

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/19/0967

Re: Property at 48/1 Drum Street, Edinburgh, EH17 8RN (“the Property”)

Parties:

Mr Cesar Felipe Dominguez Lopez, 77/6 Calder Gardens, Edinburgh, EH11 4LF (“the Applicant”)

Mr Jesus Rodriguez Ortega, 48/1 Drum Street, Edinburgh, EH17 8RN (“the Respondent”)

Tribunal Members:

George Clark (Legal Member) and Gordon Laurie (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be granted and issued an Eviction Order.

Background

By application, received by the Tribunal on 26 March 2019, the Applicant sought an Eviction Order against the Respondent under Section 51 of the Private Housing (Tenancies) Act 2016. The Ground on which the Applicant relied was Ground 4 of Schedule 3 to the 2016 Act, namely that he intended to live in the Property.

The application was accompanied by copies of a Notice to Leave, dated 18 February 2019, advising the Respondent that no application to the Tribunal for an Eviction Order would be made before 21 March 2019, an e-mail to the Respondent dated 18 February 2019, attaching the Notice to Leave, a letter from Maria Isabel Luengo Pascual dated 18 April 2019, as joint owner of the Property, confirming that she is aware of and consents to the proceedings and a Private Residential Tenancy Agreement between the Parties, commencing on 1 October 2018 at a rent of £450 per month.

On 14 May 2019, the Tribunal advised the Parties of the date, time and venue for a Case Management Discussion and the Respondent was invited to make written representations no later than 3 June 2019.

On 30 May 2019, the Community Help and Advice Initiative (CHAI) submitted written representations on behalf of the Respondent. They contended that the Applicant had provided no evidence to support his position and had not, therefore, stated a case against which the Respondent was able to put a fully informed defence. They stated

that the Property was a small studio flat and that the Applicant and his partner also owned their current home, a three-bedroom flat. The Applicant had provided no evidence that their current house was no longer to be their primary home. The Respondent was of the view that the application was in revenge for the Respondent's requests for his tenancy rights to be respected.

The Respondent submitted that, on the balance of probabilities, the Applicant had not shown that the conditions of Ground 4 of Schedule 3 to the 2016 Act had been met.

The Hearing

At the Case Management Discussion held on 14 June 2019, the Applicant stated that he wished to recover the Property to live in it. That was disputed by the Respondent, who was of the view that the Applicant simply wanted to remove him. It was agreed that there should be a hearing at which evidence would need to be led.

On 1 July 2019, the Applicant made further written representations to the Tribunal. He compared the location of the Property with that of his present home, by reference to the Scottish Index of Multiple Deprivation 2016 and by reference to relative proximity of shops, pharmacies and libraries. He stated that the area of Drum Street was more suited to their priorities and was safer.

On 3 July 2019, the Respondent's representatives made further written representations, contending that a correct interpretation of the word "intends" in Ground 4 of Schedule 3 to the 2016 Act was that the Tribunal had to be satisfied that the Applicant has an intention which is both "genuine" and "firm and settled" (following the reasoning of Lord Justice Asquith in *Cunliffe v Goodman* (1950) 2 KB237. The Respondent's representatives indicated a line of authority which they said was a starting place for the interpretation of the Grounds in Schedule 3 to the 2016 Act. There was a world of difference between a landlord having to evict a tenant because he wishes to live in the premises and a landlord having to move into premises because he wants to evict the tenant. They submitted again that the evidence provided to the Tribunal showed that the application was an attempt by the Applicant to effect a revenge eviction in response to the Respondent's requests for his tenancy rights to be respected and that the intention of the Respondent was not "genuine" nor "firm and settled" and that it had arisen solely with the aim of evicting the Respondent.

The Hearing took place at George House, 126 George Street, Edinburgh on the afternoon of 24 July 2019. Both Parties were present and each had a Spanish interpreter. The Respondent was represented by Mr Andrew Wilson of CHAI.

The Tribunal told the Parties that it accepted the legal argument made in the written submissions by the Respondent that the Applicant's intention to live in the Property had to be genuine and firm and settled.

The Applicant told the Tribunal that he lived with his wife and daughter, who is aged 7. Drum Street is a studio flat and they had done some work to make it comfortable for all three of them, but they had lived in the Property very comfortably with no problems of space from November 2017 until June 2018. If they recovered possession, the intention was to carry out further modifications to improve the layout for the Applicant, his wife and daughter.

In June 2018, they had moved to Calder Gardens. Admittedly, it gave them more space, but in time they had found out that they did not feel safe. In addition, the facilities and amenities were further away. The Applicant's wife had to leave for work

very early in the morning and, on occasion, had trouble with youths who were hanging about. They had decided that the best thing was to return to Drum Street to stay until, in time, they could get another property closer to the city centre. They did not intend to sell their present house meantime.

The Applicant was referred to a series of WhatsApp messages sent to the Respondent on or around 9 November 2018. He told the Tribunal that these had been sent in the heat of the moment at a time when he and his wife had been under stress because of the dispute with the Respondent about a bike. An adult-sized bike had been left in the Property and the Respondent had placed it outside without permission. Since then, however, things had been calm.

Mr Wilson told the Tribunal that relationships between the Parties had broken down very early in the tenancy and the Respondent had almost instantly been threatened with eviction following the issue regarding the bike. The Respondent had felt intimidated and had gone to CHAI for advice. The WhatsApp messages were the only items they had been able to have translated, as City of Edinburgh Council would not provide translation facilities for voicemail messages left by the Applicant. The Respondent had been expected to accept that it was reasonable that an adult bike belonging to his landlord should be stored in a flat which extended only to 25 square metres. The Respondent had later consulted CHAI with other concerns and they had written to the Applicant on 13 February 2019. Only 5 days later, the Notice to Leave was sent by the Applicant. He contended that this was not a coincidence. The Applicant might well intend to move in to the Property, but they were doing so simply to evict the Respondent. Mr Wilson questioned the he reasonability of three people living in such a small space. They had a property which they could sell in order to move to a different area, without having to regain possession of Drum Street and this was illustrative of the fact that the intent to live there was not genuine.

The Respondent told the Tribunal that when he had received the keys of the Property, he had found the Applicant had left a bike and other items there. The problems between the Parties had really been about the bike, which the Applicant seemed to think he was entitled to leave there. He had put it in an inside yard, padlocked and that was when he received voicemail messages saying he was to leave in 28 days' time.

The Parties then left the Hearing.

Reasons for Decision

The Tribunal had to decide whether Ground 4 of Schedule 3 to the 2016 Act had been established. The Tribunal accepted that more than a mere statement of intention to live in the Property was required and that it accepted that the intention must be genuine, firm and settled. That said, the view of the Tribunal was that the bar had been set fairly low by the Scottish Government in framing the legislation. Paragraph 4 of Ground 4, for example, stated that evidence tending to show that a landlord has the intention of living in the Property included an affidavit stating that he has that intention. The standard of proof was also the balance of probabilities.

The Tribunal noted that the Applicant had stayed in the Property with his wife and daughter until a little over a year ago. They had moved to a bigger house but, within a few months, had decided that they were not settled and did not feel entirely safe in Sighthill, the Applicant's wife having had an incident with some youths when leaving

home early one morning. The Tribunal accepted the statement of the Applicant that the move to Sighthill had simply not worked for his family.

The Tribunal was not persuaded by the arguments put forward by the Applicant based on proximity to local services and amenities. When questioned, the Applicant had confirmed that the family had no ongoing regular need to visit a pharmacy. The Respondent had said that it was totally impractical, for three people to live in the Property, but the Applicant and his family had done so until June 2018 and, whilst these were matters of fine judgement and the Tribunal had to be alert to the possibility of contrived applications, on the balance of probabilities, the Tribunal held that the intention to live in the Property was genuine and that the test of establishing Ground 4 of Schedule 3 to the 2016 Act had been met.

Decision

The Tribunal determined that the application should be granted and issued an 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.

George Clark

Legal Member/Chair

24 July 2019

Date