



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 33 of the Housing (Scotland)
Act 1988**

Chamber Ref: FTS/HPC/EV/24/0083

**Re: Property at 43 Barclay House, West Langlands Street, Kilmarnock, KA12PR
("the Property")**

Parties:

**Klin Holdings Ltd t/a Klincrabs.com, Andrew Barclay Heritage Centre, West
Langlands Street, Kilmarnock, KA1 2PY ("the Applicant")**

**Mrs Karen Miller, Mr Darren Miller, 43 Barclay House, West Langlands Street,
Kilmarnock, KA12PR; UNKNOWN, UNKNOWN ("the Respondents")**

Tribunal Members:

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

Decision (in absence of the Respondent)

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the
Tribunal") determined that the Applicant is entitled to the Order sought for
recovery of possession of the property.**

Background

1. The Applicant submitted an application under Rule 66 of the Housing & Property Chamber Procedure Regulations 2017 ("the Rules") for an order to evict the Respondents from the property.
2. A case management discussion ("CMD") took place on 1 May 2024. The Tribunal issued a note summarising that discussion, along with a notice of direction on 1 May 2024.
3. The Tribunal received further representations from the Applicant on 24 May and 19 September 2024.

4. The Tribunal received further representations from the First Respondent on 25 May, 4, 5, 19 and 26 September and 1 October 2024.

The hearing – 3 October 2024

5. The Hearing proceeded by conference call on 3 October 2024. The Applicant was represented by Mr. Fraser Napier, solicitor. The First Respondent joined the conference call and represented herself. The Tribunal explained that both parties would be given an opportunity to lead any evidence they considered relevant in relation to the present application. The Tribunal indicated that from the material already submitted, it appeared that the issue between the parties was whether it was reasonable to grant the order for possession of the Property. The Applicant's representative indicated that evidence would be led from one witness, namely Mr Drew Macklin and the First Respondent indicated that she intended to give evidence herself. The Tribunal heard evidence from Mr Drew Macklin and from the First Respondent. The evidence given is summarised below. The summary is not a verbatim account of what was said at the Hearing but rather an outline of the matters relevant to the Tribunal's consideration of the application. At the conclusion of the evidence, the Tribunal adjourned the Hearing to enable the members to consider the application further in light of the evidence given. The parties were advised that a written decision with a statement of reasons would be issued to parties.

Drew Macklin

6. He is 57 years of age and is the director of a number of companies, including the Applicant company, which is an organisation concerned with property development. The Applicant owns a residential property portfolio of approximately 30 properties. The parent company of the Applicant is Klin Investment UK Limited, which has invested in another property development in Symington. The Applicant obtained a business term loan to provide investment funds to the parent company in order to advance the property development in Symington. The business term loan was secured over all of the properties owned by the Applicant with the exception of 3 properties, including the Property at 43 Barclay House. The interest rate applicable to the Applicant's business term loan was between 0.25% and 0.5%. The interest rates have increased significantly and the interest repayments of the business term loan now amount to £13,500 per month. Mr Macklin concluded that the Applicant required to refinance. Consequently, in 2023 the Applicant sold the 2 other properties which were unencumbered to realise capital. The Applicant intends to sell the property at 43 Barclay House in order to realise funds of approximately £140,000 which will be used to progress the development in Symington.

7. Mr Macklin has known the First Respondent for approximately 15 years. He holds no malice towards her. Mr Macklin made a commercial decision to recover possession of the Property so that it can be sold. There were no personal issues which influenced the decision. He considered approaching the bank to extend the borrowing. However, the Applicant could only obtain lending on the basis of 60% of the value of the Property and that would be insufficient for the investment required. It is not financially viable for the Applicant to sell the Property with the First Respondent as a sitting tenant because the sale value would decrease by 30-50%. If the Applicant cannot realise the last remaining unencumbered property, it is at risk of defaulting on the business term loan. Mr Macklin has serious concerns that the business could be under threat if the Property is not recovered and sold. The development at Symington has been delayed because the Property has not been sold.
8. After the notice to quit and section 33 notice were served on the Respondents, the property immediately above 43 Barclay House became vacant. It has exactly the same footprint as 43 Barclay House and is the only other 3 bedroomed property the Applicant owns. The Applicant could not sell the first floor property because it is part of the security for the business term loan. There are 20 stairs between the two properties. The Applicant had been advised to let the first floor property for £850 per month. The Applicant offered it to the First Respondent at a rent of £795 per month as an alternative to the Property at 43 Barclay House. The Applicant was prepared to negotiate with the First Respondent. The First Respondent rejected the offer of alternative accommodation. She was not prepared to view the alternative accommodation and told the Applicant's letting agent that she would not move because of the stairs. The first floor property was rented within a few weeks of the First Respondent's rejection at a rent of £850 per week. With the benefit of hindsight, Mr Macklin accepted that he could have approached the lender to ask that the first floor property be released from the security so that the property could have been sold.
9. The notices expired in December 2023 and the Applicant asked the First Respondent to expedite her move to alternative accommodation. The Applicant was however prepared to be flexible in relation to the timing of the First Respondent removing from the Property. The First Respondent has now had a year from when she was told the Applicant wanted to sell the Property to move to alternative accommodation.
10. The Applicant has done all it can to assist the First Respondent by offering alternative accommodation and allowing further time for her to find alternative accommodation.

Mrs Karen Miller

11. The First Respondent is a single mother and lives in the Property with her two sons, aged 20 and 15. The Second Respondent moved out of the Property last year. The First Respondent has lived there for 12 years and there have been

no issues with the tenancy. When she signed the tenancy agreement, she knew that it was not a permanent arrangement. She has been registered on the local authority housing list for 15 years. She is managing a phased return to work because of ill health and she is currently working one day per week. She received service of the notices on 11 October 2023. The Applicant's letting agent told her at the beginning of October 2023 that the Applicant intended to sell the Property. The First Respondent made contact with the local authority without delay to make an application for alternative accommodation. There are not many 3 bedroomed properties available and she has been told it may take 7 or 8 months before she is offered accommodation. She will be entitled to refuse up to two offers of alternative accommodation by the local authority. There is no guarantee which area the First Respondent would be placed in. Since the notices were served, another 4 apartments at Barclay House have been re-let and there is one advertised for let now. The property one floor up was not suitable for her because she cannot manage the stairs. She owns a dog which cannot climb stairs and she would be unable to lift the dog upstairs. The First Respondent has been looking for properties in the private rental market. There was one property which was of interest, but the landlord did not allow pets, so it was not suitable. The First Respondent is concerned about the impact of a house move on her 15 year old son because of his health condition and the disruption to his life.

Findings in Fact

12. The Applicant is the owner and landlord of the Property at 43 Barclay House, West Langlands Street, Kilmarnock.
13. The Applicant is entitled to sell the Property.
14. The Respondents are the tenants of the Property at 43 Barclay House, West Langlands Street, Kilmarnock.
15. The First Respondent lives in the Property with her two sons, aged 20 and 15.
16. The tenancy in question is a short assured tenancy which commenced on 17 November 2012 until 17 May 2013. The tenancy has continued by tacit relocation.
17. The Applicant served Notice to Quit and Notice in terms of Section 33 of the Housing (Scotland) Act 1988 on the Respondents by sheriff officer on 11 October 2023.
18. On 9 January 2024 the Applicant applied to the Tribunal for an order for possession based on the operation of section 33 of the Housing (Scotland) Act 1988.
19. On 8 January 2024 the Applicant notified the local authority of those proceedings by serving a "section 11 notice" to East Ayrshire Council.

20. The Applicant intend to sell the Property.
21. The First Respondent is concerned that she would face difficulty in obtaining suitable alternative accommodation if an order for possession were granted by the Tribunal.

Reason for Decision

22. The Applicant served a notice to quit and a notice in terms of section 33 of the Housing (Scotland) Act 1988. The conditions of section 33 had been satisfied in respect that the tenancy had reached its end, tacit relocation was not operating and no further contractual tenancy was in operation. No issue was taken with the validity of the notices.
23. Although the First Respondent has been on the local authority housing list for 15 years, no offer of accommodation has been made to her. She notified the local authority a year ago about the Applicant's wish to recover possession and she has not been offered suitable alternative accommodation. There is no timeframe for the First Respondent to move from the Property.
24. The Tribunal accepted the evidence of the Mr Drew Macklin that the Applicant intends to sell the Property. The Tribunal took into account the written and oral evidence of the parties. The Tribunal found the evidence of Mr Macklin and the First Respondent to be credible and reliable. In deciding whether it is reasonable to grant an order for eviction, the Tribunal was mindful that it 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)
25. The Tribunal's decision on reasonableness is not in itself a finding in fact, but rather a conclusion determined by an exercise of judgment (City of Edinburgh Council v Forbes 2002 Hous. L. R. 61, at paragraph 7-16, per Sheriff Principal Nicholson QC). In assessing whether it is reasonable for the Tribunal to make an order for eviction, it must take account of all relevant circumstances that exist at the date of the hearing (Cumming v Danson [1942] All ER 653 at 655). It may take into account whether the parties' intentions are subjectively reasonable and it must "objectively balance the rights and interests of both parties" (Manson and Downie v Turner (2023) UT 38 at paragraphs 41 and 42).
26. The relevant circumstances on the Applicant's side are its legal right to use and dispose of its property as the director thinks fit, and the subjectively reasonable wish to sell the Property in order to produce investment funds to its parent company. Those on the First Respondent's side are her long period of occupancy of the Property, her health condition and that of her youngest son, her difficulty in finding a Property to rent of equivalent amenity, and her subjectively reasonable wish to live in the Property indefinitely.

27. Although the Tribunal accepts that the First Respondent and her son have health issues, the Tribunal did not hear sufficient medical evidence to allow it to make specific findings about their health problems.
28. The subjectively reasonable intention of the Applicant to sell the Property, and the diminution in the standard of living of the First Respondent and her sons if they are required to remove from the Property that they enjoy living in, deserve equal consideration. These are therefore countervailing circumstances.
29. The Tribunal considers the deciding factor to be that the Applicant exercises a right of property, whereby it can dispose of the Property as the director thinks fit. The Tribunal therefore concluded that those interests must take precedence over the wishes of the First Respondent to continue in occupation of the Property indefinitely.
30. The Tribunal considered that the interests of the parties' can be balanced in this case by postponing the date for eviction to allow the First Respondent further time to find alternative accommodation. The Tribunal granted the application for an eviction order. However, the Tribunal exercised its discretion in terms of section 216(4) of the Bankruptcy and Diligence Etc (Scotland) Act 2007 and extended the period of charge specified in section 216(1) of the Act by two months.

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.

Nicola Irvine

Legal Member/Chair

3 October 2024

Date