elderly and have health issues;
- xix) The Respondent's wife is unable to work due to visa restrictions;
- xx) In addition to the rent arrears, the Respondent has personal debts and financial commitments which he cannot meet;
- xxi) The Respondent and his family are not entitled to state benefit or assistance;

- xxii) The Respondent has been unable to secure suitable alternative accommodation for his extended family.

Issue for the Tribunal

18. The issue for the Tribunal was whether or not it should grant an Order for eviction in terms of Ground 1 of Schedule 3 to the Act as set out in the Application. Ground 1 of Schedule 3 to the Act states “(1) *It is an eviction ground that the landlord intends to sell the let property. (2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if the landlord (a) is entitled to sell the let property, (b) intends to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it and (c) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.*”

Decision and Reasons for Decision

19. The Tribunal had regard to all the information before it and to its Findings in Fact.

20. Having found that the Applicant is entitled to sell the Property and intends to sell the Property, the Tribunal found that the eviction Ground has been met.

21. The Tribunal then considered if it is reasonable to grant the Order.

22. The Tribunal first considered the Respondent’s position that he is entitled to withhold rent or is entitled to a reduced rent. The Tribunal had no evidence that the Property or parts of the Property are in a state of disrepair to justify rent being withheld or justifying an abatement of rent. The Tribunal had no evidence that the Applicant had refused or had unreasonably delayed to carry out repairs notified by the Respondent. Therefore, the Tribunal was not satisfied that the Respondent was entitled to withhold rent or to an abatement of rent.

23. The Tribunal then had regard to the circumstances of the Parties.

24. The Tribunal must establish, consider and properly weigh the “whole of the circumstances in which the application is made” (Barclay v Hannah 1947 S.C. 245 at 249 per Lord Moncrieff) when deciding whether it is reasonable to grant an order for possession.

25. The Tribunal then looked to balance the rights and interests of both parties.

26. The Tribunal accepted that the Applicant is not a professional landlord and only became a landlord because of the actions taken by his wife without his knowledge or consent. The Tribunal accepted that the Applicant is in breach of a binding shared equity agreement with the Scottish Government and that the Scottish Government is entitled to enforce the agreement and to force the Applicant to sell the Property. The Tribunal took the view that the Applicant is under a clear obligation to sell the Property.
27. The Tribunal then had regard to the level of rent arrears, to the fact that the Respondent has not paid rent since February 2023 and to the fact that the Respondent is not entitled to any state benefits to assist with payment of the rent. The Tribunal accepted that the Respondent's failure to pay rent has placed the Applicant in a precarious position with his mortgage lender due to mortgage arrears. The Tribunal took the view that the rental position is untenable for both Parties and is not likely to improve.
28. The Tribunal accepted that the Applicant is in further personal financial difficulties which are insurmountable without the sale of the Property.
29. With regard to the Respondent's position in respect of not being able to secure suitable accommodation, medical issues and difficult financial circumstances and had great sympathy for him and his family. The Tribunal noted that the Respondent accepts that he and his family cannot remain in the Property and that it appears that he cannot afford to remain in the Property. The Tribunal had regard to the fact that, if evicted and made homeless, the Respondent and his family would be entitled to make an application to the local authority for assistance in terms of Part II of the Housing (Scotland) Act 1987 and so would be likely to be eligible to access accommodation suitable for their needs.
30. On balance, the Tribunal took the view that not granting the Order would have a significantly greater detrimental impact on the Applicant as it would place him, not just in further financial difficulty, but in risk of legal proceedings by the Scottish Government and his mortgage lender, than it would on the Respondent and his family who have a route to obtain alternative housing. Accordingly, the Tribunal is satisfied that it is reasonable to grant the Order and so grants the Application.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by a 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.

Karen Moore

Legal Member

1 August 2024

Date