



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Sections 58 and 59 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/PR/23/4507

Re: Property at Flat 5, 7 Lochend Butterfly Way, Edinburgh, EH7 5GS (“the Property”)

Parties:

Mr Scott Stewart, 10/3 Albion Gardens, Edinburgh (“the Applicant”)

Mr Marcin Maruszak, 191/6, Morningside Road, Edinburgh, EH10 4QP (“the Respondent”)

Tribunal Members:

Graham Harding (Legal Member) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) granted the application under Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 and made a Wrongful Termination Order requiring the Respondent to pay to the Applicant of the sum of £1700.00.

Background

1. By application dated 13 December 2023, the Applicant sought a Wrongful Termination Order under Sections 58 and 59 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). The Applicant believed he had been misled into ending his tenancy. The Applicant submitted copy email correspondence between himself and the Respondent’s letting agents and the Respondent, a screenshot advertising the property for rent, copy tenancy agreement and Notice to Leave in support of the application.
2. By Notice of Acceptance dated 16 January 2024 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion (“CMD”) was assigned.

3. Intimation of the proceedings was served on the Respondent by Sheriff Officers on 21 March 2023.
4. By emails dated 10 and 17 April 2024 the Respondent's representatives D J Alexander, Edinburgh submitted written representations to the Tribunal.
5. A CMD was held by teleconference on 23 April 2024. The Applicant attended in person as did the Respondent who was represented by Mr Martin Urquhart of D J Alexander, Edinburgh. The parties were in agreement that the Applicant entered into a Private Residential Tenancy that commenced on 3 May 2021 at a rent of £850.00 per calendar month. It was also agreed that the Applicant had been served with a Notice to Leave under Ground 1 of Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") on 4 August 2023 providing that he should leave the property before 30 October 2023. The Applicant confirmed he moved out of the property on 17 September 2023 and Mr Urquhart confirmed the keys were returned on 18 September 2023. It was further agreed that the Respondent had obtained a Home Report from D M Hall, Chartered Surveyors, dated 6 October 2023 valuing the property at £225000.00 and that the property had been marketed for sale by D J Alexander from 10 October 2023 and that a closing date for offers was set for 31 October 2023. It was also agreed that D J Alexander received three offers for the property the highest being for £220000.00. The Applicant submitted that this was £10000.00 above the asking price. For the Respondent it was submitted that the Respondent was looking for £230000.00 for the property but had been advised that in light of the offers received and the prevailing market conditions it was unlikely that this price could be achieved and the Respondent had instructed that the property be removed from the market and re-let. It was agreed that the property was then advertised for rent at a rent of £1350.00 per calendar month from 11 November 2023 and was rented from 18 December 2023 at a rent of £1275.00 per calendar month. The Applicant maintained that he had been given false information from the Respondent's representatives who had initially said that the property had been marketed for two months and had received no offers and when this had been challenged had said it had only been marketed for three weeks and the offers received had been unacceptable. The Applicant remained of the view that the Respondent had served the Notice to Leave to remove him from the property and then fulfil the requirement to market the property but with the intention to then remove it from the market and re-let at a higher monthly rent to avoid the 3% rent cap. The Respondent disputed that this was the case explaining that although the rent had increased to £1275.00, after tax and management fees, he was only £250.00 per month better off and it had cost him over £5000.00 to market the property and would therefore take about two years to get his money back. The Tribunal considered that there were disputed issues of fact particularly with regards to the Respondent's intentions when it came to marketing the property and therefore it was necessary for the application to proceed to a hearing.
6. The Tribunal gave an oral direction to the Respondent's representatives to provide it with emails between the Respondent and them dated 31 October 2023.

7. The Tribunal noted the disputed issues as:
 - a) Did the Respondent actually intend to sell the property at market value?
 - b) Did the Respondent intend to remove the Applicant from the property and then re-let it at a higher rent?
 - c) Was the Applicant's tenancy wrongfully terminated?
8. By email dated 6 August 2024 the Respondent's representative provided details of a witness for the Respondent and requested a postponement of the hearing due to his non availability. A hearing assigned for 28 August 2024 was postponed and a further hearing assigned.
9. By email dated 11 November 2024 the Applicant submitted further written representations to the Tribunal.
10. By email dated 6 December the Respondent's representative submitted further written representations to the Tribunal.

The Hearing

11. A Hearing was held at George House Edinburgh on 11 December 2024. The Applicant attended in person as did the Respondent who was represented by Mr Martin Urquhart from the Respondent's representatives. The Respondent had one witness, Mr Yasser Albassam from the Respondent's representatives.
12. The Applicant explained to the Tribunal that after being served with a Notice to Leave he had been left with a feeling that it was the Respondent's intention to re-let the property. The Applicant went on to say that after he had moved out, he had seen the property being advertised for sale at offers over £210000.00 but that it had then been taken off the market after three weeks. The Applicant said he had then contacted D J Alexander to ask if it had been sold and had been told that it had been on the market for several months but that no offers had been received so it had been taken off the market. The Applicant said that he had challenged that and had then been told that the Respondent had received three offers for the property but that they had not been good enough. The Applicant had said he had then gone to the CAB who had advised him to apply to the Tribunal.
13. In response to queries from the Tribunal the Applicant said that there had been no issues with the Respondent throughout the tenancy which had lasted for about two years. He said that the rent of £850.00 had always been paid and that he was content in the property and thought that were it not for being served with the Notice to Leave he would still be living there. He said that he had been given notice of a rent increase to £921.00 per month but that this had not come into effect before the tenancy ended. The Applicant confirmed that the property was within walking distance to his place of work as was his current property and that he passed it every day. The Applicant also confirmed that the furniture shown in the property schedule produced by the Respondent's estate agents was the furniture in the property when he lived there.

14. The Applicant submitted he had been misled into leaving the property as he believed that although the Respondent had marketed the property for three weeks, he had intended to re-let it at a much higher rent.
15. For the Respondent, Mr Urquhart referred the Tribunal to the Respondent's written representations. He said that the Respondent's representatives had received instructions from the Respondent to serve a Notice to Leave on 2 August 2023 and the Notice had been served on 4 August 2023 and the Applicant had moved out on 17 September 2023. Mr Urquhart went on to say that the property had then been staged for sale and a Home Report was prepared dated 6 October 2023. He said the Home Report Valuation was £225000.00. Mr Urquhart went on to say the property was marketed for sale on 10 October 2023. He said there were three notes of interest and a closing date set for 31 October 2023. Mr Urquhart said three offers were received but they were all below the Home Report valuation being £212000.00, £217.000.00 and £220000.00. Mr Urquhart went on to say that the Respondent had been looking for £230000.00 as he was wanting to buy another property for his family and as the offers were below valuation decided to continue to let the property. Mr Urquhart said that between the marketing costs and the costs of preparing a home report and loss of rental income the exercise had cost the Respondent about £5000.00.
16. Mr Urquhart went on to say that the property was remarketed for rent on 22 November 2023 and a new tenancy commenced on 18 December 2023 at a rent of £1275.00 per month.
17. The Respondent confirmed that he had discussions with his representatives before serving the Notice to Leave and before marketing the property that the minimum he would accept for the property was £230000.00. The Respondent said that he could have kept the property on the market but that December was not a good month for selling property and that he had been advised to put it back on the market for rent and that is what he did. The Respondent said he just followed advice and that he might put the property back on the market next year in interest rates fall.
18. The Applicant queried with Mr Urquhart what work had been carried out to the property prior to it being marketed for sale and if this work would have been done if he had remained in the property. Mr Urquhart said that the work done had been to improve the property for selling and would not have come under repairs to meet the repairing standard and would not necessarily have been done if the Applicant had remained in the property.
19. The Applicant queried with Mr Urquhart what had happened to the missing emails that had been requested by the Tribunal following the CMD. Mr Urquhart explained that it looked as though these had been overlooked but that they could be made available.

20. The Applicant asked why the Respondent had not agreed to place the property on at a fixed price of £225000.00 as had been suggested by his representatives and the Respondent said that it was late in the year. The Respondent confirmed that there was no mortgage over the property. He also said that his own home had been purchased new at a price of £420000.00 and had an outstanding mortgage of £280000.00. He said that he thought his own home had decreased in value and might now only sell for £380000.00. He also said that the new property he would hope to buy would cost about £600000.00
21. Mr Albassam said that the Respondent had reached out to him in July 2023 and that he had provided the Respondent with costings. He said that he had explained to the Respondent that it was a tough year for selling property and that November and December were tricky months. He also said that the property was located in a popular address and was attractive. Mr Albassam went on to say that he thought the property could achieve £225000.00 or thereabouts if he spent a bit of money preparing it for sale. Mr Albassam went on to say that the Applicant had said he was hoping for a little bit more at £230000.00. Mr Albassam said that he had been expecting to get more for the property than had been achieved at the closing date and also said that he had never previously had a property go to a closing date and not achieve the Home Report valuation. He also said that similar properties were now selling for £240000.00 to £250000.00. Mr Albassam went on to say that it would have been bad advice to have advised the Respondent to accept £220000.00 for the property.
22. In response to a query from the Tribunal as to why when the Respondent wanted £2300000.00 for the property and it had been valued at £225000.00 it had been marketed at offers over £210000.00, Mr Albassam said it was normal practice to market a property at offers over a price 3-5% below the Home Report valuation in order to generate interest.
23. In response to a query from the Applicant as to why the Respondent's representatives had not gone back to the highest offeror and asked them to improve their offer, Mr Albassam said that this had been their best and final offer and it would not have been appropriate to go back and ask for more.
24. Following a short adjournment Mr Albassam provided the Tribunal with some additional email correspondence between himself and the Respondent dated 31 October 2023 setting out that it was unlikely that £230000.00 could be achieved for the property and taking the Respondent's instructions to withdraw the property from the market. Mr Albassam also provided the Tribunal with email correspondence from July 2023 responding to the Respondent's queries as regards how quickly properties were selling and if they were selling above or below the Home Report valuation and also how long the Respondent would have to wait before renting the property again.
25. In response to a query from the Tribunal Mr Albassam submitted that the market value of a property would be its Home Report Valuation. Mr Urquhart submitted it would be the price it could achieve on the open market.

26. In conclusion the Applicant remained of the view that he had been misled into leaving the property as the Respondent had not intended to sell the property at market value and had always intended to re-let it.
27. In conclusion Mr Urquhart said that the Respondent had gone to the expense of making the property look its best for sale and had incurred the cost of obtaining an EWS1 report and a Home Report as well as marketing fees and had lost rent. Mr Urquhart submitted it would not have been in the Respondent's interests to have incurred these costs as it would take a long time to recover even at the higher rent now being obtained.
28. The Applicant submitted that the costs would be recovered within a year and this was disputed by the Respondent who said that income tax required to be taken into account.
29. In response to a further query from the Tribunal the Respondent confirmed he had one other rental property that he wished to retain as a home for his son in due course.

Findings in Fact

30. The Applicant entered into a joint private residential tenancy agreement along with Camilo Aristizabal and the Respondent that commenced on 3 May 2021 at a rent of £850.00 per calendar month.
31. In July 2023 the Respondent contacted D J Alexander for advice on selling the property. Mr Albassam advised the Respondent that the Respondent should serve the Tenants notice as the Respondent should not be marketing the property in November, December or January as these are very slow months.
32. In an email dated 17 July 2023 Mr Albassam told the Respondent he could withdraw the property for sale at any point
33. The Applicant and Camilo Aristizabal were served with a Notice to Leave under Ground 1 of Schedule 3 of the 2016 Act by email on 4 August 2023.
34. The Applicant and Camilo Aristizabal vacated the property on 17 September 2023.
35. The Applicant was content to remain in the property and it is likely he would still be living there had he not been served with the Notice to Leave.
36. The Applicant had prior to being served with a Notice to Leave been served with a Rent Increase Notice whereby the rent for the property would have risen to £921.00 per calendar month and had agreed to this increase.
37. Following the Applicant's removal from the property the Respondent's representatives on the instructions of the Respondent prepared the property for

sale, obtained a Home Report and EWS1 Report and prepared a Marketing Schedule and marketed the property for sale.

38. The property was marketed for sale between 10 October 2023 and 31 October 2023 at offers over £210000.00.
39. The Home Report valuation of the property was £225000.00.
40. The Respondent's representatives received three offers for the property the highest being for £220000.00.
41. The Respondent had advised D J Alexander that he wanted £230000.00 for the property in an email dated 31 October 2023.
42. On 31 October 2023 Mr Albassam told the Respondent in an email that he was unlikely to obtain that price and the Respondent instructed D J Alexander to remove the property from the market and re-let it.
43. Following a request by the Applicant for information regarding the property, D J Alexander in an email dated 24 November 2023 advised the Applicant that the property had been marketed for sale for over two months and had not sold and had been put back on the rental market. When this was queried by the Applicant D J Alexander corrected the information provided and confirmed the property was marketed for three weeks and that the offers received were slightly less than the Respondent wanted and the Respondent had decided to re-let.
44. The property was placed on the market for let on 22 November 2023 and a new tenancy commenced on 18 December 2023 at a rent of £1275.00 per month.
45. The Respondent incurred marketing costs and costs for the preparation of the Home Report and EWS1 Report.

Reasons for Decision

46. In reaching its decision the Tribunal took account of the decision of the Upper Tribunal in the case of **Reynolds v Henry UTS/AP/24/2014**. In that case the learned Sheriff explains at paragraph 16 that "critically whether a landlord has a ground for eviction under paragraph 1 of schedule 3 depends on his intention per paragraph 1(2)(b) to either sell the property for market value or at least put it up for sale. But on either limb of this sub-paragraph the intention to sell must be genuine. If a landlord puts a property on the market but has no intention of accepting any offers that may be made for it, he is neither intending to sell the property for market value, nor is he putting it up "for sale". Rather, if he is purporting or pretending to market the property for sale simply to remove an unwanted tenant, then in reality he is putting it up for a purpose other than "for Sale""

47. The decision in Reynolds also makes it clear that the Applicant has to satisfy the Tribunal that he was actually misled by the Respondent's misrepresentations and ceased occupation of the property as a result.
48. The Tribunal took account of the agreed facts that the Applicant had been served with a Notice to Leave under ground 1 of Schedule 3 and it was also satisfied from the Applicant's evidence that were it not for the Notice to Leave he would have remained in occupation of the property.
49. The facts in the present case are of course quite different from Reynolds. The Tribunal was satisfied that the Respondent had no particular issue with the Applicant as a tenant and it was his intention to sell the property if it could achieve a figure that he had in his mind for it namely £230000.00. The difficulty for the Respondent is that this figure is substantially above the market value of the property and much higher than any offers received for the property.
50. The Tribunal was not satisfied that the figure of £230000.00 had been canvassed by the Respondent with D J Alexander prior to the property being marketed or at least that the Respondent would only accept an offer at or above that figure. Mr Albassam's evidence was that he had indicated to the Respondent that the property was worth £225000.00 or thereabouts and this was confirmed in the Home Report valuation. Mr Albassam also said that it was normal practice to market the property at 3-5% below the Home Report valuation to generate interest. That would suggest that the asking price might have been between £213750.00 and £218250.00 but for some reason not explained the property was marketed at offers over £210000.00. All three offers obtained were in excess of the asking price but below the Home Report valuation. Mr Albassam in his evidence submitted that it would have been bad advice to have advised his client to have accepted £220000.00 for the property but in his email of 31 October to the Respondent Mr Albassam says, "Personally, I would be going for the top offer of £220000 and will be pushing for an entry date before Christmas, circa 7 weeks and will request 19th December. If the solicitor can do sooner, all the better." This does not support Mr Albassam's evidence that he gave at the hearing at all.
51. Furthermore, later on the 31 October the Respondent in an email to Mr Albassam says, "I had a long conversation with my partner, the offer is very close to our asking price but in the end, we decided to reject all offers and rent the property again (I am aware of the fee)." Subsequently the Respondent is advised that £230000.00 is unrealistic and the property is removed from the market. The Tribunal also noted that in the Respondent's representatives written representations submitted by Mr Urquhart it was stated that "All offers were unfortunately below the Home Report and less than anticipated. Offers were rejected and counteroffers were anticipated but did not materialise." The last part of this statement is clearly incorrect. No opportunity was given to parties to submit any counteroffers as the Respondent instructed D J Alexander to withdraw the property from the market and re-let it.

52. At paragraph 18 of *Reynolds* the learned Sheriff explains that there may be situations where the landlord does genuinely intend to sell the let property at market value or put it up for sale with this intention but later changes his mind and he makes reference to the *Explanatory Notes* for the 2016 Act which state at paragraph 90 that a wrongful termination order should not be granted where the landlord genuinely intended to use the property in the way that the eviction ground required (even if for some reason, that intention has not come to fruition). An example is then given of a landlord who evicts their tenant because they want to sell their let property. However, after a year on the open market, the property has not sold and the landlord can no longer afford to maintain the mortgage repayments on it so is forced to withdraw the property from the market and re-let it to a different tenant. As Combe & Robson put it in ***A review of the first wrongful termination orders 2021 Jur. Rev. 88*** this captures the point that a genuine plan might not be fulfilled, and in that situation, it would be harsh - indeed wrong – to penalise the landlord by an order under section 58.
53. However, the circumstances described in the *Explanatory Notes* bear no resemblance to the circumstances in the present application. The property was marketed for sale for three weeks. Three offers were received for the property. The Respondent had not granted a standard security over the property. Furthermore, Mr Albassam said in his evidence that the property could now sell for between £240000.00 and £250000.00. It would seem therefore that if the Respondent had left the property on the market for some months an offer closer to the figure he had hoped to achieve could have been achieved. Instead, the Respondent chose to ignore the suggestion of D J Alexander to continue to market the property at a fixed price of £225000.00 and chose instead to re-let the property at a much higher rent than he would have had with the Applicant still in the property.
54. To be fair to the Respondent, in some respects the advice obtained from his representatives may not always have helped his cause. In his email to Mr Albassam dated 17 July 2023 the Respondent asks, “3. If we put the property up for sale but receive no satisfactory offers or no offers at all, what is the legal period before we can make this property available for rent again?” Mr Albassam’s reply was, “You can withdraw at any point. There is a termination fee if you withdraw within 3 months. The cost is £500.00 + VAT.” This does not answer the Respondent’s question and certainly does not guide him towards the risks of the Applicant making a claim under section 58 and if there were any subsequent discussions in this regard there was no evidence provided in the written representations or at the hearing.
55. The issue for the Tribunal is to determine whether the actions of the Respondent in only marketing the property for three weeks and then proceeding to re-let it amounts to a breach of section 58. The Tribunal is prepared to accept that if the Respondent had received an offer of £230000.00 at the closing date he would have sold the property. The difficulty for the Respondent is that given the market at that time and as he had effectively been told by his representatives it was unlikely that such a figure was achievable. The Respondent also chose to ignore the suggestion of his representatives to keep the property on the market at a fixed price of £225000.00 and see if there were

any subsequent offers. A further alternative would have been to leave the property on the market and see how the market might improve over the following months. All of these options might have avoided the difficulty the Respondent now finds himself in. Although the Respondent went to some lengths to say that he relied on the advice of his representatives the Tribunal is not entirely satisfied that this is correct given the instructions issued by him to D J Alexander on 31 October 2023. Furthermore, as an experienced landlord the Respondent ought to be aware of the legislation affecting the property and when he did not receive a clear reply to his email of 17 July he should have made further enquiries.

56. Essentially although the Respondent was prepared to sell the property and put it up for sale within a period of three months of the Applicant ceasing to occupy it, he never intended to sell it for market value and was only prepared to accept an offer that in reality was unachievable within the time frame he had set for the sale. By then removing the property from the market and re-letting it the Respondent put himself at risk of being in breach of section 58.

57. The Tribunal accepts that the Respondent incurred marketing costs and the costs of obtaining a Home Report and EWS1 report as well as further costs re-letting the property but he has also managed to obtain a substantially higher rent for the property and will be able to recover these costs within a relatively short period.

58. After considering all the evidence the Tribunal is satisfied that the Respondent is in breach of Section 58 of the 2016 Act and will therefore make a Wrongful Termination Order in terms of section 59 of the 2016 Act. In reaching its decision the Tribunal acknowledges that at least to some extent the Respondent relied on the advice of his representatives, particularly as regards the marketing of the property and the consequences of withdrawing the property from the market and that there was no malice intended towards the Applicant. For those reasons the Tribunal does not consider it would be appropriate to make an award of an amount at the upper end that can be awarded at the Tribunal's discretion namely six months' rent but that an amount equivalent to two months' rent namely £1700.00 is an appropriate amount to award the Applicant.

Decision

59. The Tribunal granted the application and made a Wrongful Termination Order requiring the Respondent to pay the Applicant the sum of £1700.00.

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.

Graham Harding

**Graham Harding
Legal Member/Chair**

**16 December 2024
Date**