



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988 (“the Act”)

Chamber Ref: FTS/HPC/EV/23/0228

Re: Property at 135 Ravensby Road, Carnoustie, Dundee, DD7 7NJ (“the Property”)

Parties:

Miss Eileen Macfarlane, 8 Buddon Drive, Monifieth, Dundee, DD5 4TH (“the Applicant”)

Ms Karen Middler, 135 Ravensby Road, Carnoustie, Dundee, DD7 7NJ (“the Respondent”)

Tribunal Members:

Martin McAllister (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession of the Property be granted in favour of the Applicant.

Background

1. This is an application for recovery of possession. It is dated 23 January 2023. The application arises from a short assured tenancy between the parties dated 12 February 2012.
2. An application for a payment order (FTS/HPC/CV/0230) was considered concurrently with the application for an order for possession.
3. A case management discussion was held on 11 April 2023 and a Direction was made in terms of Rule 16 of the Housing and Property Chamber (Procedure) Regulations 2017.
4. Prior to the case management discussion, written representations were made by both parties.

5. Prior to the Hearing, written representations were made by the Applicant.

Hearing

6. A Hearing was conducted by teleconference on 16 August 2023. The Applicant and Respondent participated, and the Applicant was represented by Ms Fiona Kelly, solicitor, of Messrs Lindsays. The Hearing was adjourned for lunch at 12.30 until 1.30 and the Applicant was unable to participate in the afternoon because of work commitments. Prior to the adjournment, Ms Kelly said that she had instructions to continue in the absence of her client.

Preliminary Matters

7. The Respondent said that she had applied for a postponement of the Hearing because she had not been able to get copies of her bank statements for the period from January to August 2013. She conceded that these would not be relevant if the Applicant was restricting the question of rent arrears to those accrued after 2018.
8. The Respondent acknowledged that she had not responded to the Direction issued at the case management discussion. She said that this was because she did not want to provide information on a piecemeal basis and that she thought it better to get the bank statements she wanted and produce all the information at once. She was asked about the delay in her getting the bank statements since April 2023 and she indicated that she worked full time and that it was difficult to get to a branch of her bank.
9. The Respondent accepted that there were rent arrears of £6,900 for the years 2022 and 2023. She said that she had withheld rent for reasons which she would explain during the course of the Hearing.
10. Ms Kelly said that she had regard to the Prescription and Limitation (Scotland) Act 1973 and, for the purpose of the Hearing was disregarding arrears accrued prior to 2018.
11. Prior to the hearing Ms Kelly lodged bank statements with the Tribunal to vouch for the arrears of £7070 accrued from 2019 to the present day but advised that the applicant did not wish these crossed over to the Respondent without further redaction. On taking further instruction Ms Kelly advised the Tribunal that her client wished to proceed on the basis of the admitted arrears of £6,900, accrued in 2022 and 2023, and so the bank statements were unnecessary.
12. Ms Kelly asked the Tribunal to make an Order for the Possession on the basis of Grounds 8, 11 and 12 of schedule 5 of the Act as specified in the Notice to Quit. Following questioning from the Tribunal on the repeal of Ground 8, Ms Kelly stated she wished to invite the Tribunal to make an order for possession under Grounds 11 and 12 only.

13. The Law

Housing (Scotland) Act 1988 Section 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 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3).....

(3A).....

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or 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.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to—

(a) the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit, and

(b) the extent to which the landlord has complied with the pre-action protocol specified by the Scottish Ministers in regulations.

Schedule 5, Part I of the 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)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.

14. Findings in Fact

- 14.1 The Applicant and Respondent are parties to short assured tenancy agreement in respect of the Property which is dated 12 February 2012.
- 14.2 The contractual rent due under that tenancy agreement and the monthly rent currently due is £575.
- 14.3 As at the date of the Hearing there are arrears of £6,900 in respect of the years 2022 and 2023.
- 14.4 A notice to quit dated 23 September 2022 was served on the Respondent on 29 September 2022 requiring her to remove from the Property as at 19 November 2022.
- 14.5 A velux window in a bedroom of the Property was faulty and was replaced by the Applicant in or around May/June 2023.
- 14.6 No payment of rent has been made since 1 August 2022.
- 14.7 Proceedings before the Tribunal commenced on 23 January 2023 which was the date of submission of the application form.
- 14.8 Appropriate notice of proceedings has been given to the local authority in terms of Section 11 of the Homelessness etc. (Scotland) Act 2003.

15. Findings in Fact and Law

- 15.1 The Respondent has persistently delayed paying rent which has become lawfully due.
- 15.2 Some rent lawfully due from the Respondent was unpaid on the date proceedings began before the Tribunal.
- 15.3 Some rent lawfully due by the Respondent was in arrears at the date of service of the notice to quit.
- 15.4 It is reasonable to grant the order of possession.

Evidence

- 16. The tribunal had the short assured tenancy agreement, rent statement covering the period 20 January 2013 to 20 July 2023 showing cumulative arrears of £14,250, Form AT6 and Notice to Quit both dated 23 September 2022 and Sheriff Officer's certificate of service dated 29 September 2023.
- 17. Miss Macfarlane said that the Respondent had been her tenant since 2012 and that there had historically been issues with non payment of rent although, in other respects, she had not been a particularly difficult tenant.
- 18. She said that the Property was her only rental property and that it had a mortgage over it. She said that her monthly mortgage payment had recently increased and was now just under £400 per month. She said that she is in employment and that she relies on the rent to pay the mortgage on the Property and to ensure that it is properly maintained.

19. Miss Macfarlane said that in April 2020 she had been advised by the Respondent that there was an issue with the Velux window. She said that this was during lockdown and that she did not consider that it constituted an emergency repair. She said that she understood that the Respondent had got someone to repair the window.
20. Miss Macfarlane said that in July 2022 she had received text messages with regard to the same window and that, before she had been able to do anything about it, she had been told by the Respondent that the window had been boarded up. She said that she had been told that the window frame had been rotten.
21. Miss Macfarlane said that she went to the Property and photographed the window which had been removed and she referred the tribunal to photographs of the window and frame. She said that there was no sign of rot but that there was evidence of damage to one side of the window frame.
22. Miss Macfarlane said that, as far as she was concerned the Respondent or someone in the Property had damaged the window. She said that she considered that, in terms of the tenancy agreement, the Respondent was responsible for damage caused to windows in the Property.
23. Miss Macfarlane said that she recognised her obligation to maintain the Property and had replaced the velux window in or around May or June 2023.
24. Miss Macfarlane said that she decided to recover the Property because of the historic issue with rent arrears and that the Notice to Quit was served at the end of September 2022. She said that the Respondent last paid rent on 1 August 2022 and she referred to the rent statement which showed that payment to be for the rent due on 20 July 2022.
25. Miss Macfarlane said that the Respondent had not intimated to her that she was withholding rent pending repair of the window.
26. Miss Macfarlane said that there was damage to the Property. She said that many doors were damaged, spindles were missing from the banister and that a cupboard from the kitchen had been relocated to the hallway. She said that there was damage to a garden fence and that none of these matters had been reported to her. She said that the damage to the internal parts of the Property was the responsibility of the Respondent.
27. Miss Macfarlane was asked about the pre action protocol procedure and she said that she relied on her solicitors to deal with all aspects with regard to the eviction procedure. She said that, as far as she knew, non payment of rent had nothing to do with any financial or cost of living pressures on the Respondent.

28. Miss Macfarlane said that, over the years, she had sent the Respondent letters with regard to rent arrears and had also sent text messages. She said that she got no reply to her suggestions to address arrears.
29. During the adjournment for lunch, Ms Middler lodged screenshots of text message exchanges which she had with the Applicant. Ms Middler directed the tribunal to them and confirmed that these broke into two timeframes.
30. In 2020 there were exchanges commencing April 2020 in connection with a faulty velux window. Ms Middler said that the window could not open and that she engaged a tradesperson, who was working in her street, to repair it. It cost £30 and she paid for it herself.
31. In Ms Middler's words, the "window worked fine" from it was fixed in 2020 until the summer of 2022 when the window could not be closed and she referred the tribunal to a text message to the Applicant dated 30 July 2022 where she reported the issue. The tribunal noted a further text message from Ms Middler to the Applicant dated 1 August 2022 where she was requesting that the Respondent telephone her to discuss the matter. It noted that the response was that no non-essential repairs would be done until damage to "doors etc repaired and rent arrears being paid off." There are exchanges of text messages over a period of an hour including a reference by the Applicant asking the Respondent to ensure that the window had been oiled regularly. At 2pm the message from Ms Middler was that the window had dropped and that she got someone to look at it and that "his only option was to remove window and board it up"
32. Ms Middler said that the person who boarded the window up was the same person who had carried out the earlier repair. She confirmed that the boarding up had been done at or around the same time as she had sent the message at 2pm. She said that the window was in a dangerous condition and that there was a chance it would fall into the room and hit her teenage son whose bedroom it was. She said that the window had come off its runners.
33. Ms Middler accepted that the Applicant did not get an opportunity to examine the window before it was removed and she said that she had intimated to her that there was an issue but that she did not get back to her. She said that it was a matter of safety.
34. Ms Middler said that she took advice and had been told that, if a tenanted property was not wind and watertight, she could withhold rent. She said that, in her job, she has contact with Angus Council and also housing associations and that she spoke to employees of these bodies. She said that they were not experts but "ordinary people."
35. Ms Middler said that since the window issue had been "going on since 2020", she decided to withhold rent. She said that she never told the Applicant that she was taking this course of action.

36. Ms Middler said that, when she started to withhold rent, she knew that she should hold the rent in a separate account. She said that she had set this up with her bank and that she has £2,200 in the account which could be paid to the Applicant.
37. Ms Middler said that there was a mix up with the account and that she did not realise that the payments were not transferring from her current account and that this was why she did not have £6,900 in the savings account. She said that she did not know what happened to the money but accepted that it had not been paid in error to anyone else. She said that she did not often check her bank account.
38. Ms Middler said that, at some point, she had advice from the CAB and had been told that, once any repairs issue with the Property had been resolved, it was her obligation to start paying rent. She said that the CAB had told her that it was okay to withhold rent if the money was being put in a separate account. Ms Middler did not know why she had not recommenced rent payments when the window had been replaced. She said that she was unsure if she should do so given that the Tribunal process was ongoing.
39. Ms Middler said that she did not break the window but accepted that the damage to the internal doors and the banister was due to her and that she was happy to make good the damage.
40. Ms Middler said that she resides in the Property with her nineteen year old daughter and her fifteen year old son. She said that her son is starting a college course and that her daughter is looking for work. She said that she had been on the Angus Council housing list for some time but that her application had lapsed and that she had re-started it.

Submissions

41. Ms Kelly said that her client had one buy to let property and that she had tried to be flexible with the Respondent. She said that she has to make monthly mortgage payments and that the arrears are considerable and invited the tribunal to find the grounds for eviction to be met.
42. Ms Kelly said that the Respondent had not advised the Applicant of her intention to withhold rent, had not retained the rental payments in a separate account and had not recommenced payments when the window had been replaced.
43. Ms Kelly invited the tribunal to consider it significant that the arrears of £6,900 which the Respondent argued was withheld is not available to be paid to the Applicant and that only a sum of £2,200 could be paid.
44. Ms Kelly was asked about the pre- action protocol. She said that the Notice to Quit signposted the Respondent to assistance if she had difficulty paying the rent and she said that there was a history of non- engagement. She said that

her understanding was that the Respondent's position was that failure to pay rent had nothing to do with any kind of financial pressure.

45. Ms Middler said that she has been in her job since 2009 and that she was experiencing no financial pressures which prevented her paying rent.

46. Ms Middler said that she accepted that she had gone about matters the wrong way and that she should have got proper advice. She said that she was not denying that she owed rent but that she considered that she had valid reasons not to pay it.

Deliberations and Decision

47. The matter was focused. The Respondent accepted that there are rent arrears for 2022 and 2023 amounting to £6,900.

48. The issue about the window was somewhat strange and the Respondent was inconsistent. She said that her decision to withhold rent was because the issue with the window had "been going on" between 2020 and 2022 but she was clear in stating that the window had "worked fine" in that period.

49. The Respondent produced no evidence to substantiate that the condition of the window was such that it would have been reasonable to withhold rent. From the evidence presented to the tribunal from the Applicant and the photograph which she had lodged, the window appeared damaged rather than rotten or worn. This evidence was preferred. The window had been removed and the opening competently boarded up until the window was replaced.

50. Withholding of rent is appropriate in some circumstances but there are three features: the tenant has to advise the landlord that rent is being withheld and the reason for it, the rent has to be placed in a separate account and be available for payment to the landlord when the particular repairs issue has been resolved and payment of rent should be recommenced when that has been achieved. The Respondent failed to comply with these three features.

51. The tribunal determined that the grounds of eviction had been proved.

52. The tribunal was concerned that the Applicant had failed to comply with the pre-action protocol particularly when she had been relying on her solicitors to ensure that the necessary procedures had been complied with. In the particular circumstances of this application, the tribunal was prepared to accept that any failure in this regard would affect whether or not it was reasonable to grant the order. The Respondent was quite forceful in stating that there was no cost of living or financial pressure which prevented her paying rent but, rather, she had made a decision to withhold rent because of the window.

53. The question of reasonableness in such applications is a matter of balance. There are arrears of £6,900 and it is reasonable for the Applicant to obtain

possession of the Property to enable her to receive an income and to meet the obligations incumbent on her as owner such as mortgage payments. In coming to this view, the tribunal balanced the particular needs of the Applicant and the Respondent and her personal and family circumstances.

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.

Since an appeal is only able to be made on a point of law, a party who intends to appeal the tribunal's decision may wish to request a Statement of Reasons for the decision to enable them to identify the point of law on which they wish to appeal. A party may make a request of the First-tier Tribunal for Scotland (Housing and Property Chamber) to provide written reasons for their decision within 14 days of the date of issue of this decision.

Where a Statement of Reasons is provided by the tribunal after such a request, the 30 day period for receipt of an application for permission to appeal begins on the date the Statement of Reasons is sent to them.

**Martin J. McAllister
Legal Member**

17 August 2023