



**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/20/0876**

**Re: Property at Flat 2/2 46 Corlaich Avenue, Glasgow, G42 0DS (“the Property”)**

**Parties:**

**Mrs Angela Fox, 56 Monteith Drive, Clarkston, Glasgow, G76 8NY (“the Applicant”)**

**Mr Steven Lyons, Ms Nicola O'Hagan, Flat 2/2 46 Corlaich Avenue, Glasgow, G42 0DS (“the Respondents”)**

**Tribunal Members:**

**Andrew Cowan (Legal Member)**

**Decision (in absence of the Respondents)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to refuse to grant an order for repossession against the Respondents**

**Background**

1. By application dated 5th March 2020 the Applicant applied to the Tribunal for an order for repossession against the Respondents under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). In support of the application the Applicant provided the following documentation:
  - i) Notice to Leave dated 2nd February 2020 stating that proceedings for possession will commence no earlier than 2nd March and citing possession grounds 11 and 12 of schedule 3 of the 2016 Act, together with proof of delivery to the Respondents;

(ii) Copy Tenancy Agreement between the parties

(iii) Notice under section 11 of the Homelessness (Scotland) Act 2003 to Glasgow City Council;

(iv) Rent Statement

2) By Notice of Acceptance of Application dated 22 May 2020 the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion ("CMD") was therefore assigned for 18th August 2020. Due to the imposition of restrictions arising from the Covid-19 pandemic a direction was issued to the parties by the Chamber President confirming that the CMD would take place by teleconference. Notification of the date and time, together with instructions on how to join the teleconference was intimated to the Respondents by Sheriff Officers on 27th July 2020.

### **Matters raised at the Case Management Discussion**

3) The CMD took place by teleconference on 18th August 2020. The Applicant was represented by Mr Hamaad Khalid, Solicitor. The Respondents did not attend the CMD, nor was there any representation on their behalf.

4) At the start of the discussion the Tribunal noted that the Notice to Leave (upon which the application for eviction was based) purported to rely on grounds 11 and 12 of schedule 3 (Eviction Grounds) of the 2016 Act.

5) These grounds, as stated in the legislation are:

#### **Ground 11- Breach of tenancy agreement**

(1) It is an eviction ground that the tenant has failed to comply with an obligation under the tenancy.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) the tenant has failed to comply with a term of the tenancy, and

(b) the Tribunal considers it to be reasonable to issue an eviction order on account of that fact.

(3) The reference in sub-paragraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent.

#### **Ground 12 - Rent arrears**

(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.

(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if—

(a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant—

(i) is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that day, and

(ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and

(b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

(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.

6) The Applicant has set out the grounds for possession, and the circumstances that led to the application being made at Paragraph 5 of the Application

### **The Application under Ground 11**

7) The Applicant claims, in her Application, that the Tenant has breached the terms of the Tenancy Agreement by failing to pay rent on time. The Tribunal highlighted that paragraph (3) of Ground 11 specifically excludes rent terms from those which can be considered under this Ground. Accordingly the Applicant cannot rely upon arrears of rent as a breach term under Ground 11. This was accepted at the CMD by the Applicant's solicitor.

8) It was noted that the notice to leave also made reference to unauthorised changes allegedly made to the property by the Tenants. Any such averments of a breach of the tenancy conditions in this respect did not, however, form part of the reasons or circumstances given for the Application being made. The Applicant's solicitor accepted that fair notice of such averments would require to be given to the Respondents in the application if they were to be founded upon in support of the application for eviction, and that such fair notice had not been given.

- 9) The Application does not rely upon any breach of a Tenancy Condition (which is not otherwise excluded by paragraph (3)) and accordingly the Tribunal refuse to grant an order for eviction based on Ground 11 of the 2016 Act.

### **The Application under Ground 12**

- 10) In order to rely upon Ground 12 of the 2016 Act the Tenant must have been served with a valid notice to leave.
- 11) The notice to leave was dated 2nd February 2020. The rent statement lodged by the Applicant shows that the Respondents had paid full rent until 30 November 2019. The Applicant's solicitor advised the Tribunal that the Respondents have made no payments towards the rent liability since that date. He advised that as at the date of the CMD the Respondents rent arrears stood at £4950, no rent having been paid since 1st December 2019.
- 12) The Respondents first went into arrears of rent on 1st December 2019. It is quite clear that, as at the date of the notice to leave dated 2nd February 2020 the Respondents had not been in arrears for three or more consecutive months (as required by Ground 12).
- 13) In *Majid v Gaffney & Anr.* [2019] UT 59, the Upper Tribunal stated, at paragraph 14, in relation to the reliance on ground 12 in a notice to leave:

“The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid. If it is invalid decree for eviction should not be granted. The decision of the First-tier Tribunal sets out the position with clarity. It could in my view it could never have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure that the 2016 Act...”.

- 14) The conditions of Ground 12 were not satisfied as at the date of service of the Notice to leave. The Notice to Leave is invalid. That being so, the Tribunal refuse to grant an order for eviction based on Ground 12 of the 2016 Act.

### **Decision**

- 15) The Tribunal refuse to grant the application for eviction

### **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.**

18/08/20

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**Legal Member/Chair**

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**Date**