



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Section 51 of the Private Housing
(Tenancies)(Scotland) Act 2016**

Chamber Ref: FTS/HPC/EV/23/2217

Re: Property at 25 Long Craigs, Port Seton, East Lothian, EH32 0TR ("the Property")

Parties:

**Ms Allison Watson, 26 Seton Wynd, Port Seton, East Lothian, EH32 0TY
("the Applicant")**

**Mr Damon Kelly, 25 Long Craigs, Port Seton, East Lothian, EH32 0TR
("the Respondent")**

Tribunal Members:

Gillian Buchanan (Legal Member) and Mike Scott (Ordinary Member)

Decision

- 1.1 At the Hearing, which took place by video conference on 23 January 2025, the Applicant was not in attendance but was represented by Mr Urquhart of DJ Alexander. The Respondent was also not in attendance but was represented by Mr Coull of Haddington CAB.
- 1.2 Prior to the Hearing Mr Urquhart on behalf of the Applicant had lodged documents by email dated 15 December 2024.

Background

- 2.1 The Application was lodged with the Tribunal by email dated 30 June 2023. The application proceeds upon Ground 11 of Schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 ("the 2016 Act") and in particular a breach of clauses 17 and 36 of the Private Residential Tenancy Agreement between the parties ("the PRT"). The application states:-

"Ground 11: The tenant has breached a term of the tenancy agreement.

An inspection highlighted heavy smoking in the property, the removal of batteries and the covers from the hallway and living room smoke detectors and cleanliness issues. A second inspection was scheduled two weeks later to allow the tenant the opportunity to rectify the situation, however the tenant cancelled the appointment. The following

week, a third inspection was cancelled after the tenant advised the property condition hadn't changed from the first inspection visit. The landlord was extremely unhappy with the condition of the property and the health and safety/fire risk hazard this posed to the tenant and the occupants of the neighbouring properties.

As per the lease agreement;

17. REASONABLE CARE The Tenant agrees to take reasonable care of the Let Property and any common parts, not interfere with the smoke detectors, carbon monoxide detectors, heat detectors or the fire alarm system;

36. SMOKING The Tenant agrees not to smoke or to permit visitors to smoke tobacco or any other substance, in the Let Property, without the prior written consent of the Landlord."

- 2.2 A CMD had previously taken place on 10 November 2023. The Respondent was not present or represented at the CMD. That CMD was adjourned to a Hearing and a Direction was issued to the Applicant to produce further evidence.
- 2.3 By email dated 2 February 2024 Mr Urquhart intimated to the Tribunal that the Applicant would wish to introduce an additional ground of eviction under Ground 14 of Schedule 3 of the 2016 Act that the Respondent has engaged in antisocial behaviour due to various reports from neighbours about noise disturbance at the Property as a result of dogs being left unattended and concerns for the dogs' welfare.
- 2.4 The Hearing subsequently assigned for 15 February 2024 was postponed at the request of the Respondent's representative.
- 2.5 The Hearing was rescheduled for 15 April 2024 and both parties were represented there. Previously on 10 April 2024 Mr Coull lodged written submissions for the Respondent. At the Hearing the Tribunal did not have before it a full set of papers relative to the Application including witness statement and also video evidence submitted for the Applicant on 6 February 2024. The Hearing could not proceed and instead a discussion took place as to additional evidence to be provided by the parties together with written legal submissions. No determination was made as to whether the additional ground of eviction – Ground 14 – would be permitted.
- 2.6 The Hearing was rescheduled for 14 August 2024 and both parties were represented there. Due to video evidence being submitted by the Applicant's representative on 13 August 2024 which could not be uploaded to be viewed and shared at the Hearing the Hearing was adjourned with a further Direction being issued to the parties relative to various requirements including the Applicant's representative producing an amended "paper apart" within a period of 14 days relative to the Application outlining "the full information relating to all Grounds relied upon ... for consideration by the tribunal". The Hearing Notes of the Tribunal made it clear that the insertion of Ground 14 as an additional ground of eviction had still to be decided upon.
- 2.7 The Hearing was rescheduled for 13 November 2024 and was postponed at the request of the Respondent's representative.
- 2.8 The Hearing was rescheduled to 23 January 2025.

The Hearing

Preliminary Matters

- 3.1 At the outset of the Hearing Mr Urquhart confirmed that the Applicant would not be attending the Hearing as she was very anxious and preferred Mr Urquhart to speak on

- her behalf. Similarly, Mr Coull confirmed that the Respondent would not be attending as he was not well due to his mental health. Neither party had any other witnesses from whom evidence would be led.
- 3.2 The Tribunal highlighted that Mr Urquhart had not lodged the revised “paper apart” as order by virtue of the Direction issued after the Hearing on 14 August 2024. He said he lacked legal knowledge and that the Applicant had not been able to get legal representation.
- 3.3 With regard to the video clips, Mr Urquhart confirmed these related to noise from the Property over a period of time from different neighbours as a result of the dogs being left unattended and the video clips therefore pertained to the proposed addition ground, Ground 14, alone.
- 3.4 Mr Urquhart also stated that the parties had been unable to agree any facts for the Hearing and that those individuals who had given the unnamed and unsigned statements lodged by him were from neighbours who did not want to take part in the proceedings for fear of reprisals particularly in light of a recent incident where windows in the Property were vandalised. The Tribunal appreciated the difficulty but expressed reservations as to the extent to which such statements are useful.
- 3.5 Mr Coull for the Respondent confirmed he was relying upon only those medical records previously lodged in respect of the Respondent and his prior written submissions. He said the Respondent is on the waiting list for a number of services but that these can take a long time to become available due to a backlog. In particular he is waiting for a support worker to be provided through a contract with the NHS which could take 2 years. The Respondent does not engage well with the Social Work department even although he had done so previously and has struggled to engage with Mr Coull who is doing his best to assist.
- 3.6 Mr Coull said there are no funds available for medical reports for the Respondent. A letter from a Consultant, Mr Simon Groves, had not been lodged due to Mr Coull’s oversight.

Proposed Additional Ground of Eviction – Ground 14

- 4.1 Mr Urquhart asked the Tribunal for additional time to lodge the “paper apart” required by the Tribunal’s Direction of 14 August 2024. He confirmed that, notwithstanding having first raised the proposed amendment to the Application to include Ground 14 on 2 February 2024 no Notice to Leave had ever been served on the Respondent relative to that Ground.
- 4.2 Mr Coull indicated that he had no objection to the Hearing being adjourned for that purpose.
- 4.3 The Tribunal briefly adjourned to consider whether to allow further time for the amended “paper apart” to be submitted on behalf of the Applicant per the Direction of 14 August 2024 and to therefore adjourn the Hearing for that purpose.
- 4.4 The Tribunal refused Mr Urquhart’s request for additional time to lodge the paper apart. The issue of an amendment to include Ground 14 was first raised almost 12 months previously in Mr Urquhart’s email of 2 February 2024. Since then no amendment to the application had been made submitted despite a Direction to that effect being made by the Tribunal on 14 August 2024 asking for an amended “paper apart” to include “the full information relating to all Grounds relied upon ... for consideration by the tribunal”. Indeed despite the time that had passed still no Notice to Leave had been served on the Respondent relative Ground 14. Given the very unsatisfactory and protracted progress of this Application it was not appropriate to allow further time and the Hearing therefore required to proceed in respect of the Application as originally framed relative to Ground 11 alone.

Submissions on behalf of Applicant

Mr Urquhart made the following submissions for the Applicant:-

- 5.1 Mr Urquhart referred to the inspection of the Property on 21 March 2023. He said the inspection disclosed there to be heavy smoking within the Property and smoking paraphernalia was found.
- 5.2 Smoking is prohibited in terms of the PRT.
- 5.3 Smoke detectors had been removed.
- 5.4 The position it was flagged both to the Respondent and his original support worker at Crisis as well as to the homelessness Case Officer.
- 5.5 Mr Urquhart said his firm had tried to reach out to the Respondent but he refused access.
- 5.6 The Applicant was concerned at the violation of the terms of the PRT and the refusal of access with the likely ongoing damage.
- 5.7 The Tribunal looked at the Report of the inspection and noted Natalia Piekarska to be the "Assessor". Mr Urquhart said she was the Property Managers who did the inspection.
- 5.8 Most evidence was found within the living room which the Respondent had also turned into a bedroom and where the Respondent spent most of his time.
- 5.9 The odour of smoke was evident throughout the Property and detectors had been removed.
- 5.10 The Tribunal referred to page 6 of the Inspection Report where the answer "YES" had been noted against the question "Smoke/heat detectors tested and working?". Mr Urquhart indicated that answer was not right and was a default setting within the Report form which had not been changed.
- 5.11 The Tribunal also referred to the answer "YES" on page 6 of the Report to the question "Is the property being generally maintained to a good standard?". Mr Urquhart confirmed this was a mistake too.
- 5.12 With regard to the images on the page 7 of the Report, Mr Urquhart said the second image shows an ashtray with tobacco and cigarette ends. Mr Urquhart accepted that he could not see what the first image was intended to illustrate. With regard to the highlighted photograph on page 9 of the Report Mr Parker said this showed the batteries having been taken out of the smoke alarm on the landing of the Property and on page 10 the highlighted photograph showed the batteries having been taken out the smoke alarm within the living room.
- 5.13 Mr Urquhart confirmed there were batteries in and all alarms were present when the PRT began.
- 5.14 He said that when the contractors attended the alarms had been removed. The Tribunal looked at the invoice of the contractors, Benaird Property Maintenance dated 22 November 2023. Mr Urquhart stated that the contractors had been refused access hence the delay in their attendance.
- 5.15 The Assessor who attended the inspection reached out to Crisis. The Respondent said that he would get the Fire Brigade out to deal with the smoke alarms. No confirmation was received that this had been done. The representative of Crisis then said that the Respondent had not engaged with her either. The Applicant wanted a contractor to check the position and it was only when the contractors gained access to the Property that confirmation of the removal of the smoke alarms was obtained.
- 5.16 The occasions when the Respondent engages and is coherent are few and far between.
- 5.17 The next inspection was undertaken on 6 December 2024. The Respondent had previously referred to there being guard dogs at the Property and had told Mr Urquhart's firm not to attend for their own safety. They had tried to liaise with the

homelessness Case Officer and Crisis but by then the Respondent was not engaging and could not assist.

- 5.18 The Respondent randomly allowed access in December 2024. The Tribunal referred to the Inspection Report and noted the assessor to be Natalie Cotton. On page 5 of the Report again the answer "YES" is given to the question "Smoke and heat detectors tested and working". Mr Urquhart explained that the assessor was not able to test the smoke alarms. Her inspection was very brief. The atmosphere was not great within the Property. They had been trying to engage with the Respondent with regard to concerns for the welfare of his dogs. The Police and RSPCA attended and the Respondent's brother was present. He said he was going to feed and walk the dogs. He was not enamoured that photographs were being taken. The Assessor wanted to be in and out the Property as quickly as possible and generally gauge how the Property was looking. She said it had deteriorated considerably. There was a smell of smoke but not as bad as previously. The overpowering smell was of dog urine. There was no evidence specific to smoke. However, the Property requires redecorated throughout. The odour is ingrained within the fabric of the property, the floors and walls.
- 5.19 Mr Urquhart said it is not unreasonable to evict the Respondent. He said that one of the smoke alarms required batteries and the other had been tampered with. The smoke heads had been removed. He said the contractor had paraphrased the position within their invoice.
- 5.20 He said various authorities had been involved – the Police, the RSPCA, the Council and support workers. He said there is a lack of responsibility from any organisation to look after the Respondent's mental health. There are concerns that the Property is not being cared for and it is right that the Applicant wants to protect the Property and safeguard neighbours from fire risks.
- 5.21 The Property is deteriorating in value and the Applicant is struggling to understand the position. It appears that there is not a great deal that the Applicant can do and she has no peace of mind.

Submissions on behalf of the Respondent

- 6.1 Mr Coull accepted that there is evidence of smoking within the Property. He also accepted that the batteries in the smoke alarms had been removed.
- 6.2 However, he did not agree with the suggestion that the terms of the contractor's invoice was to the effect that smoke alarms had been removed. He said one of the alarms needed replaced as it was not the right type. The Tribunal noted this to be in the kitchen.
- 6.3 He said it was not reasonable to evict the Respondent on the ground that he has smoked within the Property.
- 6.4 Mr Coull accepts the PRT states there to be no smoking within the Property but having regard to the Respondent's mental health and his personality disorder his behaviour is not unreasonable as it is not taking place through choice.
- 6.5 Mr Coull referred to the Respondent's medical records and the page numbered 45. The Respondent is diagnosed with ADHD and has an unstable personality disorder and psychosis. He said with these conditions a person's behaviour might be unreasonable but not through choice.
- 6.6 Mr Coull referred to his written submissions and the Supreme Court case noted therein. He said the Tribunal required to take into account the health condition of the Respondent in considering his actions.
- 6.7 He said the Respondent would not give evidence. That would make his situation worse and he could not control what he would say not by choice but due to his health.

- 6.8 The Respondent is not living as a person of good health would live and is recovering which is why his brother was there to give access to the Property in December.

At the conclusion of the Hearing the Tribunal adjourned to consider the parties' written representations and documentary evidence, together with their representatives' oral submissions.

Reasons for Decision

- 7.1 The onus of proof is on the Applicant to establish that, on the balance of probabilities, the ground of eviction is established and that it is reasonable for the Tribunal to issue an eviction order on the ground stated in the Application.
- 7.2 Evidence supporting the Application is scant.
- i. The Inspection Report of 21 March 2023 is somewhat historic being almost 2 years old. The author of that Report, Ms Piekarska, did not give evidence.
 - ii. On page 6 the Report states that the smoke and heat detectors were tested and working, and that the Property was generally being maintained to a good standard. Mr Urquhart said these questions had been answered wrongly by the default answer in the Report form not having been corrected. He was not at that inspection and any such evidence ought to have been given by Ms Piekarska, being the best evidence of the condition of the Property at that time.
 - iii. Further, the Inspection Areas (Page 8) were noted as in "Good" condition and of "Fair" cleanliness throughout and the only evidence of smoking was one of the photographs on Page 7 of the Report which showed an ashtray with tobacco and cigarette ends.
 - iv. The highlighted photographs on pages 9 and 10 of the Report showed smoke alarms in the stairs/landing and living room with the note "TT is replacing the batteries in the smoke alarm" beneath.
 - v. The works done by the contractor, Benaird Property Maintenance, in November 2023 as narrated in their invoice refer to their attendance at the Property "to upgrade smoke alarms". The invoice refers to the kitchen heat alarm being of the wrong type and being broken. (There is no complaint about this alarm in the 23 March 2023 Inspection Report.) The invoice also refers to the lounge smoke alarm head being "missing". Mr Urquhart said the contractors had paraphrased the description of their work. That's not good enough. There was no evidence directly from the contractors to that effect in the form of oral representations, an affidavit or even a letter.
 - vi. The recent Inspection Report of 6 December 2024 is of little assistance. The author, Ms Natalia Cotton, did not attend to give evidence. Mr Urquhart was not at that inspection and any evidence as to the content of the Report ought to have been given by Ms Cotton, being the best evidence of the condition of the Property at that time. On page 5 the Report states that the smoke and heat detectors were tested and working which Mr Urquhart said was not correct. Mr Urquhart's submission is not good enough.
 - vii. On page 7 the Inspection Areas were noted to be, for the most part, "Unacceptable" in their condition and cleanliness.
- 7.3 However the Application does not proceed upon complaints about the condition of or damage to the fabric of the Property. The Notice to Leave dated 18 April 2023 refers only to the Respondent "smoking in the flat when not permitted", which the Respondent admits. The Application seeks an eviction order relative to the Respondent "smoking in the Property, the removal of batteries and their covers from the hallway and living room smoke detectors and cleanliness issues". Given the terms of the Notice

- to Leave the Applicant can only seek an eviction order relative to the Respondent smoking in the Property, nothing more.
- 7.4 The Inspection Report of 6 December 2024 indicates that the smoke and heat detectors were tested and are working. Mr Urquhart's statement to the contrary is not sufficient. The prior Inspection Report of 23 March 2023 is of historic value and does nothing more than show one image of an ashtray with associated smoking paraphernalia and two images of smoke alarms with batteries removed which the Respondent had said he would replace. It's not clear whether he did so or not and no direct evidence was led from any witness that he did not do so. The Tribunal has no evidence that the smoke alarms were, as at 6 December 2024, tampered with by the Respondent such that one or more of them were not working. The Report says the detectors were tested and working. Mr Urquhart was not there. In any event, the issue of the Respondent allegedly tampering with the detectors is not focussed in the Notice to Leave and cannot therefore form the basis of the Application in whole or in part.
- 7.5 Whilst the Respondent admits smoking in the Property the Tribunal is not persuaded, on the balance of probabilities, that the Applicant has established a material breach of the PRT under clause 36 thereof and Ground 11 of Schedule 3 of the 2016 Act is not established. The evidence of the extent of the Respondent smoking is confined to a single photograph of an ashtray and associated paraphernalia in the Property in the Inspection Report of 21 March 2023, almost 2 years ago.
- 7.6 For the sake of completeness, even if that single photograph was considered to be sufficient evidence of the Respondent being in material breach of Clause 36 of the PRT the Tribunal does not consider the grant of an eviction order is reasonable on that very limited basis.

Decision

The Tribunal refuses the Application.

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.

Gillian Buchanan

Legal Member/Chair

23 January 2025

Date