



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 (Act)

Chamber Ref: FTS/HPC/EV/20/2007

Re: Property at 2 Chamfron Gardens, Stirling, Stirlingshire, FK7 7XU (“the Property”)

Parties:

Mr Archibald Cowan, c/o Lindsays, Caledonian Exchange, 19A Canning Street, Edinburgh, EH3 8HE (“the Applicant”)

Mr David Grierson, 2 Chamfron Gardens, Stirling, Stirlingshire, FK7 7XU (“the Respondent”)

Tribunal Members:

Alan Strain (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application for eviction and recovery of possession be granted.

Background

This is an application under Rule 109 and section 51(1) of the Act in respect of the Applicant’s intention to sell the Property and for eviction and recovery of possession on Ground 10 of Schedule 3 to the Act.

The Tribunal had regard to the following documents from the Applicant which had been lodged pursuant to the Tribunal’s Directions of 27 October and 9 November 2020:

1. List of Documents;
2. Supplementary list of Documents from Applicant;
3. Second Supplementary List of Documents;
4. Third Supplementary List of Documents;

5. Fourth Supplementary List of Documents.
6. List of Witnesses.

The Respondent had not complied with the Tribunal's Directions of 27 October, 9 November and 1 December 2020 which required him to provide:

27 October 2020

1. *A paginated bundle of documents upon which they intend to rely, so that the Tribunal can be directed to any pertinent documents at the Hearing.*
2. *A list of witnesses they intend to call.*

9 November 2020

1. *A paginated bundle of documents upon which they intend to rely, so that the Tribunal can be directed to any pertinent documents at the Hearing.*
2. *A list of witnesses they intend to call.*
The said documentation should be lodged with the Chamber no later than close of business on 18 November 2020.

1 December 2020

1. *A paginated bundle of documents upon which he intends to rely, so that the Tribunal can be directed to any pertinent documents at the Hearing.*
2. *A list of witnesses he intends to call;*
3. *Written explanation as to why the Tribunal's Direction of 9 November 2020 requiring items 1 and 2 above has not been complied with;*
4. *A medical certificate from the hospital the Respondent has attended in Venice (or a suitably qualified Italian Doctor) confirming:*
 - (a) *Date and Reason for Admission;*
 - (b) *Duration of Admission;*
 - (c) *Expected date of Discharge (if not already discharged);*
 - (d) *The Respondent's fitness to participate by telephone in the Hearing of the Tribunal by conference call on 16 December 2020;*
 - (e) *When the Respondent will be fit to travel.*
5. *A Written Statement detailing the following:*
 - (a) *A detailed chronological response to the Applicant's assertion that the Respondent has ceased to occupy the Property;*

(b) The date(s) the Respondent physically occupied the Property from 1 June 2020 to 16 December 2020;

(c) The date(s) the Respondent accepts that he did not occupy the Property from 1 June 2020 to 16 December 2020;

(c) The date of the Respondent's departure from Scotland to Venice along with supporting evidence such as flight booking;

(d) Whether or not the Respondent intends to return to the Property and if so, when?

(e) Whether or not the Respondent has leave to remain in the UK and proof of same?

The said documentation should be lodged with the Chamber no later than close of business on 11 December 2020.

The Respondent provided the following documentation immediately prior to the Hearing:

1. Written submissions by email of 15 December 2020 enclosing screenshots and Sky bill;
2. Written Submissions by emails of 11 -14 December enclosing Medical Report dated 7 December 2020, prescription, certificate and screenshots.

Hearing

The case called for a Hearing by conference call on 16 December 2020. The Applicant participated and was not represented. The Respondent participated and was accompanied by his support person, Ms Leung.

The Respondent had sought postponement of the Hearing by various emails in the week prior to the Hearing. This had been due to a period of hospitalisation from 23 November 2020 until 7 December 2020. The Tribunal had directed the Respondent to lodge:

4. A medical certificate from the hospital the Respondent has attended in Venice (or a suitably qualified Italian Doctor) confirming:

(a) Date and Reason for Admission;

(b) Duration of Admission;

(c) Expected date of Discharge (if not already discharged);

(d) The Respondent's fitness to participate by telephone in the Hearing of the Tribunal by conference call on 16 December 2020;

(e) When the Respondent will be fit to travel.

The Respondent had lodged a medical certificate dated 7 December 2020 which confirmed the Respondent had been admitted on 23 November 2020 with shortness of breath and intense coughing. His chest x-ray was consistent with bilateral pneumonia. He had been treated with antibiotics and had improved to the extent he was discharged on 7 December 2020. He was recommended to rest from work and convalesce for 3 weeks.

The Tribunal did not consider that the certificate complied with the Direction and that it did not confirm whether or not the Respondent was fit to participate in the Hearing or travel.

In light of the information available to it the Tribunal had refused the application to postpone. In doing so, the Tribunal had also taken into account that the last Hearing (23 November 2020) had been discharged due to the Respondent's ill-health. The Tribunal had due regard to the overriding objective and the delay that had been occasioned to date.

The Tribunal had also directed the Respondent to provide:

5. A Written Statement detailing the following:

(a) A detailed chronological response to the Applicant's assertion that the Respondent has ceased to occupy the Property;

(b) The date(s) the Respondent physically occupied the Property from 1 June 2020 to 16 December 2020;

(c) The date(s) the Respondent accepts that he did not occupy the Property from 1 June 2020 to 16 December 2020;

(c) The date of the Respondent's departure from Scotland to Venice along with supporting evidence such as flight booking;

(d) Whether or not the Respondent intends to return to the Property and if so, when?

(e) Whether or not the Respondent has leave to remain in the UK and proof of same?

The Respondent had not complied with this Direction other than to provide some information in the almost daily emails both he and his supporter had issued to the Tribunal prior to the Hearing.

The Tribunal had issued the Direction to try and facilitate the Respondent's presentation of evidence whilst minimising his oral evidence and potential impact on his health. The Respondent had not availed himself of this opportunity despite displaying to the Tribunal in the many emails prior to the Hearing that he was clearly

well enough to draft, issue and send emails with attachments to the Tribunal Administration.

The Respondent and his supporter were clearly in a position to proceed at the commencement of the Hearing.

The Tribunal afforded the Respondent breaks when he (or his supporter) required them. At one point in the Hearing the Respondent appeared to have a coughing fit which, Ms Leung informed the Tribunal, meant he could no longer participate and needed a Doctor to attend him. The Tribunal adjourned for 15 minutes and Ms Leung, initially, and then Respondent re-joined the Hearing. No further mention was made of getting or needing a Doctor and the Hearing proceeded to a conclusion.

Evidence

During the course of the Hearing the Tribunal heard evidence from the following witnesses for the Applicant:

1. The Applicant.
2. Catherine Cowan.
3. Clive Loble.
4. Jessie Gwynne.

The Tribunal also heard evidence from the Respondent and Ms Leung.

Evidence

Applicant

The Applicant's evidence was to the effect that he had let the Property to the Respondent under false pretences. The Respondent had not disclosed that he was on a visitor visa to the UK, or that he (along with Mr and Mrs Leung) had been in rental arrears with his previous landlord (Mr Loble) or that an eviction order had been obtained against them (Both orders were produced within the inventories and granted 28 November 2019). Further, he had not disclosed that Mr and Mrs Leung would be living with him.

The visitor visa meant that the Respondent could only stay in the UK for periods of 6 months and then had to leave for 3. As far as the Applicant was aware the Respondent did not have a current visa to enable his return to the UK and he would be ineligible for one given the awards made against him for non-payment of rent.

This was a point that was supported by Mr Loble. Mr Loble also spoke of his experience with the Respondent and Mrs Leung where they had made repeated representations that payments had been made – when they hadn't. Mr Loble had asked them to confirm when they had vacated his Property and they had refused to

do so. This necessitated his bringing an eviction application even though it appeared the Property had been abandoned.

The Applicant contended that the Respondent was in rent arrears of £7,425 as at the date of the Hearing. He had only paid rent on 31 January and 3 May 2020 in the sum of £825.

He entirely refuted the suggestion that his sister had received £3,000 in cash through the kitchen window of the Property. He referred to the correspondence exchanged with Ms Leung on 17 April 2020 in which she says that the Respondent would not agree to pay his sister cash.

The Respondent informed the Applicant's agents by email of 2 August 2020 that he was leaving the country within a few days and was going to visit family in Hong Kong for a few weeks and then would return to the Property. He would not confirm the exact date to the Respondent.

The Applicant formed the view that when the Respondent left then he was ceasing to occupy the Property as his sole or main residence despite his expressed intention to return. He did not believe that the Respondent would return.

The Applicant accordingly instructed Ms Gwynne (cleaner) to undertake daily surveillance of the Property. Ms Gwynne confirms that she did so and produced photographic and video evidence confirming that the Property was and remains unoccupied. This is contained in her affidavit and the Applicant's productions which sets out the checks that she undertook and the relevant dates.

The Applicant served Notice to Leave on the Respondent by email on 17 August 2020. The Ground for recovery of possession was Ground 10.

The Respondent had not gone to Hong Kong. He had gone to Venice and had not returned. He had not been in the Property since before 17 August 2020.

Respondent

Ms Leung and the Respondent gave their evidence to the effect that they had not misled the Applicant at the time of entering the PRTA. The PRTA was solely with the Respondent. It was the Applicant's obligation to have carried out checks. They failed to do so.

It is correct that 2 payments of £850 were made in January and May 2020. A further payment of £3,000 in cash was made through the kitchen window to the Applicant's sister at the Applicant's request around 20 April 2020. Reference was made to the screenshot message from the Applicant to that effect. The Respondent could not describe the person to whom he passed the money and he did not get a receipt due to Covid. Ms Leung had drawn the money out in cash. Statements could be provided showing this – but hadn't.

The Respondent had remained in the Property until 20 October 2020 when he had left by car to Venice. He had no documentary evidence of this.

Ms Leung stated that she had produced a video of the Respondent in the house dated 26 August 2020. This was disputed by the Applicant.

The reason Ms Gwynne had not observed anyone in the house was due to the Respondent staying in an upstairs bedroom and being reclusive.

The Respondent was on a visitor's visa and that did not prevent him from renting the Property. When questioned by the Applicant about the current visa status Ms Leung stated this was "pending" whereas the Respondent stated he had an exceptional extension to his visa.

The Respondent had intended to return by easyjet flight on 23 November 2020 but that had been cancelled due to the pandemic. He had not returned since due to his health. He hoped to return around 20 January 2021 but had not booked his flight yet.

His belongings remained within the Property. He would bring his rental payments up to date upon his return.

Findings in Fact

1. The Parties entered into the Private Residential Tenancy Agreement (**PRTA**) commencing 31 January 2020;
2. As at the commencement of the PRTA the Respondent did not inform the Applicant or his agents about the existence of an eviction order or order for payment of rent arrears in respect of his previous tenancy;
3. The monthly rent was £825;
4. The Respondent had not paid any rent since 3 May 2020;
5. The Respondent emailed the Applicant's solicitors on 2 August 2020 informing them of his intention to go to Hong Kong in a few days to visit family for a few weeks;
6. The Respondent ceased to occupy the Property prior to 17 August 2020 and has not occupied it since;
7. Section 11 Notification was served on the local authority by email on 21 September 2020;
8. The Respondent is currently in Venice and has been there since at least immediately prior to 23 November 2020;
9. The Respondent has not fully complied with the Directions of this Tribunal dated 27 October, 9 November and 1 December 2020;
10. The Respondent's current visa status is unknown as is his ability to return to the UK;
11. The Respondent ceased to occupy the Property as his only or principal home prior to service of the Notice to Leave;
12. The Property not being so occupied is not attributable to a breach of the Applicant's duties under Chapter 4 of Part 1 of the Housing (Scotland) Act 2006,
12. It is reasonable to grant the eviction order sought.

Reasons

The Tribunal had regard to Ground 10 of Schedule 3 to the Act which provides:

10(1) It is an eviction ground that the tenant is not occupying the let property as the tenant's home.

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

(a) the let property is not being occupied as the only or principal home of—

(i) the tenant, or

(ii) a person to whom a sub-tenancy of the let property has been lawfully granted, and

(b) the property's not being so occupied is not attributable to a breach of the landlord's duties under Chapter 4 of Part 1 of the Housing (Scotland) Act 2006, and

(c) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.

(3) In sub-paragraph (2), the reference to a sub-tenancy being lawfully granted is to be construed in accordance with section 46(3).

The Tribunal then considered the oral and documentary evidence it had received from the Parties.

The Tribunal preferred and accepted the evidence of the Applicant and his witnesses as being both credible and reliable in the circumstances.

The Applicant and his witnesses gave their evidence in a straightforward, consistent and clear manner which accorded with the verifiable facts and the documentary evidence before the Tribunal.

This could be distinguished from the evidence of the Respondent and Ms Leung which appeared evasive, inconsistent and unreliable. The Respondent had failed, without reasonable explanation, to comply with the Tribunal's Directions which had been made in an attempt to assist with inquiry and the presentation of evidence to the Tribunal. The Respondent had ample opportunity to do so. It appeared to the Tribunal that the Respondent was using his medical conditions to prevaricate and obfuscate.

The Tribunal had given the Respondent clear direction on the information required. The Respondent (and Ms Leung) repeatedly failed to provide the information and sought to use the excuse of ill health. This position was entirely unsustainable and contrary to their own actions and evidence. The Respondent was well enough to correspond with the Tribunal administration, compile lengthy emails and attachments on a daily (and sometimes more) basis. Yet he was not well enough to prepare a detailed written statement as required by the Direction of 1 December 2020. He was unable to produce evidence confirming the date he left for Venice or of any booking to return – in fact he conceded that no booking to return had been made. He was unable to produce any evidence of his visa status despite making reference to the existence of such documentation during the course of his evidence and Ms Leung's.

Ms Leung's evidence contradicted that of the Respondent on the visa status. She, after first seeking to evade responding to the Applicant, stated that the visa was "pending" whereas the Respondent stated he had been granted exceptional extension. Ms Leung further stated that the Respondent didn't require a visa.

The email of 2 August 2020 sent by the Respondent to the Applicant's agents was another example of such inconsistency. In that email he had stated he was leaving within a few days to go to visit family in Hong Kong. This can be contrasted with his evidence before the Tribunal which was that he had left (by car) on 20 October 2020, been driven by another person, and gone to Venice – where he remains. He could produce no evidence of this journey.

The Respondent gave evidence that upon his return in January 2021 he would bring rental payments up to date. This is entirely inconsistent with the position adopted by him in the conjoined application [CV/20/1481] in terms of which he claims entitled to withhold rent due to defects in the Property and has held rental payments in a separate account. The Tribunal Direction in that conjoined case of 27 October 2020 required him to produce evidence of that – he has not complied.

The Respondent's evidence that he had paid £3,000 in cash on 20 April 2020 to an unidentified female through the kitchen window who didn't give a receipt was not accepted by the Tribunal. Ms Leung said that the cash withdrawals for the cash used to make the payment could have been produced – but weren't. The Tribunal considered and found that no such payment had been made.

Mr Loble's evidence also set out similar behaviour of the Respondent with regard to his Property. It was also beyond doubt that the eviction and payment orders had been granted as these were produced.

For all of these reasons the Tribunal did not find the evidence of the Respondent or Ms Leung to be credible or reliable. The Tribunal accepted and preferred the evidence of the Applicant and his witnesses.

The Respondent had clearly not occupied the Property since prior to 17 August 2020 and the Tribunal did not accept his evidence that he intended to return. All of the evidence pointed to an abandonment of the Property. Non-payment of rent, obfuscation about when/where and for how long the Respondent had left the country, what his visa status was all indicated that he was not occupying the Property as his only or principal home.

The Tribunal then considered whether or not it was reasonable to grant the eviction order sought. The Tribunal had no hesitation in all of the circumstances of this case to find that it was reasonable to grant the eviction order sought. After all, the Respondent was not occupying the Property as his only or principal home.

The Tribunal was satisfied that Ground 10 had been established, the order sought was reasonable and accordingly granted the application for eviction and recovery of possession.

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.

A. S.

22 December 2020

Legal Member/Chair

Date