



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/22/0476

Re: Property at 3/20 149 Ingram Street, Merchant City, Glasgow, G1 1DW (“the Property”)

Parties:

Kay McIntyre Vassilopoulou, 42 Thetidos, Dionysos, Athens 145 76, Greece (“the Applicant”)

Joshua Murray, 3/20 149 Ingram Street, Merchant City, Glasgow, G1 1DW (“the Respondent”)

Tribunal Members:

Joel Conn (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined the following:

Background

1. This is an application by the Applicant for an eviction order in regard to a Private Residential Tenancy (“PRT”) in terms of rule 109 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended (“the Procedure Rules”). The tenancy in question is a Private Residential Tenancy of the Property by the Applicant to the Respondent commencing on 15 November 2019. The application was dated 18 February 2022 and lodged with the Tribunal on that date.
2. The application relied upon a Notice to Leave dated 17 June 2021 in terms of section 50 of the Private Housing (Tenancies) (Scotland) Act 2016, said to have been intimated upon the Respondent by email on the same date to the email address provided by the Respondent in the PRT Agreement in accordance with

the provisions of the PRT. The Notice relied upon Ground 12 of Schedule 3 Part 1 of the 2016 Act, being that “the tenant has been in rent arrears for three or more consecutive months”. In regard to Ground 12, the body of the notice referred to arrears of £5,600 at that time, referred to a “rent statement” which was said to show this amount as being arrears accumulated from 1 April 2020. A copy of the rent statement showing arrears as of 1 June 2021 of £5,600 made up from irregular payments since 1 April 2020 and particularly periods of no rent being paid from 1 December 2020 to 1 March 2021. The rent due under the PRT is £900 per month due in advance on the first day of each. The Notice intimated that an application to the Tribunal would not be made before 20 December 2021.

3. Evidence of a section 11 notice in terms of the Homelessness Etc. (Scotland) Act 2003 served upon Glasgow City Council on 18 February 2022 was provided with the application. Evidence of the Applicant’s letting agent providing pre-action protocol information to the Respondent by email on 18 February 2022 was further provided in the application papers.
4. The application was conjoined with a civil application for unpaid arrears under reference CV/22/0477. We heard the two applications together throughout, and this concluded with two days of evidence and submissions at a Hearing heard on 31 August and 23 November 2022. The defence to this eviction application is two-fold: whether the Notice to Leave was properly served, and whether the underlying rent was due (or whether an abatement for rent was appropriate). The defence to the arrears action was that the Property had not been properly maintained within a reasonable time and accordingly an abatement on rent was appropriate. We have considered those issues in our decision on CV/22/0477 and adopt the figure determined by us there as the arrears sum due in this application. In this decision we will review the evidence on the Notice to Leave and thereafter make our decision on eviction.
5. We have issued detailed Notes in regard to both days of the Hearing, due to various motions for late lodging and on scheduling of witnesses. We do not repeat the content of them here, though some of what is recorded within them is relevant in regard to the expenses motion made by the Applicant. In matters of doubt as to the background of procedural matters, we would refer parties to our Notes on those Hearings.

The Hearing

6. The matter called for a Hearing of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote videoconference by Webex on 31 August and 23 November 2022, both days starting at 10:00. Parties were represented throughout the days of the Hearing by Alexandra Wooley, trainee solicitor, Ballantyne Kirkwood & France, for the Applicant and Jack Smith, solicitor, Latta & Co, for the Respondent.
7. We heard the Applicant’s three witnesses on 31 August and the Respondent’s two witnesses and both parties’ submissions on 23 November 2022. All witnesses had witness statements lodged which were adopted as their

examination-in-chief. The majority of oral evidence heard was either in response to questions from ourselves, or in cross-examination.

Rory Cowan

8. Mr Cowan is a solicitor and partner at Bannatyne Kirkwood France & Co, the solicitors for the Applicant. He gave evidence of being instructed by the Applicant's letting agent, Goodearl Property Management Ltd, on 17 June 2021 to draft and issue a Notice to Leave on the Respondent further to arrears of £5,600 for which he was provided with a rent statement.
9. He drafted the Notice to Leave and then emailed the Respondent at 13:32 but noticed he had attached the wrong Notice to Leave. He recalled the email on or around 13:33.
10. Thereafter he emailed the Respondent with the correct Notice to Leave at 13:36 but realised that he had not sought "read" or "delivery" receipts, which was his usual procedure. He then emailed the Respondent a further time at 13:38 with the correct Notice to Leave, and requesting "read" and "delivery" receipts. He then recalled the second email (of 13:36) on or around 13:40.
11. Mr Cowan did not recall whether he obtained "read" or "delivery" receipts for the 13:38 email. He did not receive either receipts and he said that his IT team had failed to locate any when asked to try and recover them. He did not receive any notification of the emails to the Respondent bouncing as undelivered.
12. He said that the Notice to Leave would have been scanned with the rent statement and the attachment to the 13:36 and 13:38 emails would have been a single pdf of the Notice with the statement combined.

Lee Cunningham

13. Mr Cunningham is a director of Cairn Building Solutions Ltd ("CBS"). His evidence related to issues of repair is reviewed in our decision on CV/22/0477.

Andrew Pace

14. Mr Pace is a Property Manager of Goodearl Property Management Ltd, the Applicant's letting agent and property managers. His evidence related to issues of repair is reviewed in our decision on CV/22/0477.
15. Regarding his evidence on service of the Notice to Leave, he had a conversation with the Respondent on or about 17 June 2021. He did not recall the exact conversation but thought he would have told the Respondent that if the rent was paid and the arrears cleared in full, there would be no grounds for evicting. He was certain neither he nor anyone at Goodearl would suggest that the Notice was being retracted.

16. He described having regular contact with the Respondent on payment of the rent through the period of the Notice to Leave (including emails which were lodged). Mr Pace described a period of default in payment, during which the Respondent gave updates on his financial position and offers of payment. Payments were made sporadically, including a large payment in September 2021. Mr Pace did not recall any comment by the Respondent that non-payment was an attempt to retain rent until the raising of the action. He referred to retention being mentioned (relating to the balcony door) in February 2020, but the rent was not then retained that month or the month after.

The Respondent

17. The Respondent's evidence related to issues of repair is reviewed in our decision on CV/22/0477.
18. Regarding his evidence on service of the Notice to Leave, the Respondent accepted receiving four emails: the emails of 13:32 and 13:36 and their two recalls though in evidence he accepted that the recalls did not expressly confirm which email was being recalled. (We noted that they would all have looked similar due to similar subject lines.)
19. He said that he spoke to Mr Pace after receiving the Notice to Leave (as we understand it, he meant that he called immediately after receiving the 13:36 email) and discussed payments. He said that: "There was no number put on it" (ie what he was to pay) and that the "discussion I had on the phone was very vague. He [Mr Pace] was like 'yeah, okay'" and that Mr Pace said: "'As long as payments are made for rent, it won't be an issue.' Something along those lines."

Alison Connolly

20. Ms Connolly is the Respondent's mother. Her evidence related to issues of repair, and is reviewed in our decision on CV/22/0477. She confirmed that the payment of £5,500 of 28 September 2021 came from her parents, and was made in an attempt to help out the Respondent with sizeable arrears that had developed. At the time of the payment, the Respondent had not discussed with her any intention to retain rent and she said he was keen to make payment of rent at that time.

Submissions for the Applicant

21. The Applicant's submissions were simple: the Notice to Leave of 13:38 was sent and valid. It was not recalled and had expired. Ground 12 was validly sought given the size of the remaining arrears.

Submissions for the Respondent

22. The Respondent's submissions on the Notice to Leave sought to cast doubt on the email of 13:38, principally based on the lack of the "read" and "delivery" receipts that were said to have been requested. We were asked to prefer the

Respondent's evidence that he did not receive the email, and to hold that it was not thus validly served.

Expenses

23. The Applicant made a motion for expenses should she be successful. She sought the expenses of the second day of the Hearing (23 November 2022) on the basis that it would not have been required had the Respondent provided his witness statements by the original deadline. The details of this motion are within our decision on CV/22/0477.

Findings in Fact

24. On 15 November 2019, the Applicant let the Property to the Respondent under a Private Residential Tenancy with commencement on that date ("the Tenancy").
25. In terms of clause 4 of the Tenancy Agreement, the parties agreed that email to the email address provided by the Respondent could be used for communication of notices in terms of the Tenancy.
26. On 17 June 2021, the Applicant's solicitor, Rory Cowan, drafted a Notice to Leave in correct form addressed to the Respondent, providing the Respondent with notice, amongst other matters, that he was in rent arrears for a period in excess of three consecutive months and detailing arrears at that date of £5,600.
27. The Notice to Leave provided the Respondent with notice that no application would be raised before the Tribunal prior to 20 December 2021.
28. The Applicant's solicitor served a copy of the Notice to Leave on the Respondent by email to the agreed email address for the Respondent on 17 June 2021 at 13:38.
29. Service of the Notice to Leave followed emails by Mr Cowan to the Respondent of 13:32 where the wrong Notice to Leave was emailed, and of 13:36 when the correct Notice to Leave was emailed but Mr Cowan had not sought "read" or "delivery" receipts.
30. Mr Cowan recalled the 13:32 email on or about 13:33 and the 13:36 email at on or about 13:40.
31. Mr Cowan did not recall the 13:38 email which contained the correct Notice to Leave. He did not receive either a "delivery" or "read" receipt for that email.
32. During the period of the Notice to Leave expiring, the Respondent (or those on his behalf) made payments of £900 on 4 August, £700 on 24 September, £5,500 on 28 September, £900 on 4 October, and £450 on 2 December 2021.

33. At the expiry of the Notice to Leave, the Respondent remained in arrears of rent of £2,150 being over two months' arrears.
34. The Applicant raised proceedings for an order for eviction with the Tribunal, under Rule 109, relying in part on Ground 12 of Schedule 3 Part 1 of the 2016 Act after the expiry of the Notice to Leave.
35. A section 11 notice in the required terms of the Homelessness Etc. (Scotland) Act 2003 was served upon Glasgow City Council on the Applicant's behalf.
36. The Applicant's agent provided the Respondent with suitable pre-action protocol information by email on 18 February 2022.
37. As of 23 November 2022, the Respondent remained in arrears of rent (subject to valid abatements determined by this Tribunal) in the amount of £10,150 which is the equivalent of over 11 months of rent.
38. The Respondent does not claim to have paid any amount of the arrears of £10,150 remaining as at 23 November 2022.
39. The sum of arrears remaining as of 23 November 2022 is neither wholly nor partly a consequence of a delay or failure in the payment of a relevant benefit, other than any referable to an act or omission of the Respondent.
40. The Respondent lives alone at the Property and has no dependents.

Reasons for Decision

41. The application was in terms of rule 109, being an order for eviction of a PRT. From the CMD, we understood that a defence was being advanced on the basis that the Respondent understood that if payments of at least £5,600 were made by 20 December 2021, the Notice would not be insisted upon. It was confirmed by the Respondent's agent at the Hearing that this was not a defence being extended and, along with the abatement of rent defence, the defence to eviction was solely that the Notice to Leave relied upon by the Applicant was not sent to the Respondent.
42. Simply, we prefer the Applicant's evidence. We were presented – between the productions lodged by the parties – with the three emails sent and the two recalls. We accepted Mr Cowan's evidence that he recalled the first email due to sending the wrong attachment, and recalled the second email (which was otherwise fine) due to wanting to have "read" and "delivery" receipts. We accepted his evidence that he sent the third email and had no notification that any of the three emails had bounced.
43. We acknowledge that all email users have anecdotal evidence of emails that do not appear to be received. We heard no evidence on the IT reasons, but it is within judicial knowledge of the Tribunal that human errors occur that can lead to

a perception of emails not being received. Emails can be accidentally deleted or, if multiple emails have similar headings, may be disregarded in error. Further, non-junk emails may be overlooked if they are automatically placed into junk folders by the recipient's email system.

44. We appreciate Mr Cowan's preference to seek a "read" and "delivery" receipt but these are not required under the 2016 Act and the Act assumes delivery 48 hours after a Notice to Leave is sent under section 62(5), and we do not see that this assumption has been rebutted by the Respondent in this case. He simply says he did not receive the one email of the five that the Applicant relies upon, but gives no further explanation for this. Implicitly he wishes us to believe it is a happy coincidence for him, but we do not accept that. We hold that it was sent and duly served. We are fortified in this view by his discussions with the Applicant's letting agent at the time about payment, and his payments thereafter. The dispute about service of the Notice was not presented until after the expiry date of the Notice to Leave.
45. We are thus satisfied on the basis of the application and supporting papers that the Notice to Leave had been correctly served upon the Respondent and expired without being repaid in full.
46. Ground 12 of Schedule 3 to the 2016 Act (as temporarily amended) applies if:
- (1) ...the tenant has been in rent arrears for three or more consecutive months. ...*
- (3) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—*
- (a) for three or more consecutive months the tenant has been in arrears of rent, and*
- (b) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order.*
- (4) In deciding under sub-paragraph (3) whether it is reasonable to issue an eviction order, the Tribunal is to consider whether the tenant's being in arrears of rent over the period in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.*
47. On the basis of our decision in CV/2/0477, we are satisfied that £10,150 of arrears remain outstanding as at the end of the Hearing on 23 November 2022. Ground 12 was satisfied in regard to the length of arrears and amount outstanding. No defence was extended in regard to benefits and we are satisfied that the arrears of rent are not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.
48. We require, in terms of the Act as temporarily amended, to consider the reasonableness of the application even in regard to such substantial arrears. We were satisfied that the Applicant's reasons for seeking eviction were reasonable given the increased amount and duration of the arrears. The Respondent lives

alone in a two-bedroom flat and has no dependents. In all the circumstances before us, we were satisfied that Ground 12 was well founded by the Applicant and reasonable to grant. On the basis of the information held, we are satisfied to grant an order for eviction at this time.

49. In regard to the expenses motion, we reject this and make a finding of no expenses. Our reasoning is set out in our decision in CV/22/0477.

Decision

50. In all the circumstances, we grant an order against the Respondent for eviction from the Property under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 in normal terms further to ground 12 of Schedule 3 of that Act.

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.

J. Conn

1 December 2022

Legal Member/Chair

Date