Housing and Property Chamber
First-tier Tribunal for Scotland

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/24/1309

Re: Property at 44 Keppenburn Ave, Fairlie, KA29 0BA ("the Property")

Parties:

Mrs Johann MacDougall, 81 Alexander Ave, Largs, KA30 9EX ("the Applicant")

Miss Lynn Mennie, 44 Keppenburn Avenue, Fairlie, KA29 0BA ("the Respondent")

Tribunal Members:

Andrew Upton (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 eviction order should be granted.

Statement of Reasons

1. This Application called for a Hearing on 28 February 2025 by teleconference call. The Applicant was represented by Mr Gardiner, solicitor. The Respondent was neither present nor represented. The Tribunal was satisfied that the Respondent had received adequate notice of the Hearing. Accordingly, the Tribunal determined to proceed in the absence of the Respondent.

2. In this Application the Applicant seeks an eviction order under section 33 of the Housing (Scotland) Act 1988. In advance of the previous Case Management Discussion, the Respondent's support worker wrote to the Tribunal in terms sufficient to put in issue whether it was reasonable to grant the eviction order. In particular, that the Respondent has Multiple Sclerosis and autism, and that eviction would have a significantly detrimental impact on her well-being. No issue was raised by the Respondent concerning the validity

of the notices served by the Applicant, and the Tribunal regards that as not being in dispute. Accordingly, the only issue for the Tribunal's determination is whether it is reasonable to grant the eviction order.

3. The Applicant adopted the same position as that expressed at the Case Management Discussion, as supplemented by written submissions lodged on her behalf on 14 February 2025. In brief:-

    a. The Applicant co-owns the Property with her ex-husband;
    b. The Applicant is under contractual obligation to take over the lending for the Property;
    c. The Applicant is unable to secure sufficient mortgage lending in her own name to do so, and therefore requires to sell the Property;
    d. The Applicant increased the rent from £575 per month to £650 in February 2023, and again to £700 in April 2024;
    e. The Respondent has maintained payments towards rent at the rate of £575, and has accordingly accrued arrears;
    f. The Respondent's arrears are £2,275;
    g. The current mortgage payments for the Property are £452.83 per month. The mortgage is on a variable rate until 2026;
    h. The Respondent is refusing to allow access to the Property for safety inspections;
    i. The Respondent has removed the smoke detectors in the Property; and
    j. The Respondent is not keeping the Property and its garden in a condition commensurate with the full performance by her of her obligations under the tenancy agreement.

4. At the Hearing, the Applicant confirmed that the Respondent lives alone at the Property. The Property has not been adapted for her use. The Respondent has a support worker, but the Applicant is unaware of the Respondent accessing any specialist services in the locality of the Property. The Respondent is in her early 50s. The Respondent's mother lives locally. The Respondent has a son who is in his 20s, but the Applicant does not know where he lives. The Respondent has been in discussions with the local authority about being re-housed. The Applicant has been told by the local authority that offers of alternative accommodation have been made to the Respondent and refused by her.

Submissions

5. Mr Gardiner invited the Tribunal to grant the eviction order under section 33. His submission was that, in all of the circumstances, it was reasonable to evict. The Tribunal made enquiries regarding the alleged rent arrears. Whilst any rent arrears owed did not form the basis for eviction, the existence of any rent arrears was a relevant consideration to the question of reasonableness. Mr Gardiner accepted that the Respondent was only in rent arrears if the Tribunal was satisfied that the rent increases imposed by the Applicant were valid.

6. Mr Gardiner referred to clause 2.2 of the tenancy agreement. In terms thereof:-

"The landlord is entitled to increase the rent after the aforementioned end date specified in clause 1.1. Under such circumstances the tenant will be given a minimum of one month's notice in writing of any proposed change before the beginning of the rental period when the change is to start."

7. The ability of a landlord under assured tenancies to increase rent was restricted by section 23A of the Housing (Scotland) Act 1988, as temporarily enacted by Paragraph 2 of Schedule 1 to the Cost of Living (Tenant Protection) (Scotland) Act 2022. However, in terms of section 23A(1), those restrictions did not apply to "exempt tenancies" as described in s.23A(6). S.23A(6)(b) provides that exempt tenancy includes "a contractual tenancy which makes provision of the type mentioned in" s.24(5)(b). S.24(5)(b) refers to a "term of a contractual tenancy which makes provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period)".

8. Mr Gardiner submitted that clause 2.2 was sufficient in its terms to render the tenancy agreement an exempt tenancy within the meaning of s.23A. He referred to the Tribunal's decision in *Slash Property Ltd v Horne*, FTS/HPC/CV/23/3285. In that case, the tenancy agreement included a rent review clause in near identical terms to the one under consideration in this case. At paragraph 12 of its decision, the Tribunal said:-

"The Tenancy Agreement in this case is a contractual tenancy which makes provision for an increase in rent. In those circumstances it is exempt from the rent cap controls in the 2022 Act. It was Mr Horne's submission that a tenancy agreement could only be exempt from the rent cap controls if the provision for a rent increase in the contract set out the mechanism by which the rent would be increased. That does not accord with the definition of an "exempt tenancy" in section 24(5)(b) of the 1988 Act."

Accordingly, the Tribunal determined that the tenancy was an exempt tenancy for the purposes of s.23A. Mr Gardiner submitted that the decision, though not binding, was persuasive and invited the Tribunal to apply that decision here.

Decision

9. There is no dispute in this case that the requirements of s.33 of the 1988 Act, other than reasonableness of granting the order, are satisfied. The only question for the Tribunal is whether it is reasonable to grant the order.

10. The role of a Court (or Tribunal) in considering reasonableness was set out in *Cumming v Danson*, [1942] 2 All E.R. 653, per Lord Greene MR at p655:-

"[I]n considering reasonableness… it is, in my opinion, perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

11. Having considered all of the circumstances of this case, the Tribunal is satisfied that it is reasonable to grant the eviction order. In reaching that conclusion, the Tribunal had regard to the Respondent's medical conditions, the existence of which was not disputed by the Applicant. The Respondent did not attend the Hearing to give evidence of the likely impact of eviction on her, but the Tribunal considered that granting an eviction order would likely have a negative impact on her mental health.

12. That notwithstanding, the Tribunal considered that the likely impact on the Respondent of granting the order was not of itself the determining factor. The Applicant wishes to sell the Property. Her circumstances have changed significantly following the end of her marriage. She is under contractual obligation to assume responsibility for the Property, and will be unable to finance that obligation. She ought, in the circumstances, to be able to sell the Property for that reason. The Respondent has received offers of alternative accommodation from the local authority, which is aware of her circumstances. The Tribunal was satisfied that the Respondent will be able to source suitable alternative accommodation and receive adequate support for her moving to that alternative accommodation. The Respondent has no dependents living with her. There is no evidence to suggest that her remaining in the Property is necessary for her to access specialist services. Separately, the Respondent has failed to maintain the Property in the condition that she ought to have. She has caused damage to the Property, including by removing measures for the detection of fire. She is refusing access for safety inspections. In all of those circumstances, it is reasonable to grant the eviction order.

13. In reaching that conclusion, the Tribunal disregarded the question of whether the Respondent was in rent arrears. The Tribunal was satisfied that the bar of reasonableness was met irrespective of whether the Respondent was in arrears. However, given the time taken by Mr Gardiner in his submissions on the validity of the rent increases, the Tribunal will provide a view on that.

14. The terms of clause 2.2 are widely drawn. It amounts to no more than a statement that the Applicant has the power to increase the rent. That is a power that the Applicant would have had under the 1988 Act anyway, and which the rent cap imposed by s.23A was intended to control. The question is whether a mere reference to a contractual right to increase the rent, without reference to any measure of determining an appropriate increase, is sufficient to bring it within the meaning of s.23A(6)(b).

15. In the *Slash Property Ltd* case, a differently constituted Tribunal determined that it was. The reasons given in that case for that decision are limited. However, this Tribunal agrees with that decision. What is required for a tenancy to be exempt for the purposes of s.23A is a matter of statutory interpretation. In approaching that exercise, the Tribunal considers that the approach to be adopted is that set out by the Lord President in *Faculty of Advocates and Judicial Appointments Board for Scotland, Special Case*, 2025 S.L.T. 171, at paragraph [25]:-

"The principles which should be applied, when construing a provision in a statute, are not in dispute. The court requires to ascertain the meaning of the words used in light of their context and the purpose of the statute (*In Re JR222 [2024] 1 WLR 4877* , Lord Stephens at para 73 and, at para 74, citing *R (O) v Home Secretary [2023] AC 255* , Lord Hodge at para 29). The primary source of a provision's meaning will be the natural and ordinary meaning of the words used in their context (*ibid*) as understood from the whole section, group of sections and the Act . External materials, such as explanatory notes, policy memoranda or ministerial statements, may be relevant to understand the context of a provision. They may reveal an ambiguity or uncertainty. Nevertheless, if the words in their context are clear and unambiguous and "do not produce absurdity" then that is an end of the matter (*ibid* para 30). No amount of external material can displace the natural and ordinary meaning of the words. Where possible, courts should strive to avoid an interpretation that produces an absurd result, because that is not likely to be what Parliament had intended. Absurdity is to be given a "very wide meaning, covering, amongst other things, unworkability, impracticality, inconvenience, anomaly or illogicality" (*In Re JR222* , Lord Stephens at para 76; see also *Mykoliw v Botterill 2010 SLT 1219* , Lord Pentland at para [20] citing *R (Edison First Power) v Central Valuation Office [2003] 4 All ER 209* , Lord Millett at paras 116-117)."

16. In this case, the wording of s.24(5)(b) is widely drawn. It refers only to the existence of a term "which makes provision for an increase in rent". Clause 2.2, though scant in its terms, does make provision for the Applicant to increase rent. It provides for a minimum period of notice to be given, and specifies the earliest date that the increase may be applied from.

17. The terms of s.24(5)(b) can be contrasted with s.24(5)(a) which, in relation to statutory assured tenancies, only relate to terms which not only increase rent but also specify the mechanism by which the rent increase is to be determined. The Tribunal can only conclude from that provision that Parliament intended to apply a restriction on the terms applicable to statutory assured tenancies but not to contractual assured tenancies. The Tribunal should not, as a consequence, read those words into s.24(5)(b).

18. Accordingly, the Tribunal is of the view that the rent increases applied by the Applicant were valid. That necessarily means that the Respondent is in arrears of £2,275. It follows that, had the Tribunal taken the question of arrears into consideration, it would have lent additional weight in favour of granting the eviction order.

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.

Andrew Upton

28/02/2025

Legal Member/Chair	**Date**