



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

Chamber Ref: FTS/HPC/EV/23/1889

Re: Property at 101/5 Whitson Road, Edinburgh, EH11 3BR (“the Property”)

Parties:

Mr Raymond Lumsden, 5 Stenhouse Gardens, Edinburgh, EH11 3JL (“the Applicant”)

Mr Paul Modiak, 101/5 Whitson Road, Edinburgh, EH11 3BR (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member) and Gerard Darroch (Ordinary Member)

Decision - in absence of the Respondent

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession should be granted against the Respondent in favour of the Applicant.

Background

1. The Applicant seeks an order for possession of the property in terms of Section 18 and ground 15 of schedule 5 of the 1988 Act. Part of a tenancy agreement, an AT6 Notice with Sheriff Officer certificate of service, letter from the Procurator Fiscal, statement from a neighbour, and section 11 notice were lodged with the application.
2. A copy of the application was served on the Respondent and both parties were notified that a case management discussion (“CMD”) would take place on 12 October 2023 at 2pm. This CMD was postponed at the request of the Applicant and parties were advised that it would take place on 16 January 2024 at 10am.

A further postponement request was refused.

3. Prior to the CMD the parties lodged further documents. The CMD took place by telephone conference call on 16 January 2024. The Respondent participated. The Applicant did not participate. The Tribunal clerk contacted the Applicant's representative who stated that he thought that the case was calling at 2pm and was unable to join the call. The Tribunal noted that the CMD could not proceed in the absence of the Applicant or his representative and determined that the CMD should be continued to another date. The Tribunal also issued a direction to the parties.
4. The parties were notified that a further CMD would take place on 30 May 2024 at 10am. The Applicant participated and was represented by Mr Warner. The Respondent also participated. Prior to the CMD the Applicant lodged a written response to the direction and a copy of a letter from Victim Support on headed paper. The Respondent sent an email with some information and a request that the case be dismissed.

Summary of discussion at CMD

5. The Legal Member of the Tribunal advised the parties that case could not be dismissed at this stage and there had to be grounds for this course of action in terms of the Procedure Rules, such as a failure to cooperate with the Tribunal. No grounds had been established and the case would therefore proceed.
6. Mr Warner told the Tribunal that he had contacted the Procurator Fiscal about the criminal case against Mr Modiak and was told that the trial had not taken place in April and was now scheduled for 30 July with a preliminary hearing on 19 July 2024. He was not told why it had been adjourned. In terms of the direction response the Tribunal noted that the letter from Victim Support had been lodged. Mr Warner confirmed that the letter from the Procurator Fiscal lodged with the application should be disregarded and would not be relied upon at the hearing. In response to questions from the Tribunal, Mr Warner said that the Applicant intended to request an extract conviction from the Sheriff Court at the conclusion of the criminal proceedings.
7. Mr Modiak told the Tribunal that the trial had been adjourned due to a problem with video evidence. He said that he previously lodged letters from neighbours as evidence and did not intend to lodge any other documents. He said that he could also ask the neighbours to attend as witnesses. He hadn't realised that might be required. He stated that the letter from Victim Support contains false information. It is dated 4 May 2023 and states that he had threatened Mrs Kwiatek if he was evicted. However, that doesn't make sense as he did not know about the eviction action until August 2023. .
8. The Tribunal told parties that a further update on the criminal proceedings should be provided by the Applicant following the intermediate diet and/or trial diet and advised that the application would proceed to an in-person hearing.

9. The parties were notified that a hearing would take place on 19 November 2024 at 10am at George House in Edinburgh. Prior to the hearing the Applicant lodged a number of additional documents including a letter from Edinburgh Sheriff Court which confirmed that the Respondent had been convicted of a contravention of Section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and was fined £630. The Respondent did not lodge any further documents. At 4.53pm on 18 November 2024, the Respondent sent an email to the Tribunal which stated “ I am writing to let you know that I can not make the date on the 19th November, the reason is I started a new job on the 12th November and I can not ask for a day off as I am on trial. Also my witness is on holiday at the moment, all of this can be proven if you need me too. Also in response to the landlord’s latest letter, he has lied once again, saying her was directed to the wrong court...he was sitting in court the whole time in July when I was up, also he lied saying in his last letter that I had “multiple charges”..this is lies again as I have only had “1” charge which was stalking and harassment. Also the procurator fiscal agreed to drop the allegations of shouting threats, shouting racist things and approaching the door. As there is no evidence of any of that. The judge rewarded the Kwaitec family forty pounds only. The judge also refused a lifetime restraining order.”
10. The hearing took place on 19 November 2024 at 10am. Only the Applicant and his representative Mr Warner attended.

The Hearing

11. At the start of the hearing the Legal Member discussed the Respondent’s email and indicated that, as he had not requested a postponement and had not sent the email until shortly before 5pm on the previous day, the Tribunal proposed to proceed with the hearing. Mr Lumsden and Mr Warner confirmed that they wished to proceed. Mr Warner also advised that the only witness would be Mr Lumsden as Mr Kwiatek had decided that he was unable to attend as he was apprehensive about being in the same room as the Respondent. The Tribunal noted that the Applicant had been directed to obtain an extract conviction from the Court. Mr Lumsden said that he had tried to obtain this, but the Court had refused. However, Mr Kwiatek had managed to obtain written confirmation from them as to the conviction. Mr Lumsden said that it had been very frustrating as they had been in court and heard the outcome of the case but had been refused written confirmation of it.

The Applicant’s evidence

12. Mr Lumsden told the Tribunal that the Respondent has been his tenant since 2007. He knew Mr Modiak as he had previously been engaged to his aunt and both his mum and dad had worked for him. They asked him to let the property to Mr Modiak and he agreed to do so. The flat is a small one bedroom property. At some point Mr Modiak’s partner moved in, and they have a child of 4 or 5. His rent is paid by Universal Credit. There is no contact between them and this has been the case for some time. Mr Lumsden said that he has eight rental properties and has been a landlord for 20 years. In response to questions about the tenancy history Mr Lumsden said that there have been problems for years.

Mr Modiak incurred rent arrears of £6000. His rent is now paid directly to the Applicant, but the arrears have never been addressed. There have also been other issues. A neighbour sent Mr Lumsden a text complaining about people coming and going at all times of the day and night. She said that she thought he might be dealing drugs. She had obtained his details from landlord registration and got in touch. He went to the property and spoke to the resident. She confirmed her complaint. There have been other issues. Mr Modiak changed the locks at the property without consent. Contractors have had problems getting access for gas safety and other checks. Mr Lumsden no longer has a contact telephone number for the Respondent. More recently, there have been problems with a resident in the flat on the floor below the property. It had been flooded on a few occasions. He arranged for investigations to be carried out, but no leak was detected. The conclusion reached was that the water was coming over the top of the bath when it was being used. However, the resident whose flat was flooded told Mr Lumsden that she went to the property to complain about the flooding and Mr Modiak racially abused her. As a result, the Council have rehoused her. He is contacted regularly by the Housing department of the Council about this eviction action as a result of this episode.

- 13.** Mr Lumsden told the Council that there are six flats in the block, two on each floor. The property is located on the top floor. The Kwiateks had been the owner occupiers of the flat across the landing from the property. Mr Lumsden said that he was visited by them at his home one night when he was recovering from heart surgery. They came with their child. They were very upset – Mrs Kwiatek couldn't stop crying. They explained about the problems they were having with Mr Modiak. He was harassing them and Mrs Kwiatek was assaulted. Mr Lumsden was horrified and felt that he had to do something. He went to speak to Mr Modiak. However, Mr Modiak denied everything. He used bad language and Mr Lumsden felt threatened. He left and has not been back at the property since then. Mr Lumsden then decided that he would have to seek eviction. He felt that he could not allow the behaviour to continue. He was also concerned that his landlord registration might be affected if he did not deal with the situation. Mr Lumsden said that there have also been problems in relation to the communal garden area with rubbish accumulating and trees being burned. He referred to photographs lodged by him prior to the hearing. The Tribunal asked whether the behaviour by Mr Modiak had been triggered by anything. Mr Lumsden said that Mr Kwiatek had complained to Mr Modiak about people coming and going at all times of the day and night and concerns that he was drug dealing. This may have been the trigger.
- 14.** The Tribunal asked Mr Lumsden about the letters lodged by Mr Modiak which claim to be from other residents who support him. Mr Lumsden said that he does not know if they are genuine. Other than the Kwiateks, he has only spoken to two residents. The woman who sent him the text about drug dealing and the Council tenant who was flooded and said that she had been racially abused. Neither of them still lives in the block.

Findings in Fact

15. The Applicant is the owner and landlord of the property.
16. The Respondent is the tenant of the property in terms of an assured tenancy agreement. He has resided there since 2007 and occupies the property with his partner and child.
17. The Respondent subjected his neighbours at 101/6 Whitson Road, Edinburgh to stalking and harassment.
18. The Respondent pursued a course of conduct which caused his neighbours at 101/6 Whitson Road, Edinburgh to experience fear and alarm.
19. The Respondent was convicted of a contravention of Section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The victims of the offence were his neighbours at 101/6 Whitson Road, Edinburgh.
20. The victims of the antisocial behaviour have been re-housed by the Local Authority.
21. The victims of the antisocial behaviour contacted the Applicant and told him that they were being harassed by the Respondent. They were distressed.
22. The Applicant served an AT6 Notice on Respondent on 23 May 2024.
23. The Respondent has incurred rent arrears of £6000. His current rent is being paid by Universal credit.
24. The Respondent has applied to the Local Authority and has priority status on the waiting list, due to overcrowding.
25. The Applicant has received complaints from other residents regarding visitors to the property at all hours of the day and night, suspected drug activity, verbal abuse, leaks from the property, trees being burned and rubbish being allowed to accumulate in the communal garden.

Reasons for Decision

26. The Tribunal found the Applicant to be generally credible and reliable. It was clear from his evidence that he has known the Respondent for a considerable period of time and although their relationship is now strained, he was reluctant to start proceedings to recover possession of the property. However, having become aware of the Respondent's behaviour towards his neighbours, the Applicant felt that he had no option but to make the application. It was clear from his evidence that he had had communications from the Council and Victim Support about the Respondent, and these have helped to convince him that the property should be recovered. The Tribunal did not hear evidence from any other party or witnesses.

27. The application was submitted with the first page of a tenancy agreement which indicates that the tenancy started on 1 April 2007. The Applicant stated that the remainder of the tenancy documentation is missing. The Applicant also submitted a Notice to Quit and AT6 Notice, with a Sheriff Officer certificate of service. This establishes that the notices were served on the Respondent on 23 May 2023. The Notice to Quit was later withdrawn by the Applicant who indicated that he intended to rely on Section 18(6)(A) of the 1988 Act. The AT6 Notice is in the prescribed format and specifies ground 15 of schedule 5. It states that the earliest date that proceedings can be taken is 7 June 2023, giving the Respondent two weeks' notice, as required by Section 19(4) of the 1988 Act. A copy of a section 11 Notice has also been lodged, with evidence that it was sent by email to the Local Authority.
28. Section 18(6) of the 1988 Act allows a landlord to seek recovery of possession of an assured tenancy without first terminating the tenancy contract in certain circumstances and where certain grounds apply. Ground 15 is excluded. However, the Section 18(6)(A) states; " 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 11 of schedule 5 to the Act." The effect of this section is that a landlord who relies on ground 15 only, does not require to issue a notice to quit before making an application to the Tribunal. As the Applicant only relies on ground 15, the Tribunal is satisfied that Section 18(6)(A) applies. The Tribunal is satisfied that the Applicant has complied with Sections 19 and 19A of the 1988 Act.
29. Section 18 of the 1988 Act (as amended by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 states:-
- (1) 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 the Act.
 - (4) If the First-tier Tribunal is satisfied that any of the grounds in Part i or Part 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.
30. Ground 15 of Schedule 5 states, " The tenant, a person residing or lodging in the house with the tenant or a person visiting the house has –
- (a) Been convicted of –
 - (i) Using or allowing the house to be used for illegal or immoral purposes, or
 - (ii) An offence punishable by imprisonment committed in, or in the locality of, the house; or
 - (b) Acted in an antisocial manner in relation to a person residing, visiting or otherwise engaging in lawful activity in the locality; or

- (c) Pursued a course of antisocial conduct in relation to such a person as is mentioned in head (b) above.

In this ground "antisocial" in relation to an action or course of conduct means causing or likely to cause alarm, distress, nuisance or annoyance, "conduct" includes speech, and a course of conduct must involve conduct on at least two occasions and "tenant" includes any one of joint tenants.

31. The Applicant submitted the following documents in support of the eviction ground

- (a) A letter from Edinburgh Sheriff Court which confirms that the Respondent was convicted of a contravention of Section 39(1) of the 2010 Act.
- (b) A brief statement from Mr Kwiatek which provides limited information as the criminal case was still pending.
- (c) A letter from Victim Support addressed to Mrs Kwiatek and copied to the Applicant
- (d) A letter from Edinburgh City Council to the Applicant.
- (e) A statement from the Applicant.

32. The Respondent also submitted documents. He provided two very detailed letters which purport to be from other residents in the block. These describe the Respondent in complimentary terms and state that he is a good neighbour. The difficulty for the Tribunal is that there is no evidence that these letters are genuine. The Respondent was advised at the CMD that he could call witnesses. He indicated that he would do so. However, he did not notify the Tribunal in advance of the hearing that he intended to call witnesses. At 4.53pm on the evening before the hearing, he stated that he could not attend and that his witness was also unavailable. As the letters could not be tested or challenged, and as they could have been written by anyone, including the Respondent himself, the Tribunal determined that they could not be considered.

33. The Tribunal did not hear evidence from the victims of the antisocial behaviour, although the Applicant gave evidence that he was told about it by them. The Tribunal also noted that the Council and Victim Support have been involved and that the Council placed the victims and their child in temporary accommodation and in due course re-housed them, although they had been owner occupiers. The key piece of evidence is the conviction. Unfortunately, the Applicant was unable to obtain full details of the offence and the conviction, as the Court declined to provide these. However, Mr Kwiatek was sent a letter from the Court which confirms that the Respondent was convicted of a contravention of section 39(1) of the 2010 Act, the offence of stalking. In order to establish this offence, the accused must have engaged in a course of conduct which caused the victim to suffer fear or alarm. (Section 39(2)(a) and (c)). Conduct is defined in Section 39(6) as following, contacting or attempting

to contact, publishing material, monitoring the use of the internet, entering premises, loitering, interfering with property, watching or spying or “acting in any other way that a reasonable person would expect would cause (the victim) to suffer fear or alarm”. Course of conduct has to be on at least two occasions. Although he did not attend the hearing, the Respondent sent an email to the Tribunal indicating that he was only convicted of stalking and harassment.

34. Having regard to the terms of ground 15 of schedule 5 of the 1988 Act and the terms of Section 39(1) of the 2010 Act, the Tribunal is satisfied that the Respondent has pursued a course of anti-social conduct in relation to a person who was residing in the locality in terms of Ground 15 (c). This behaviour caused the victims, his neighbours, to suffer fear and alarm. This is established by the conviction and by the additional evidence (both documentary and oral) presented to the Tribunal. The Tribunal notes that the Respondent has also been convicted of an offence punishable by imprisonment committed in the locality of the property in terms of ground 15(a)(ii), However, the application was made some time before the conviction took place and the application and AT6 notices do not refer to this ground. The Tribunal is satisfied that ground 15 is established

35. The Tribunal proceeded to consider whether it would be reasonable to grant the order for possession and noted the following:-
 - (a) The Respondent’s position regarding the application is not completely clear. He defended the application and initially denied the allegations of antisocial behaviour. However, he did not attend the hearing or request a postponement. In his email he admitted that he had been convicted of stalking and harassment. He also said that other aspects of the charge – making threats, racial abuse and approaching the door – were removed. Assuming this is correct, and the Tribunal was not provided with any contradictory evidence, this only establishes that he was not convicted of an offence involving these activities. However, the Tribunal was not provided with any evidence that the Respondent assaulted or racially abused the complainers. Mr Lumsden’s evidence about the precise nature of the antisocial behaviour was vague. All that was established is that the Respondent committed the offence and was fined.
 - (b) The Respondent has been a tenant of the property for 18 years. He resides there with his partner and a young child. In previous submissions he indicated that he has been awarded high priority for re-housing as the property, a small one bedroom flat, is overcrowded.
 - (c) The effect of the antisocial behaviour has been significant. The victims had to seek re-housing from the Local Authority. They were first placed in temporary accommodation as there was some urgency. They have had to sell their home.
 - (d) Although he has been a tenant of the property for a long time, the behaviour towards his neighbours is not the first time that the Respondent has engaged in activity which has caused problems for the landlord and other residents. The evidence given at the hearing established that there have been rent arrears, still outstanding, although his current rent is being met by benefit payments.

There have been complaints from other residents regarding visitors to the property at all hours of the day and night and suspected drug activity. A Council tenant had to be moved due to flooding and racial abuse. The Respondent has burned trees in the garden and allowed rubbish to accumulate. The Respondent's behaviour toward the Applicant has also been problematic and there is no doubt that their relationship as landlord and tenant is not sustainable. The Respondent has changed locks without consent, did not tell his landlord when a partner moved in and has not cooperated with essential maintenance and repair. The Applicant no longer has a telephone number for the Respondent and is unwilling to visit or inspect the property due to feeling threatened on the last occasion that he did so.

36. Having regard to the factors listed in paragraph 31, the Tribunal is satisfied that it is reasonable to grant an order for possession of the property. Although the granting of the order will undoubtedly have serious implications for the Respondent and his family, these considerations are outweighed by the gravity of the antisocial behaviour, the other serious tenancy related issues and the deterioration in the landlord/tenant relationship. The property is, in any event, unsuitable for the Respondent's needs and the submissions indicate that he has been accorded a degree of priority for re-housing by the Local Authority.

37. As the Applicant has complied with the requirements of the 1988 Act, and as the Tribunal is satisfied that it would be reasonable to grant the order, the Tribunal determines that an order for possession should be granted.

Decision

38. The Tribunal determines that an order for possession of the property should be granted against the Respondent.

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.

Josephine Bonnar

Josephine Bonnar, Legal Member

24 November 2024