



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988**

**Chamber Ref: FTS/HPC/EV/23/1537**

**Re: Property at 42/3 Annandale Street, Edinburgh, EH7 4AZ (“the Property”)**

**Parties:**

**Dr Lindsay Miller, Flat E, 3/F Block T12 Heng Shang Mansion, 19b Taikoo Shing Road, Quarry Bay, Hong Kong (“the Applicant”)**

**Mr James Kennedy, 42/3 Annandale Street, Edinburgh, EH7 4AZ (“the Respondent”)**

**Tribunal Members:**

**Fiona Watson (Legal Member) and Eileen Shand (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for possession of the Property under section 18 of the Housing (Scotland) Act 1988**

- Background
- 1. An application dated 10 May 2023 was submitted to the Tribunal under Rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), seeking a repossession order against the Respondent under section 18 of the Housing (Scotland) Act 1988.
- 2. A Case Management Discussion (“CMD”) took place on 14 August 2023 by conference call. The Applicant was represented by Ms Matthew of Bannatyne, Kirkwood, France & Co. The Respondent appeared and represented himself.
- 3. A separate application under Rule 70 seeking a payment order in respect of rent arrears (under case reference FTS/HPC/CV/23/1538) was also before the Tribunal.

4. The Applicant's representative moved for the order for eviction to be granted. It was submitted that a Notice to Quit and Form AT6 on the basis of Ground 8A (there being substantial rent arrears) had been served on the Respondent. The rent arrears now stood at £31k, with a monthly rent of £620. No payments had been made since October 2019. It was submitted that the tenancy was no longer viable or sustainable. It was submitted that the Applicant had allowed the Respondent not to pay rent for a period of 4 months in 2019 following him travelling to Canada to deal with the death of his mother. The Respondent had advised the Applicant that he would repay all of the arrears from a payment due to him under his late mother's estate, but this has not happened. It was submitted that the Applicant had left matters this long because they had wrongly thought that during the covid lockdown period and beyond, they were not permitted to evict.
5. The Respondent opposed the order sought. It was submitted firstly that the Applicant, Dr Lindsay Miller, was not the landlord and that her partner, David Crawford, was the landlord. The Respondent disputed the level of arrears claimed due. It was submitted that the Respondent had withheld rent since 2019 due to repairing issues outstanding at the Property. It was submitted that the Applicant had failed to provide the Respondent with a parking permit, and which had deprived the Respondent of income from being able to sub-let the parking space. The Respondent submitted that he had instructed a number of repairs to the Property himself and paid for same. Specifically, it was stated that the heating did not work properly, the windows were cracked and that the water tank had dangerous wiring. The Respondent stated that the rent statement produced was incorrect, and that he had paid rent on some of the months which wasn't shown, and which would reduce the balance. He wished to take legal advice. It was submitted that the copy lease lodged by the Applicant was false.
6. The Applicant's representative responded by submitting that she would require to take specific instructions from her client, however the general position was that any repairing issues at the Property are of a minor nature and not worthy of withholding or abating of rent. It was submitted that the landlord has always been Dr Miller and that David Crawford has acted as the landlord's agent for a time.
7. The CMD was adjourned to another CMD in order for:
  - (i) the Respondent to obtain legal advice;
  - (ii) for the parties to lodge documentation as outlined in the accompanying Direction and as set out as follows:

*"The Applicant is required to provide:*

1. *A copy of the complete lease between the parties (and which shows the signatures of the parties)*
2. *Evidence showing all inspections (or attempted inspections) at the Property.*

*The said documentation **must** be lodged with the Chamber no later than*

*14 days prior to the next Case Management Discussion.*

*The Respondent is required to provide:*

- 1. A copy of the lease which he considers to be in place between the parties (and which shows the signatures of parties);*
- 2. Evidence showing that the Respondent notified the Landlord of his intention to withhold rent;*
- 3. Bank statements (in full and complete from October 2019 to date) which show the rental payments being put aside each month, and showing the total balance currently withheld;*
- 4. Details of all repairs carried out to the Property organised by the Respondent and with receipts/invoices showing costs incurred;*
- 5. Copies of all correspondence between the Respondent and the Applicant (or the Applicant's agent) reporting repairing issues in the Property and showing the Applicant's (or Applicant's agent's) response.*
- 6. Evidence of all rental payments made by the Respondent since October 2019.*

*The said documentation must be lodged with the Chamber no later than 14 days prior to the next Case Management Discussion. The said documentation must be paginated and accompanied by an inventory.”*

8. A further CMD took place on 7 November 2023 by conference call. The Applicant was represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent appeared and represented himself.
9. The Applicant's representative submitted that no further rent has been paid and the arrears now stood at £33, 480. The Applicant's representative moved for the order to be granted.
10. The Respondent submitted that he had been ill since the last CMD, he had been in hospital for a week and a half and had been diagnosed with heart failure. He had an appointment with a solicitor but had to cancel due to his hospitalisation. He is now on six different types of heart medication. The Respondent submitted this as being the reason why he had not fully adhered to the terms of the Direction previously issued.
11. The Respondent had lodged a series of emails with the landlord as productions and nothing further. Upon questioning by the Tribunal, the Respondent was unable to direct the Tribunal to a particular email which shows that he had given notice to the Landlord that he intended to commence withholding his rent, however the Respondent stated that one of the emails did show this. He confirmed that he did not hold a copy of the alternative lease referred to previously. He confirmed that the signature on the lease lodged by the Applicant was his, but submitted that the front page had been changed and that he had only ever signed a lease with David Crawford as landlord. He could not produce this. The Respondent submitted that he was withholding rent but this was being held in a safe for him by his friend, Lisa Anderson, who lives in London. The

Respondent submitted that none of the repairs have been carried out and the following issues remain: the Property is not wind and watertight, windows are cracked, carpets are mouldy, there is dangerous wiring in the bathroom and near the boiler and storage heaters are not working. The Respondent submitted that he is unable to produce receipts and invoices to show the costs he has incurred in instructing repairs himself but estimates these to be in the region of £600-£700.

12. The Tribunal decided to adjourn the CMD and fix a Hearing to determine the following:

- (i) whether there are repairing issues within the Property which have affected, and continue to affect, the habitability of the property, and
- (ii) whether or not the Respondent has been withholding his rent, and
- (iii) whether or not the Respondent has been entitled to withhold his rent.

13. The Tribunal also issued a Direction setting out documents which must be lodged by the Respondent within 28 days of the CMD to enable the Hearing to proceed. The Tribunal noted that if the Respondent is unable to comply with the Direction due to his ongoing health issues, he must produce a medical certificate which confirms same.

- The First Hearing

14. A hearing took place on Monday 15 April 2024 by video conference. The Applicant was present and represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent did not appear nor was he represented.

15. On Friday 12 April 2024 at 15:27 the Respondent emailed the Tribunal administration advising that he had attended the Royal Infirmary Hospital and would not be able to attend the hearing on 15 April due to illness and requested a postponement of the Hearing. The Respondent was notified by e-mail that he would require to produce a sole and conscience certificate from his doctor. This was not produced.

16. The Applicant opposed the request for postponement of the hearing due to the delays already incurred in proceedings and on the basis that the Applicant's witness had flown to Scotland in order to attend the hearing from the UK and had faced disruption to his work schedule to accommodate the hearing.

17. The Tribunal notified the Applicant's representative that the request to the FCDO for permission to hear evidence from the Applicant whilst resident in Hong Kong had been refused on Friday 12 April. Accordingly, evidence could not be heard from the Applicant directly at the hearing. Due to the Respondent's failure to appear, it was agreed that the Tribunal would initially hear submissions from the Applicant's representative and thereafter adjourn to discuss whether or not a decision could be made on the basis of those submissions without requiring to hear evidence from the Applicant directly.

18. The Applicant's representative moved for permission to amend the application under Rule 14A to include Ground 1 under schedule 5 to the 1988 act as well as existing ground 8A, in terms of an application submitted on 19 December 2023. It was submitted that the Applicant intends to return to Scotland to live in the Property.
19. It was submitted that the Applicant had purchased the Property in the late 1990s with the intention to retire to it. The Applicant has spent 30 years living in Hong Kong and has maintained strong connections to Scotland during that time. Towards the end of 2021 the Applicant turned his mind towards retirement and put plans in motion to return to the Property and live there. At that point, the Respondent was already in significant arrears of rent. A notice to quit and form AT6 were served on the Respondent on the basis of grounds 1 and 8A, and a tribunal application lodged on 10 May 2023. Since then no further rent has been paid and there is no prospect of the Respondent removing himself from the Property willingly without an order being granted.
20. It was submitted that the Respondent has claimed that there are various issues of disrepair and has been refusing to pay rent. These issues have either not been notified to the Applicant nor to his agent, or where they have, do not merit abatement of rent on the scale being alleged by the Respondent. The current rent arrears stand at £36,580. It was submitted that even if the Tribunal granted the level of abatement to the Respondent of more than four years of full rent, ground 8A would still apply, so significant are the arrears. It was submitted that it would be reasonable to grant the order given the significance of the arrears, the length of time since rent was last paid by the Respondent and the lack of any evidence produced by the Respondent in relation to the position he has taken against the application.
21. The Applicant's representative submitted that there had been problems gaining access to the Property to carry out inspections, with the Respondent refusing access to both the Applicant's agent and to contractors.
22. The Tribunal noted the Respondent's late request for a postponement of the hearing and refused same, on the basis that no medical evidence had been produced in relation to the Respondent's alleged medical issues, and which had been mentioned previously by him during the course of the proceedings. The Tribunal noted that it had been set out in a previous direction issued to the Respondent that if he was unable to comply with directions of the Tribunal due to medical issues he should produce medical evidence, and he had not done so.
23. The Tribunal was satisfied that an appropriate application had been made to include Ground 1 in the application under rule 14A of the rules, and which had been intimated on the Respondent by tribunal administration.
24. The Tribunal was satisfied that the grounds relied upon in the form AT6 had been met. At the date of service of the AT6 on the Respondent, there were rent arrears of £26,660. The monthly rent was £620. At the date of the hearing, the

rent arrears stood at £35,960. Accordingly, both at the date of service of the AT6 and at the date the case called before the tribunal, there were well in excess of the equivalent of 6 months' rent due under the tenancy. Further, the Tribunal was satisfied that the Applicant required repossession of the Property in order to occupy same as his principal home.

25. The Tribunal was satisfied that the Respondent had not produced sufficient evidence as had been required in terms of previous directions issued, to satisfy the Tribunal that there had firstly been any withholding of rent, and secondly that there had been any basis for doing so.

26. The Tribunal was satisfied that it was reasonable under the circumstances to grant the order for repossession as sought on the basis of grounds 1 and 8A under schedule 5 to the 1988 act. The Tribunal was satisfied that it could do so on the basis of the submissions made by the Applicant's representative and on the basis of the documentary evidence already submitted as part of the application. The Tribunal did not consider that it required to hear any oral evidence from the applicant directly. The Tribunal noted that the level of rent arrears incurred by the Respondent was excessive, and it appeared very unlikely that there was any real prospect of repayment. The Tribunal had not been satisfied by the suggestions previously made by the Respondent, nor by the limited documentary evidence provided by the Respondent, that there was any basis for non-payment of rent. The Tribunal was satisfied that it would not be appropriate, for either party, to allow such arrears to continue to accumulate.

27. The Tribunal granted an order against the Respondent for possession of the Property under section 18 of the Housing (Scotland) Act 1988.

- Application for Recall

28. On 16 April 2024 the Respondent emailed the Tribunal administration advising that they had not attended the Hearing as they *"had to go to the emergency at Royal Infirmary on Fri April 12, 2024 as I had worsening symptoms of my heart failure as you can see clearly in the Soul and Conscience letter from my gp."* The Respondent sought recall of the Order granted. An accompanying GP letter issued by Dr Diamond of The Hopetoun Practice and dated 15 April 2024 stated that *"I certify on Soul and Conscience that this person, who is a patient at this practice, has significant medical problems which would make it impossible for them to attend a tribunal hearing today."*

29. The Tribunal considered matters in terms of the provisions of Rule 30 of the Rules which states as follows:

*30 (1) In relation to applications mentioned in Chapters 4, 6, 8, 11 and 12 of Part 3 of these Rules, a party may apply to the First-tier Tribunal to have a decision recalled where the First-tier Tribunal made the decision in absence because that party did not take part in the proceedings, or failed to appear or be represented at a hearing following which the decision was made.*

*(2) An application by a party to have a decision recalled must be made in writing to the First-tier Tribunal and must state why it would be in the interests of justice for the decision to be recalled.*

*(3) An application for recall may not be made unless a copy of the application has been sent to the other parties at the same time.*

*(4) Subject to paragraph (5), an application for recall must be made by a party and received by the First-tier Tribunal within 14 days of the decision.*

*(5) The First-tier Tribunal may, on cause shown, extend the period of 14 days mentioned in paragraph (4).*

*(6) A party may apply for recall in the same proceedings on one occasion only.*

*(7) An application for recall will have the effect of preventing any further action being taken by any other party to enforce the decision for which recall is sought until the application is determined under paragraph (9).*

*(8) A party may oppose recall of a decision by— (a) lodging with the First-tier Tribunal a statement of objection within 10 days of receiving the copy as required under paragraph (3); and (b) sending a copy of the statement to any other party, at the same time.*

*(9) After considering the application to recall and any statement of objection, the First-tier Tribunal may— (a) grant the application and recall the decision; (b) refuse the application; or (c) order the parties to appear at a case management discussion where the First-tier Tribunal will consider whether to recall the decision.*

30. The Tribunal determined that in light of the GP letter produced, that it was in the interests of justice that the application for recall of the Decision of the Tribunal dated 15 April 2024 is granted.
31. The application was remitted back to a Hearing, to take place by video conference.
- The Second Hearing
32. A further hearing took place on 22 November 2024 by Webex video conference. The Applicant was present and represented by Ms Wooley of Bannatyne, Kirkwood, France & Co. The Respondent did not appear nor was he represented.
33. The Respondent had been invited to attend a Webex test prior to the Hearing which he also did not attend.
34. The Tribunal had received no correspondence from the Respondent since the recall application was granted and the Hearing fixed.

35. The Applicant's representative submitted that the Applicant had no communication from the Respondent since the last Hearing, despite attempts by the Applicant (and by an agent acting on the Applicant's behalf) to communicate with the Respondent regarding the ongoing proceedings as well as to gain access to the property to carry out an inspection. No further rent had been paid and the arrears had continued to increase and now stood at £40,920. It was submitted that the Applicant was very frustrated at the length of the proceedings and moved for the Orders which were granted at the April hearing and subsequently recalled, to be reinstated.

- Findings in Fact

36. The Tribunal made the following findings in fact:

- (i) The parties entered into a short assured tenancy agreement ("the Agreement") which commenced 13 March 2013;
- (ii) A notice to quit and form AT6 under section 19 of the 1988 act were served on the Respondent;
- (iii) The notice to quit required the respondent to remove from the property by 28 February 2023;
- (iv) The form AT6 under section 19 of the 1988 Act relied on grounds 1 and 8A under schedule 5 to the 1988 Act
- (v) The form AT6 under section 19 of the 1988 Act advised that proceedings would not be raised before 28 February 2023;
- (vi) By virtue of the Respondent accruing rent arrears in the sum of £40,920, ground 8A has been established;
- (vii) by virtue of the Applicant intending to reside in the Property as his principal home, ground 1 has been established;
- (viii) the Respondent had failed to remove from the Property and continued to reside therein.

- Reasons for Decision

37. Section 18 of the 1988 act states as follows:

*The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.*

*(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.*

*(3) . . .*

*(3A) . . .*



*(4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.*

*(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to—*

*(a) the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit, and*

*(b) the extent to which the landlord has complied with the pre-action protocol specified by the Scottish Ministers in regulations.*

*(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.*

*(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—*

*(a) the ground for possession is Ground 2 ... in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9 ... Ground 10, Ground 15 or Ground 17; and*

*(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.*

*(6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.*

*(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.*

*(8) In subsection (4A) above—*

*(a) “relevant housing benefit” means—*

*(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or*

*(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;*

*(aa) “relevant universal credit” means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;*

*(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.*

*(9) Regulations under subsection (4A)(b) may make provision about—*

*(a) information which should be provided by a landlord to a tenant (including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy),*

*(b) steps which should be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,*

*(c) such other matters as the Scottish Ministers consider appropriate.*

*(10) Regulations under subsection (4A)(b) are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10)).*

38. Ground 1 of schedule 5 to the 1988 Act states as follows:

*Not later than the beginning of the tenancy the landlord (or, where there are joint landlords, any of them) gave notice in writing to the tenant that possession might be recovered on this Ground or the First-tier Tribunal is of the opinion that it is reasonable to dispense with the requirement of notice and (in either case)—*

*(a) at any time before the beginning of the tenancy, the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them occupied the house as his only or principal home; or*

*(b) the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them requires the house as his or his spouse’s or civil partner’s only or principal home, and neither the landlord (or, in the case of joint landlords, any one of them) nor any other person who, as landlord, derived title from*

*the landlord who gave the notice mentioned above acquired the landlord's interest in the tenancy for value.*

39. Ground 8A of schedule 5 to the 1988 Act states as follows:

*The tenant has accrued rent arrears under the tenancy in respect of one or more periods, and the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice is served under section 19 on this ground or, after dispensed with, when proceedings are raised for an order of possession on this ground.*

40. The Tribunal was satisfied that the grounds relied upon in the form AT6 continued to be met. At the date of service of the AT6 on the Respondent, there were rent arrears of £26,660. The monthly rent was £620. At the date of the first hearing, the rent arrears stood at £35,960. At the date of the second hearing, the rent arrears stood at £40,920. Accordingly, both at the date of service of the AT6 and at the date the case called before the tribunal, there were well in excess of the equivalent of 6 months' rent due under the tenancy. Further, the Tribunal was satisfied that the Applicant required repossession of the Property in order to occupy same as his principal home.
41. The Tribunal was satisfied that the Respondent had not produced sufficient evidence as had been required in terms of previous directions issued, to satisfy the Tribunal that there had firstly been any withholding of rent, and secondly that there had been any basis for doing so.
42. The Tribunal was satisfied that it was reasonable under the circumstances to grant the order for repossession as sought on the basis of grounds 1 and 8A under schedule 5 to the 1988 act. The Tribunal was satisfied that it could do so on the basis of the submissions made by the Applicant's representative and on the basis of the documentary evidence already submitted as part of the application.
43. The Tribunal noted that nothing had changed since the first hearing and that the arrears had continued to rise, and the level of rent arrears incurred by the Respondent was very high. The Respondent had made no contact with the Tribunal, nor with the Applicant, and had taken no steps to attempt to rectify or improve the situation. It continued to appear very unlikely that there was any real prospect of repayment. The Tribunal had not been satisfied by the suggestions previously made by the Respondent, nor by the limited documentary evidence provided by the Respondent, that there was any basis for non-payment of rent. The Tribunal was satisfied that it would not be appropriate, for either party, to allow such arrears to continue to accumulate.
44. Despite the Respondent failing to explain his non-appearance nor provide any update on his current health condition, the Tribunal was mindful that he had produced a letter from his GP previously and that there appeared to be health issues at that time in April (albeit the details and extent of same were unknown).

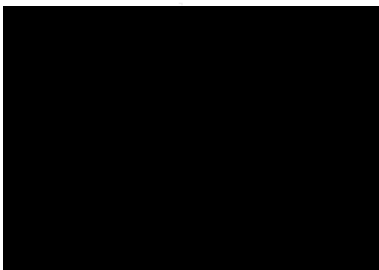
The Tribunal noted that the usual enforcement period of an eviction order would fall just prior to Christmas, and that during the Christmas period the Respondent may find it difficult to find assistance with his health and accommodation needs due to public holidays. Balancing the needs of the Applicant to minimise any further arrears, the Tribunal considered it reasonable under the circumstances to extend the period of enforcement of the order so as not to take place until Monday 6 January 2025. This would afford the Respondent a longer period to get his affairs in order, whilst minimising the extent of further arrears accruing.

- Decision

45. The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) granted an order against the Respondent for possession of the Property under section 18 of the Housing (Scotland) Act 1988.

### **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.**



**Date: 22 November 2024**