



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18(1) of the Housing (Scotland) Act 1988**

**Chamber Ref: FTS/HPC/EV/19/3845**

**Re: Property at 120 Kingsbridge Drive, Glasgow, G44 4JS (“the Property”)**

**Parties:**

**Staffa Rock PLC (formerly Carduus Housing PLC), c/o Indigo Square Property Ltd, 42 Holmlea Road, Glasgow, G44 4AL (“the Applicant” and “the Landlord”)**

**Miss Lisa McCabe, Mr Martyn John Curran, 120 Kingsbridge Drive, Glasgow, G44 4JS (“the Respondent” and “the Tenant”)**

**Tribunal Members:**

**Martin McAllister (Legal Member) and Donald Wooley (Ordinary Member) (“the tribunal”).**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) determined that the application for an order for possession of the Property be refused.**

**Background**

- 1. This is an application for an order of possession in terms of Section 18 (1) of the Housing (Scotland) Act 1988 (“the 1988 Act”). The application states that the Applicant seeks recovery of the Property on Grounds 8, 11 and 12 of Parts I and II of Schedule 5 of the 1988 Act.**
- 2. Two other applications involving the Property have been determined by the Tribunal. One was an application under Section 22 (1) of the Housing (Scotland) Act 2006. The Tribunal made a repairing standard enforcement order and has issued a certificate of compliance. The other application was a claim for compensation and an award was made in favour of the Tenant. The Landlord has credited the rental account for the Property with a sum equivalent to the award of compensation. Determination of the current application was delayed because of the restrictions imposed by**

coronavirus and also because of procedures to determine the other applications.

3. There had been a number of case management discussions.
4. The matter had called for Hearings on 19<sup>th</sup> April 2022 and on 27<sup>th</sup> June 2022 and was adjourned on both occasions without hearing of evidence. The adjournments, which had been opposed by Ms West, were to allow the position of rent arrears to be clarified and for Mr McIntosh to assist the Respondents in issues regarding Universal Credit in relation to payment of rent and arrears. The matter of benefits had been complicated by the Respondents separating.
5. At the case management discussions and Hearings, the Respondents' solicitor had stated that he had a fundamental point of competence which he would want addressed when the tribunal considered the application.
6. Prior to the Hearing on 27<sup>th</sup> June 2022, the Applicant's Representative intimated that an order for possession of the Property under Ground 8 of Parts I and II of Schedule 5 of the 1988 Act was no longer being pursued and could be removed from consideration by the tribunal.

#### Hearing on 29<sup>th</sup> September 2022

7. A Hearing was held by video conference. Ms West, of Indigo Square, the Applicant's letting agents represented the Applicant and Mr McIntosh, solicitor, represented the Respondent. Ms McCabe was present throughout the Hearing and gave evidence.

#### Written Submissions and Representations

8. Prior to the Hearing, the Applicant's representative submitted an up to date rental statement showing arrears of rent as at 27<sup>th</sup> September 2022 amounting to £500.
9. Prior to the Hearing, the Respondent's solicitor submitted a rental statement which had been prepared on behalf of the Respondents and which included a future payment of £500 to be made by the DWP on 15<sup>th</sup> October 2022 and which, including that payment, brought the arrears of rent to zero.
10. The Respondent's solicitor made a number of written submissions and amendments thereto which he helpfully combined into one document. He submitted a sixth Minute of Amendment prior to the Hearing on 29<sup>th</sup> September 2022 which related to the rental account.

## **Preliminary Matters**

- 11. Mr McIntosh indicated that he would want to address the tribunal on the competence issue, thereafter the matter of whether or not rent was lawfully due and whether or not there were arrears of rent and finally the issue of reasonableness.**
- 12. Mr McIntosh explained that Mr Curran and Ms McCabe had separated and that the tenancy had been taken on by Mr Curran alone and he was considered the tenant as far as the claim for and payment of Universal Credit was concerned but that Ms McCabe would be providing evidence. Mr McIntosh indicated that it may be the case that, in law, Ms McCabe might still be a tenant but he said that was not a matter which he was going to address the tribunal on.**
- 13. Parties helpfully set out their position with regard to the respective rental statements which each had lodged.**
- 14. Ms West was clear in stating that as at the date of the Hearing the level of arrears was £500. She said that the rent was due to be paid on 27<sup>th</sup> September 2022 but had not been. She confirmed that, since July 2022, the rent had been paid by Universal Credit and that payments of £500 had been made on 15<sup>th</sup> July, 15<sup>th</sup> August and 15<sup>th</sup> September. Ms West confirmed that an additional payment of £500 had been made by Universal Credit on 30<sup>th</sup> August and that it had taken some time to identify that it was in respect of the Property. She said that this payment had been due for some months and was the one which Mr McIntosh had previously referred to. She alluded to general issues which she had experienced with payments from Universal Credit. Ms West accepted that an additional payment of £127.13 was made by the Respondents on 15<sup>th</sup> September 2022.**
- 15. Ms West accepted that, if the payment of £500 was made from Universal Credit on 15<sup>th</sup> October 2022, the rent account would be up to date until 27<sup>th</sup> October 2022 when the next payment of £500 would be due. She stressed that the term of the lease was that the rent required to be paid in advance on the twenty seventh day of each month.**
- 16. Mr McIntosh explained the system of payment by Universal Credit which is linked to the date of application and the ensuing period of assessment. He said that the particular timing of Mr Curran's application meant that the rent would be paid on the fifteenth of each month.**

## The Law

### Housing (Scotland) Act 1988

#### *S.18 Orders for possession.*

*(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.*

*(2) The following provisions of this section have effect, subject to section 19, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.*

*3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6), the Tribunal shall make an order for possession.*

*(3A) If the First-tier Tribunal is satisfied—*

*(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and*

*(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.*

*(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.*

#### *Part II, Schedule 5 of Housing (Scotland) Act 1988*

##### *Ground 11*

*Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.*

##### *Ground 12*

*Some rent lawfully due from the tenant—*

- (a) is unpaid on the date on which the proceedings for possession are begun;  
and
- (b) (b) except where subsection (1) (b) of section 19 of this Act applies was, in arrears at the date of the service of the notice under that section relating to those proceedings.

## Competence Issue

### 17. The Respondents' Representative had submitted written representations on the matter:

***“The parties entered into a tenancy agreement on 17 June 2016. On the same date a Form AT5 was issued to the respondents confirming that the said tenancy agreement was a short assured tenancy in terms of the Housing (Scotland) Act 1988. In terms of clause 3 of the said tenancy agreement entry to the subjects was at 17 June 2016 and the tenancy endured for the period of 12 months from 17 June 2016 and expired at midnight on 17 June 2017 and unless otherwise extended for a fixed term, continued monthly thereafter unless or until terminated in writing by either party giving two months’ notice. On Monday 27 November 2017, four days prior to the commencement of the Private Housing (Tenancies) (Scotland) Act 2016, the parties entered into another tenancy agreement. The tenancy agreement of 27 November 2017 (hereinafter referred to as “the 2017 tenancy”) had the same parties, the same subjects and the same rent as the tenancy agreement of 17 June 2016 (hereinafter referred to as “the 2016 tenancy”). However, the period of the tenancy was different. In terms of the 2017 tenancy agreement, “The date of entry (lease renewal) under this lease shall be Monday 27 November 2017 (“the date of entry”) (regardless of the date or dates on which this lease is signed by the landlord and the tenant) and this lease (renewal) shall endure for the period to Monday 26 November 2018 (“the expiry date”), both dates inclusive.”***

***Thereafter the tenancy continued from month to month until termination on notice given of two months. The commencement of the 2017 tenancy interrupted the monthly tenancy period of the 2016 tenancy, which should have finished on 17 December 2017. There was no express agreement on this point. The 2017 tenancy agreement superseded the 2016 tenancy agreement. The period of the tenancy is an essential term. The period of the tenancy in the 2017 tenancy agreement was substantially and materially different from that in the 2016 tenancy agreement. Accordingly the relevant tenancy agreement between the parties at the commencement of the current application was the one which commenced on 27 November 2017. This was a new tenancy. The landlord required to lodge this tenancy agreement in terms of Rule 65 of the First Tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017.***

***Instead the landlord lodged the 2016 tenancy agreement. The application is therefore incompetent and should be dismissed.***

***Further, the said 2017 tenancy agreement purported to be a short assured tenancy agreement. It was not a short assured tenancy agreement. It was an assured tenancy agreement. No Form AT5 was served at or before the commencement of the 2017 tenancy agreement. The Form AT5 lodged by the landlord relates to the 2016 tenancy agreement. In any event, even if the Tribunal holds that the lack of a Form AT5 does not prevent the 2017 tenancy being a short assured tenancy, which is denied, in terms of Section 32(3) of the Housing (Scotland) Act 1988 (as amended by the Private Housing (Tenancies) (Scotland) Act 2016) the 2017 tenancy can only be a short assured tenancy if it is continued by tacit relocation. The 2017 tenancy did not continue by tacit relocation and therefore the 2017 tenancy cannot be a short assured tenancy in terms of the said Section 32.”***

- 18. Mr McIntosh adopted the written representations he had made on the matter.**
- 19. Ms West confirmed that the Applicant’s position was that there were two tenancy agreements- one entered into on 17<sup>th</sup> June 2016 and one entered into on 27<sup>th</sup> November 2017. She said that it is not the Applicant’s position that the two tenancy agreements effectively constituted one contract for lease. Ms West confirmed that she considered relevant tenancy agreement to be that entered into by the parties in 2017.**
- 20. Mr McIntosh said that his position was that the wrong tenancy agreement had been submitted with the application. He said that the 2016 tenancy had ceased to be effective once the 2017 Agreement had been entered into. He referred the tribunal to Rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”):**

**Rule 65**

*Application for order for possession in relation to assured tenancies*

*Where a landlord makes an application under section 18(1) (orders for possession) of the 1988 Act, the application must—*

*(a) state—*

*(i) the name, address and registration number (if any) of the landlord;*

*(ii) the name, address and profession of any representative of the landlord;*

- (iii) the name and address of the tenant; and*
- (iv) the possession grounds which apply as set out in Schedule 5 of the 1988 Act;*
- (b) be accompanied by—*
  - (i) a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the landlord can give;*
  - (ii) a copy of the notice by landlord of intention to raise proceedings for possession of a house let on an assured tenancy;*
  - (iii) a copy of the notice to quit served by the landlord on the tenant (if applicable);*  
*and*
  - (iv) evidence as the applicant has that the possession ground or grounds has been met; and*
- (c) be signed and dated by the landlord or a representative of the landlord.*

**21. Mr McIntosh said that the 2017 tenancy agreement should have been submitted with the application and that, accordingly, the Applicant had not complied with Rule 65 (b)(i). He said that the application had been accepted for determination on 12<sup>th</sup> December 2019 but that it was not until March 2021 that the 2017 tenancy agreement had been submitted to the Tribunal. He said that the 2017 tenancy agreement must have or should have been available to the Applicant when the submission was made to the Tribunal. He said that, had the Chamber President (or the legal member of the Tribunal acting under delegated powers of the President) been aware that the 2016 tenancy agreement was not the relevant one, the application would not have been admitted for determination.**

**22. Mr McIntosh said that the two tenancy agreements were quite different in format and terms. As one example, he cited the ish dates as being different. He said that the two tenancy agreements could not exist at the same time.**

**23. Mr McIntosh submitted that the Rules required to be followed strictly and that it was important that a Respondent had proper notice of an application, particularly in view of the consequences for a tenant of an order for possession being granted. He said that the application was fundamentally flawed.**

**24. Mr McIntosh was directed to Rules 2 and 3 of the Rules. He said that he did not consider that the overriding objective set out in Rule 2 could be engaged in circumstances where the wrong tenancy agreement had been submitted in support of an application. He said that he considered that, in such circumstances, the whole case would be fundamentally flawed and incompetent.**

**25. Ms West said that the application had been submitted with what was considered, at the time, to be the correct tenancy agreement, that an error had been made and that, when the 2017 tenancy agreement had been found, it had been submitted to the Tribunal. She explained that the 2017 Agreement had not been in the relevant file and had been inadvertently archived. She said that, if she had the 2017 Agreement when the application had been submitted, it would have been lodged.**

**26. Ms West gave some background to the tenancy agreements. She said that the 2016 lease had been entered into by the parties. It was for a period from 17<sup>th</sup> June 2016 to 16<sup>th</sup> June 2017 and, unless otherwise extended, on a month to month basis until terminated by either party giving two months' notice. Ms West said that the Applicant instructed its letting agent to send lease extensions to all of its tenants including the Respondents. In the case of the Property, this document was dated 18<sup>th</sup> April 2017 and stated that the existing lease would continue on a month to month basis until either party served notice of termination. Ms West said that the Respondents wanted more security and that the Applicant agreed to grant a new tenancy agreement which commenced on 27<sup>th</sup> November 2017 for a period of one year and thereafter on a monthly basis. Ms West said that, in error, an AT5 form had not been served when the later tenancy agreement had been instituted.**

**27. Mr McIntosh said that, because of the lack of service of the AT5 Form, the 2017 tenancy could not be a short assured tenancy and that it was an assured tenancy.**

#### **Rent Lawfully Due**

**28. Mr McIntosh submitted that Ground 12 should not be at issue before the tribunal. He said that the Tribunal had made a Repairing Standard Enforcement Order in respect of the Property. He said that, until the work under that Order had been done, the rent was not lawfully due. He referred to the terms of Ground 12. They refer to rent being lawfully due and unpaid at the date on which the proceedings for possession are**



begun and was in arrears at the date of service of the notice relating to those proceedings. He stated that, because of the condition of the Property, the rent could not have been lawfully due until either the work was completed, the Property had been reinspected by members of the Tribunal or the certificate of compliance with the repairing standard enforcement order had been issued. Mr McIntosh said that, at the time proceedings for possession commenced, the Property did not meet the repairing standard set out in the Housing (Scotland) Act 2006 and that the rent was not lawfully due.

29. Mr McIntosh referred the tribunal to the case of *Fingland & Mitchell v Howie* 1926 SC 319 and in particular Lord Anderson at page 324; *“One party to a contract can insist on contractual prestation only if he himself has fulfilled his part of the contract. Under a contract of let, if the lessor sues for rent, the tenant, if it is established that the lessor has not performed his contractual obligation, has a good answer to the claim.”* Mr McIntosh said that it was his position that, up to the date that the repairs had been completed, the rent was not lawfully due.

30. Mr McIntosh said that the issue of outstanding repair issues also impacted on consideration of Ground 11. He referred to the rent statement from March 2022 when compensation of £2725 which had been awarded to the Respondents had been credited to the rent account. He said that the rent statement showed a consistent reduction of the arrears from March 2022 and, once the issues with Universal Credit had been resolved, regular payment of rent. He said that the rent statement, in his submission, did not demonstrate persistent delay in paying rent.

31. Ms West said that persistent delay in payment of rent was demonstrated from earlier rent statements. Mr McIntosh maintained that rent was not lawfully due for that period for reasons he had outlined in connection with the repair issue.

#### **Reasonableness**

32. Ms West explained that the Applicant had a portfolio of properties which it is seeking to sell in order to repay borrowings and also to concentrate on property development. She said that the Applicant would prefer to sell a vacant property rather one with a sitting tenant.

- 33. Ms McCabe explained that she and Mr Curran had separated in October 2021 and that, since then, they had been sharing the care of their three children aged 6, 4 and 1. She said that they have been working towards a reconciliation, that she sometimes stays in the Property and that she plans to shortly move back into it.**
- 34. Ms McCabe said that her oldest child attends a local primary school and that her four year old son attends a local nursery. She is pregnant and is due to give birth in November 2022.**
- 35. Ms McCabe said that both she and Mr Curran have health issues which affect aspects of daily living and for which they have been prescribed medication. She said that the health issues have been taken into account by DWP in assessment of benefits. Ms McCabe said that her four year old child is awaiting assessment and a diagnosis in respect of what might be a significant condition.**
- 36. Ms McCabe said that the Property is not suitable for what will become a family of six but that alternative housing has not been found. She said that her Health Visitor is going to provide a letter of support and it is hoped that they may eventually be allocated a house by a Housing Association. Ms McCabe said that, if they were evicted, the Council would probably house them in homeless accommodation which could be anywhere in Glasgow and may not be suited to the needs of her family including schooling and nursery provision.**

#### **Submissions**

- 37. Ms West asked the tribunal to find that grounds 11 and 12 of Part II, Schedule 5 of the 1988 Act were met. She said that there had been considerable rent arrears and that there continues to be a level of rent arrears which, at the date of the Hearing, amounted to £500. She said that non payment of rent had been persistent and asked the tribunal to take into account that a considerable amount of the arrears accrued at a time when the Respondent had been in receipt of Housing Benefit but had not used it to pay the rent which had been due.**
- 38. Mr McIntosh asked the tribunal to find the application to be incompetent for the reasons set out in his written submissions and those made orally during the course of the Hearing.**
- 39. Mr McIntosh said that, if the tribunal did consider the application to be capable of determination, there be a finding that no rent be lawfully due.**

He submitted that, in respect of both Grounds 11 and 12, the repairs issue with the Property meant that rent was not lawfully due and that there was no persistent delay in paying rent once the repairs to the Property had been completed.

40. Ms West asked the tribunal to accept that the rent is currently in arrears and that there had been persistent delay in paying rent as evidenced by the rental statements which had been lodged.

41. Ms West submitted that the tribunal should exercise its discretion to grant the order of possession because it was reasonable for the Applicant to have recovery of the Property.

42. Mr McIntosh asked the tribunal to consider the evidence given by Ms McCabe and, in exercise of its discretion, not grant the order of possession. He also asked the tribunal to consider that it would be unreasonable to consider the current level of arrears to warrant eviction and that it was only because of the payment date of Universal Credit that arrears existed.

#### **Discussion and Determination**

43. We found Ms West and Ms McCabe to be credible and reliable witnesses. We accepted the personal circumstances outlined by Ms McCabe and the evidence of Ms West with regard to the tenancy documentation.

44. If we accepted the Respondent's submission that the application is fundamentally flawed and incompetent then we would require to refuse the application.

45. Rule 65 is clear and unequivocal in its terms. An application *must* be accompanied by a copy of the tenancy agreement. Ms West accepts that the relevant tenancy agreement is that from 2017 and indeed she relied on that one when she addressed the matter of the date each month that the rent should be paid- the twenty seventh. She also accepts that, had the 2017 tenancy agreement not been archived and if it had been readily available to her, she would have submitted it with the application.

46. We had no doubt in determining that the application is fundamentally flawed and incompetent. Furthermore, the Applicant's position could not be rescued by relying on the overriding objective set out in Rule 2 which requires the Tribunal to deal with the proceedings justly. It would not be

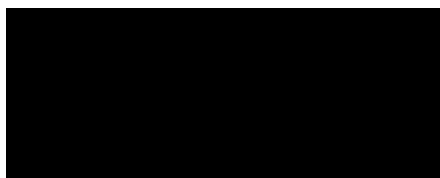
just to grant an order of possession of a property where the wrong tenancy agreement was being relied on.

47. Because of our determination, we did not require to consider the question of whether or not rent was lawfully due although, had we required to do so, we would have found the submissions of Mr McIntosh to have been persuasive.

48. Because of our determination, we did not require to consider whether or not it would have been reasonable to grant the order. Had we required to do so, we would have carried out the appropriate balancing exercise taking into account the respective situation of the Landlord and the Tenant. We would not have considered it reasonable to evict the Respondent because of the family situation, the current level of arrears of rent and the fact that there had been a reduction in those arrears. We also considered that the payment date of Universal Credit was one which a reasonable landlord would accept given that such dates are outwith the control of a tenant.

### **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.



**Martin J. McAllister**  
**Legal Member**  
**3<sup>rd</sup> October 2022**