



**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/24/2265**

**Re: Property at 13/2 Sandpiper Road, Edinburgh, EH6 4TR (“the Property”)**

**Parties:**

**Mr Alexander Mearns, 19 Palmerston Road, Edinburgh, EH9 1TL (“the Applicant”)**

**Mr Ali Barfatani, 13/2 Sandpiper Road, Edinburgh, EH6 4TR (“the Respondent”)**

**Tribunal Members:**

**Ruth O'Hare (Legal Member) and Gerard Darroch (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an eviction order with execution of the order suspended for a period of two months**

**Background**

- 1 On 20 May 2024 the Tribunal received an application from the Applicant for an eviction order under section 33 of the 1988 Act and Rule 66 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure (“the Rules”). The application was conjoined with a separate action for payment under Rule 70 of the Rules as they pertained to the same property and the same parties.
- 2 By Notice of Acceptance of Application a Legal Member with delegated powers from the Chamber President determined that there were no grounds to reject either application. A Case Management Discussion (“CMD”) was therefore assigned for the 4 November 2024.

- 3 Both parties were given notification of the CMD in terms of Rule 17(2) of the Rules. The Respondent received notification by sheriff officers on 27 September 2024 along with a copy of the application paperwork.
- 4 On 17 October 2024 the Respondent emailed the Tribunal requesting that the application be dismissed as it was invalid. The Tribunal responded confirming that no decision would be made on the applications until the CMD, or until such time as any further procedure required for the Tribunal to reach a determination on the applications had concluded.
- 5 On 2 November 2024, following a request from the Tribunal, BEAD Properties Ltd, as representative for the Applicant, provided a copy of the notice pertaining to a rent increase in support of the rent statement provided.

### The Case Management Discussion

- 6 The Case Management Discussion took place on 4 November 2024. Mr David Gibb of Bead Properties Ltd represented the Applicant. The Respondent was in attendance. Having heard submissions from the parties the Tribunal referred the matter to an evidential hearing. The Tribunal identified the issues to be resolved as whether the Applicant had title to bring the application and, if so, whether it was reasonable for an eviction order to be granted. A Direction was issued to parties requiring the submission of documents and intimation of witnesses in advance of the hearing.
- 7 On 30 December 2024 the Applicant's representative submitted a list of documents to the Tribunal which included written submissions on the Applicant's title to bring the application and the reasonableness of making an eviction order. The Applicant's representative also provided a copy of the title deeds for the property, proof of landlord registration, a copy of the tenancy agreement and notices required under the 1988 Act, email correspondence between the Respondent and Mr Gibb, a letter of engagement from McEwan Fraser Legal regarding the sale of the property, a mortgage statement, email correspondence between the Applicant and the Respondent, a factoring bill, a bank statement and a rent statement.
- 8 On 23 January 2025 the Respondent provided written submissions on the Applicant's lack of title to bring the application and the reasonableness of making an eviction order to the Tribunal. The Respondent also submitted a copy of a notice to quit and section 33 notice, and an excerpt from the landlord register.

### The Hearing

- 9 The hearing took place on 30 January 2025 by videoconference. The Applicant was in attendance with his father Andrew Mearns as a witness. Mr Gibb appeared again to represent him. The Respondent was also present.
- 10 The Tribunal heard evidence from both parties and the witness present. The following is a summary of the evidence relevant to the Tribunal's determination of the application and does not constitute a verbatim account of the proceedings.

### *The Applicant*

- 11 Both the Applicant and his father gave evidence with assistance from Mr Gibb. The Applicant was the owner of the property as per the title deeds produced. The Applicant's father had been named on the tenancy agreement as the Applicant was working down south when the agreement was signed. The Applicant's father had contacted a letting agent he used to assist with the management of the tenancy. The property had been advertised and rented to the Respondent in the name of the Applicant's father. However he was acting as agent for the Applicant who was the landlord. The Applicant's father confirmed this. The letting agent had not asked whether the Applicant's father was the owner of the property. Mr Gibb pointed out that this was prior to the letting agent code of practice coming into force. When the Applicant returned to the area he took over responsibility for the tenancy. Mr Gibb referred to the extensive amount of correspondence that had been produced between the Applicant and the Respondent. They confirmed numerous interactions relating to tenancy matters. The Respondent recognised that he was dealing with the Applicant as the owner and landlord of the property. Mr Gibb confirmed that notices had been given to the Respondent under section 33 of the 1988 Act. The landlord had the right to seek an eviction order upon valid termination of the lease. Mr Gibb referred to the rent statement produced which confirmed there were arrears outstanding in the sum of £2870.
- 12 The Applicant explained that it was no longer financially viable for him to be a landlord. His mortgage rate had doubled and there were communal fees associated with the property. It had become very expensive. The Applicant wanted to remove himself from the property market. This was his only rental property. It had not been a good experience. The Applicant confirmed that he had instructed McEwan Fraser Legal to market and sell the property.

### *The Respondent*

- 13 The Respondent explained that the contract he had in place was with Andrew Mearns. Andrew Mearns had been identified as the landlord. The notice to quit was issued by Andrew Mearns. He was not an agent. He was the registered landlord. The application was full of errors and should be dismissed.
- 14 The Respondent acknowledged that the Applicant was the owner of the property and had been since prior to the commencement of the tenancy. Accordingly it was not possible for the contract to have transferred to him. The Applicant was the son of Andrew Mearns and any arrangement in place was between them. Mr Andrew Mearns had misrepresented himself in the contract. The Applicant was not mentioned in any of the documents and there was no mention of Andrew Mearns acting as his agent. If Andrew Mearns was the Applicant's agent then the Respondent was of the view that no tenancy agreement was in place.
- 15 The Respondent confirmed that he had corresponded with the Applicant regarding the tenancy. He did this out of courtesy to Andrew Mearns. That was not however the basis of any contractual agreement. His contract was with Andrew Mearns. The Tribunal highlighted an email that had been produced in

which the Respondent appeared to refer to the Applicant as his landlord. The Respondent did not recall this and was unable to comment.

- 16 The Respondent explained that he respected the notice to quit but had been unable to find alternative accommodation. The consequences of an eviction order would be severe. He was still searching for a new property. He had advised the letting agent of this. There was nothing else he could do. The Respondent had been surprised when he received the Tribunal application as he had told the letting agent that he would move. He did not think the application was reasonable. The Respondent explained that he was 66 years old and effectively retired. His employment situation had deteriorated during the pandemic and did not recover. He had been diagnosed with several different health problems over the past 12 months although did not provide any further specification regarding these. He had been in touch with the local council but they did not offer any help. He had told them about the Tribunal proceedings but had not been offered temporary or emergency accommodation. He had been looking at the common housing register but had not registered as yet. The Respondent acknowledged that there were rent arrears outstanding in the sum of £2870 in terms of the payments he was making to the letting agent.
- 17 Both parties were invited to make closing submissions. Mr Gibb moved the Tribunal to make an eviction order. The Applicant acknowledged that the Respondent had faced difficulties in obtaining alternative accommodation. However the Applicant was entitled to sell the property and exit the rental market.
- 18 The Respondent explained that the rule of law should be respected. Insofar as common law was concerned the privity of contract was sacrosanct. He had seen no evidence that the Applicant was the landlord. The evidence supported his position that Andrew Mearns was the landlord. The application was invalid. The landlord registration number was not correct. The Applicant was not a registered landlord. He could not raise the application as he had no title to do it. The Respondent confirmed that it was always his intention to leave after receiving the notice to quit but he had not yet secured alternative accommodation.
- 19 The hearing concluded and the Tribunal determined to issue its decision in writing.

### **Relevant Legislation**

- 20 The legislation the Tribunal must apply in this case are the following provisions of the Housing (Scotland) Act 1988.

***“32 Short assured tenancies.***

*(1)A short assured tenancy is an assured tenancy—*

*(a)which is for a term of not less than six months; and*

*(b)in respect of which a notice is served as mentioned in subsection (2) below.*

*(2) The notice referred to in subsection (1)(b) above is one which—*

*(a) is in such form as may be prescribed;*

*(b) is served before the creation of the assured tenancy;*

*(c) is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and*

*(d) states that the assured tenancy to which it relates is to be a short assured tenancy.*

*(3) Subject to subsection (4) below, if, at the finish of a short assured tenancy—*

*(a) it continues by tacit relocation;*

*(b) . . . . .*

*the continued tenancy... shall be a short assured tenancy, whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above.*

*(4) Subsection (3) above does not apply if, before the beginning of the continuation of the tenancy the landlord or, where there are joint landlords, any of them serves written notice in such form as may be prescribed on the tenant that the continued tenancy is not to be a short assured tenancy.*

*(5) Section 25 above shall apply in relation to a short assured tenancy as if in subsection (1) of that section the reference to an assured tenancy were a reference to a short assured tenancy.*

**33 Recovery of possession on termination of a short assured tenancy.**

*(1) Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the First-tier Tribunal may make an order for possession of the house if the Tribunal is satisfied—*

*(a) that the short assured tenancy has reached its end;*

*b) that tacit relocation is not operating; and*

*(c) . . . . .*

*(d) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house, and*

*(e) that it is reasonable to make an order for possession.*

*(2) The period of notice to be given under subsection (1)(d) above shall be—*

*(i) if the terms of the tenancy provide, in relation to such notice, for a period of more than six months, that period;*

*(ii) in any other case, six months.*

*(3) A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.*

*(4) Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that finish shall end (without further notice) on the day on which the order takes effect.*

*(5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.*

### **Section 55 – Interpretation of Part II.**

*(1) In this Part of the Act, except where the context otherwise requires-*

*“landlord” includes any person from time to time deriving title from the original landlord and also includes, in relation to a house, any person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the house”*

### **Findings in Fact**

- 21 The Applicant is the registered owner of the property in terms of land certificate MID135842.
- 22 The Applicant purchased the property on or around 20 May 2011.
- 23 The property was let to the Respondent in terms of a tenancy agreement, which commenced on 1 September 2015.
- 24 The tenancy agreement states the landlord is “Andy Mearns”.
- 25 Andy Mearns is Andrew Mearns and is the father of the Applicant.
- 26 Andrew Mearns was acting on behalf of the Applicant when he signed the said tenancy agreement. The Applicant was working elsewhere in the United Kingdom at the time.
- 27 On 20 February 2024 the Respondent was given a notice to quit and a notice under section 33 of the Housing (Scotland) Act 1988. The notice to quit sought to terminate the tenancy as at 29 April 2024 which is an ish date under the terms of the said tenancy agreement.
- 28 The Respondent corresponds directly with the Applicant regarding matters arising from the tenancy.

- 29 The Respondent has referred to the Applicant as the landlord in said correspondence.
- 30 The Applicant requires to sell the property. The property is no longer financially viable due to an increase in mortgage costs and property fees.
- 31 The Applicant does not have any other rental properties.
- 32 The Applicant has engaged a solicitor to market and sell the property once vacant.
- 33 The Respondent is 66 years old and retired. The Respondent has recently had various health diagnoses.
- 34 The Respondent is willing to leave the property but has been unable to source suitable alternative accommodation.
- 35 The Respondent has accrued rent arrears in the sum of £2870 as at the date of the hearing.

#### **Reasons for decision**

- 36 The Tribunal took into account the application paperwork, written representations from the parties and the evidence taken during the hearing and concluded that it had sufficient information to determine the application.
- 37 The Tribunal first considered the Applicant's right to make an application for an eviction order under section 33 of the Housing (Scotland) Act 1988 in respect of the property.
- 38 The Applicant's ownership of the property was not in dispute. The Respondent had acknowledged that the Applicant had been the owner since 2011. The Respondent's argument was that the Applicant could not bring the application because he was not named as landlord on the tenancy agreement.
- 39 The Tribunal considered the definition of landlord under section 55 of the Housing (Scotland) Act 1988. The definition includes any person who is entitled, or would be so entitled were an assured tenancy not in place, to have possession of the house. As the registered owner of the property, the Applicant has a right to possession. It therefore falls that he is the landlord for the purposes of the 1988 Act.
- 40 The Respondent had sought to rely upon the principle of privity of contract, stating that only those party to the contract could enforce the contractual rights and obligations. His position was that the Applicant was not a party to the contract and could not therefore make the application for an eviction order.

- 41 The right to apply to the Tribunal for an eviction order in relation to a short assured tenancy is a statutory right, as opposed to a contractual right. It arises from section 33 of the 1988 Act. In defining the identity of the landlord for the purpose of determining who is entitled to exercise that right the Tribunal can look to the statute itself. Furthermore it would appear unjust and illogical to conclude that an owner has no rights to recover their own property in which they have property rights. Accordingly the Tribunal concluded that the principle of privity of contract does not apply in this case, as the Applicant can make the application as a person falling within the definition of landlord under section 55 of the 1988 Act.
- 42 As an observation, even if the statutory definition did not apply in this case, the Tribunal was satisfied that Andrew Mearns was acting for the Applicant as his agent when he entered into the agreement back in 2014. Since then, the Applicant had been the primary contact for the Respondent. The Respondent did not dispute this. The correspondence between the parties reflects a relationship between a landlord and tenant. In one email dated 19 April 2018, the Respondent mentions receiving a call from a contractor *“on behalf of the landlord (whose name I didn’t recognise – it wasn’t your or the agency’s name)”*. In another email dated 24 April 2019 when referring to a notice received following unpaid rent he states *“the agency email me saying: “on behalf of our landlord I hereby give you two months notice to leave the flat”. I was not given the chance of paying on the 23<sup>rd</sup>. And you are wrong to say it was the agency’s decision. Their email made it clear that it was done at your request.”* Accordingly the evidence before the Tribunal all pointed to the fact that the Applicant had held himself out as the landlord, despite not being specifically named in the tenancy paperwork. The Tribunal did not therefore accept that the Respondent was unaware of the Applicant’s status as landlord of the property.
- 43 The Respondent had made reference to the landlord registration of the Applicant. The Tribunal considered this was irrelevant to the determination as to whether the Applicant was a landlord under the provisions of the 1988 Act. However the Tribunal was satisfied that the excerpt provided by the Applicant from the landlord register was suitable proof of his registration.
- 44 Accordingly having concluded that the Applicant had title to bring the application, the Tribunal considered whether the provisions of section 33 of the 1988 Act had been met.
- 45 The Tribunal accepted based on the documents submitted by the Applicant that the Respondent had been served with a notice to quit which had terminated the contractual tenancy as at 29 April 2024, which was a valid ish date. The Tribunal further accepted that the Respondent had been given notice that the landlord required the property back as at that date.
- 46 The Tribunal therefore considered whether it was reasonable for an eviction order to be made in this case which required the Tribunal to identify those factors relevant to reasonableness and determine what weight should be given to them.



- 47 The Tribunal took into account the Applicant's circumstances, noting that he was facing increased property costs, in particular following an increase in mortgage rates. The rent arrears that had accrued had worsened the situation for him. The Tribunal accepted that he was a reluctant landlord who was keen to leave the rental market. The Applicant's evidence had been open and straightforward regarding these issues and the Tribunal had no reason to doubt the credibility of the information he had provided which was supported by documentary evidence in the form of statements and correspondence. The Tribunal also took into account the fact that the Applicant was entitled to exercise his property rights and sell the property if that was his wish. The Tribunal believed that his intention was genuine in this regard and he had already instructed solicitors to proceed with the sale once vacant possession was obtained. These were factors to which the Tribunal gave significant weight.
- 48 The Tribunal also had regard to the Respondent's circumstances. The Tribunal noted he was 66 and retired, with some recent health diagnoses. He had not however provided any specification or evidence regarding his health, which meant the Tribunal could only give this moderate weight as a relevant factor. Of greater significance was his willingness to leave the property, with the only barrier being his inability to date to source alternative accommodation. The Tribunal noted that he had taken some steps in this regard by speaking with the council but had not yet taken decisive action such as registering for the common housing register in his area. The Tribunal also took into account the rent account which showed a pattern of missed rent payments as a relevant factor. Whilst the Respondent had recently made a lump sum payment to reduce the balance, nevertheless the arrears remained substantial at nearly £3000. This was not disputed by the Respondent.
- 49 Accordingly having weighed the above factors as relevant to the question of reasonableness the Tribunal concluded that the Applicant's financial situation and right to sell the property outweighed the Respondent's circumstances in this case. The Tribunal therefore determined that it would be reasonable to make an eviction order. However in order to give the Respondent sufficient time to find alternative accommodation the Tribunal determined to suspend execution of the order for a period of two months.
- 50 The decision of the Tribunal was unanimous.

### **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.**

Ruth O'Hare

6 February 2025

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**Legal Member/Chair**

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**Date**