



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

Chamber Ref: FTS/HPC/EV/22/0691

Re: Property at 9 Connor Court, Girvan, KA26 9DR (“the Property”)

Parties:

Mr Christopher Barnes, 12 Corton Lea, Ayr, KA26 6GJ (“the Applicant”)

Mr William Martin, Mrs Suzie Martin, 9 Connor Court, Girvan, KA26 9DR (“the Respondents”)

Tribunal Members:

Richard Mill (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application be dismissed. It is not reasonable to grant an eviction order against the respondents

Introduction

1. This application is under rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 and section 18 of the Housing (Scotland) Act 1988. The applicant seeks an eviction order.

Procedural background

2. The application is dated 7 March 2022. The proceedings have been actively case managed. Case Management Discussions took place by teleconference on 29 June 2022 and 24 August 2022. Notes on the discussions and issues arising were issued after these hearings. By way of summary, further time was allowed to enable the respondents’ solicitor to take instructions and prepare.

3. The first scheduled evidential hearing due to be heard on 30 November 2022 required to be adjourned due to the absence of the respondents because of ill health.

Previous proceedings between the parties

4. Two previous conjoined applications were previously dismissed by the tribunal on 24 August 2021 after numerous hearings. These applications also sought an eviction order and payment order relative to alleged rent arrears and were under references FTS/HPC/EV/19/2518 and FTS/HPC/CV/19/2520. Both applications were dismissed, the tribunal having found that the AT2 served upon the respondents and which purported to increase the rent for the property, had been invalid and, as such, there were no rent arrears for the applicant to recover and no rent arrears to found an eviction upon.
5. Conjoined to this application was a further payment order application under reference FTS/HPC/CV/22/0692. This was an application for civil proceedings under rule 70 and section 16 of the Housing (Scotland) Act 2014 which related to rent arrears. On 28 March 2023, by consent, the tribunal made a payment order against the respondents in the sum of £8,830 subject to a time to pay direction requiring the full amount to be paid within 3 months. Said time to pay direction was timeously complied with and the said sum was paid to the applicant on 5 April 2023.

Documentary evidence

6. The applicant ultimately relied upon an amended Form E (in the eviction proceedings), an amended Form F (in the civil proceedings), together with six Inventories of Productions which contain a total of 19 items. A further detailed written submission received on 23 November 2022 is also relied upon together with two affidavits of the applicant.
7. The respondents relied upon conjoined Answers to both applications, together with an Inventory of Productions containing 11 items and a further Inventory containing one item. Affidavit evidence of the respondents and further informal email submissions on numerous occasions have been produced together with additional items of documentary evidence which are not indexed or paginated or contained within any inventory. All have been considered.

The evidential hearing

8. The final evidential hearing commenced remotely by video (Webex) on 28 March 2023 at 10.00 am.
9. At that time the scope of the dispute between the parties was agreed to be restricted to the issue of the reasonableness of the tribunal making an eviction order.

10. Oral evidence was heard from all parties and the respondents' daughter on relevant matters. The tribunal utilised its inquisitorial function to explore matters and both parties representatives' were fairly afforded the opportunity of exploring matters and re-examining as they saw necessary.
11. It was not in the interests of justice to conclude the evidential hearing on 27 March 2023. Whilst substantial rent arrears continued to exist, it was anticipated that these would be cleared in their entirety within a period of 3 months, as the respondents were to receive a lump sum back payment of state benefits.
12. It was reasonably anticipated that if the arrears were cleared and the respondents continued to make payment of the monthly rent obligations then this would be a significant factor to weigh up in the overall balancing exercise on reasonableness. That expectation was realised and all rent arrears were cleared on 4 May 2023.
13. The continued hearing took place remotely by video (Webex) on 5 July 2023 at 10.00 am.
14. Throughout the proceedings the applicant was represented by Ms Jennifer Grosvenor of Messrs Harper Macleod Solicitors and the respondents were represented by Mr Gerard Tierney of Ayr Housing Aid Centre.
15. The applicant was present at the hearing in March but could not attend the July hearing due to work commitments. At the March hearing he gave evidence on his own behalf as did both of the respondents and their daughter, Ms Karen Martin. The three of them were also all present at the July hearing.

The respondents' health

16. One of the reasons for multiple continuations in the earlier stages of the proceedings had been to afford the respondents' representative the opportunity of clarifying their state of health, including his ability to be satisfied that they each had capacity to instruct him. Letters from the respondents' respective general practitioners were lodged. The unchallenged contents are found by the tribunal to be an accurate reflection of their circumstances.
17. By way of letter dated 18 August 2022 by Dr Kenneth Brooksbank certifies that since 2001 the first respondent, Mr Martin, has had significant persisting anxiety and depression with agoraphobia and has been essentially housebound since then. He had urinary sepsis in 2020 and subsequently had discitis in June 2020 confirmed by MRI with cord compression at this level for which he had fusion fixation of his spine at this area. This has had a significant impact on his mobility and pain and he has ongoing issues relating to infection. He is a type 2 diabetic. He is certified to be on multiple daily medications.
18. By way of letter dated 12 August 2022, Dr Gareth Powell certifies on soul and conscience that Mrs Susan Martin, the second respondent, suffers from

epilepsy and also from anxiety and depression. She is on three different medications for epilepsy and two for her anxiety and depression. Unfortunately due to recent stress she is struggling with her mental health and this has also had an impact on her seizure frequency. Her GP certifies that her attendance at a tribunal would have a significant adverse effect on both her physical and mental health.

Findings in fact

19. The property is 9 Connor Court, Girvan KA26 9DR. The applicant is Mr Christopher Barnes who is the heritable proprietor and registered landlord of the property. The respondents are Mr William Martin and Mrs Suzanne Martin who are the tenants.
20. There is a historical relationship between the parties. The respondents are the parents of Ms Karen Martin who is the applicant's former cohabitee. The applicant and Ms Karen Martin separated in October 2013. They entered into a Minute of Agreement seeking to regulate issues arising from their separation which was executed in November 2013 and registered in the Books of Council & Session.
21. The applicant's source of funds, which enabled him to purchase the property, was substantially compensation monies which the respondents and their daughter received following upon the death of the respondents' son in a road traffic accident in January 2010. The parties and Ms Karen Martin all agreed at the time of purchase that Title to the property would be taken in the applicant's sole name. The respondents chose the property.
22. The applicant's interest as heritable proprietor is registered under Title Number AYR92623 in the Land Register on 1 September 2011.
23. No formal written lease was entered into between the parties due to the historical relationship between them. No written terms have been requested by the respondents and none offered by the applicant. The respondents have occupied the property as their principal home since on or about 25 September 2011. There are no other occupants.
24. The bare details of the tenancy are recorded in writing in the form of an undated letter issued by the applicant to South Ayrshire Council referring to a meeting which the applicant had with the Council on 5 September 2011. This was also signed by the respondents and confirms that the tenancy start date was 25 September 2011 and that the rent would be charged at £425 per calendar month. The tenancy is an 'assured tenancy' under the Housing (Scotland) Act 1988.
25. Sometime after the creation of the tenancy a verbal agreement was entered into between the parties which reduced the rent from £425 per month to £350 per month. In practice, the rent was paid at a rate of £320 every 4 weeks. The

historical shortfall is not a matter complained of by the applicant nor has he sought to recover any historical rent arrears.

26. The applicant's desire to evict the respondents from the property goes back a number of years. A Notice to Quit dated 5 June 2018 was served upon the respondents. This required the respondents to remove by 25 September 2018. Documentary evidence from the Post Office shows that the respondents signed for this item on 6 June 2018. The respondents have not removed. A statutory assured tenancy was created on 25 September 2018.
27. By way of service of a Form AT2 the applicant increased the rent due in respect of the property. The relevant Notice was dated 13 March 2020 with the increase in rent due to take effect from 25 September 2020. The Form AT2 was valid and provided 6 months' notice of the substantial increase in rent. The rent was increased to £625 per month. Documentary evidence from the Post Office shows that this item was signed for by the respondents on 16 March 2020.
28. A Form AT6 was served on the respondents, being a Notice under section 19 of the Housing (Scotland) Act 1988 advising of the applicant's intention to raise proceedings for possession. Grounds 8, 11 and 12 as set out in schedule 5 to the Act were to be relied upon. That Notice was dated 27 August 2021. A Sheriff Officer's execution evidences that this was served upon the respondents on 30 August 2021.
29. The applicant relies upon the shortfall of rent received following the increase in rent which took effect from 25 September 2020. A detailed rent account has been produced which shows the monthly payments of £625 falling due and corresponding amounts being received in the restricted sum of £320, being the previous unchallenged level of rent which was paid and not complained of.
30. A Section 11 Notice was issued by the applicant to South Ayrshire Council on 7 March 2022.
31. A letter dated 21 December 2021 was served upon the respondents on 24 December 2021 and provided the information required by the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020.
32. At the time that the AT6 was served on the respondents in August 2021, the level of rent arrears was £3,660. As at 4 March 2022 when the application was lodged with the tribunal the respondents were in rent arrears to the extent of £5,170. The arrears outstanding at the date that the evidential hearing commenced in March 2023 was £8,830.
33. During the subsistence of the applicant's ownership of the property, he has increased the mortgage. The mortgage is held with the Royal Bank of Scotland. The outstanding mortgage on 6 August 2022 was £78,103.13. The property has a current market value of approximately £160,000. The applicant's monthly mortgage liabilities as at 24 October 2022 were £357.41 per month.

34. On 31 March 2023 the respondents were successful in receiving a back payment of Employment and Support Allowance for the period 21 August 2020 to 16 February 2023. The total amount received was £17,659.
35. On 5 April 2023 the respondents paid a lump sum of £8,830 to the applicant in respect of rent arrears outstanding (and in implementation of the payment order made by the tribunal on 28 March 2023). It was believed by them at that time that this would clear the entire balance. There remained a small shortfall however which was cleared in full on 4 May 2023.
36. Since 4 May 2023 the respondents have not been in rent arrears.
37. The respondents have now set up a standing order to make payment of the full monthly rent which is £625 per month. On 26 May 2023 and 26 June 2023 these payments were made to the applicant timeously. The respondents have the financial means to afford the £625 monthly rent charge and are committed to paying this.
38. As at the date of the hearing on 5 July 2023, and the tribunal's final determination, the respondents are not in rent arrears. In fact, there is a surplus on their rent account of £320.
39. Due to the poor relationship between the parties, the applicant has not always been successful in gaining access to the property for the purposes of discharging his legal obligations as a registered landlord. There has now been an improvement in the respondents' level of cooperation following advice being tendered to them by their current representative in this process. In June 2023 the respondents complied with reasonable access requests to tradesmen and engineers instructed by the applicant. They did refuse a gas engineer in June 2023 as they believed that this attendance was unnecessary. The respondents have periodically ensured that maintenance checks of the gas boiler have been carried out at their own expense. These checks are certified to have taken place on 4 July 2017, 11 November 2020, 14 January 2023 and most recently on 13 February 2023. The respondents have provided an undertaking to permit reasonable entry requested by and on behalf of the applicant in the future.

Eviction grounds

40. The AT6 set out the applicant's proposed basis for eviction which was restricted to grounds 8, 11 and 12 in Schedule 5 to the Housing (Scotland) Act 1988. In her oral submissions the applicant's representative acknowledged that ground 8 was repealed by the provisions of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 and accordingly founded upon grounds 11 and 12 only, which are in the following terms:

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.

41. The tribunal found that grounds 11 and 12, contained in Schedule 5 to the Housing (Scotland) Act 1988 were established on the basis of the facts found. There were rent arrears at the time proceedings for possession began. The respondents did (albeit for a time in the past) persistently delay paying rent.

Test of reasonableness

42. In *East Lothian Council v Duffy and Others* 2012 SLT SC 113, Sheriff Braid opined:

“I do not consider that the Court should approach the issue of reasonableness by asking whether eviction is the most reasonable course or one of several equally reasonable but conflicting courses. A particular course of action can either be reasonable or unreasonable but it cannot be both. A reasonable course of action does not cease to be reasonable simply because there are other actions which might be equally, or more, reasonable. The Court is not concerned here with whether a decision already reached falls within that range of reasonableness. Rather, the Court must form its own view as to whether it is reasonable to make the order sought. If the answer to that question is yes, then the order must be granted. If it would not be reasonable to make the order, it must be refused.”

43. In reaching a determination on reasonableness the tribunal has a duty to consider the whole circumstances of the case and the circumstances by which the application was made, in accordance with the case of *Barclay v Hannah* 1947 SC 245.

Reasons for decision

44. The tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

45. The tribunal's decision is based upon the tribunal's detailed findings in fact which were established on the basis of the documentary and oral evidence together with clarifications in the oral submissions from the parties representatives.

46. The tribunal has considered all the evidence and submissions and made findings in fact in relation to the relevant live issues in the case. It is not necessary to make findings in fact in relation to every element of the application. The failure to make more extensive findings in fact does not carry with it any assumption that the tribunal has failed to consider the whole evidence or that the tribunal's reasoning was based upon a consideration of only parts of the evidence.
47. Credibility was not a material factor in the tribunal establishing the detailed findings upon which the decision is based. The tribunal broadly found both parties credible and reliable.
48. The tribunal found that grounds 11 and 12 of Schedule 5 to the 1988 Act were established on the basis of its findings in fact. This was not a matter disputed on behalf of the respondents. These are both 'rent arrears' grounds.
49. The respondents did persistently delay paying rent and had been in rent arrears for the period between September 2020 and May 2023. However, it is a highly material factor, in respect of which a considerable degree of weight is attached by the tribunal, that as at the date of the tribunal's decision there are *no* rent arrears due. In fact there is a surplus on the respondents' rent account.
50. Whilst there was a persistence by the respondents not to pay the full rent, that is a matter which is now in the past. Their initial defence was based around a rejection that a tenancy existed or that rent was due. After matters were investigated and advice tendered that position was not insisted upon in the context of the final hearing. It is now candidly acknowledged by them that a tenancy exists, that they require to pay £625 per month, and they have now evidenced a willingness to pay this regularly as required for the last couple of months.
51. The tribunal also found it to be a relevant factor that at no time did the respondents fail to pay any rent at all. They were, in fact, very regular payers of their rent at the rate of £320 every 4 weeks which was the previously agreed amount between the parties and unchallenged for many years by the applicant.
52. The tribunal attached no weight to the applicant's concerns that the respondents would not pay the full amount of rent in the future. The tribunal found this to be nothing other than mere speculation on his part. The respondents have cleared the arrears, have set up a standing order for the monthly rent and can afford this, and are committed to paying this rent going forward.
53. There is no dispute that the applicant is the heritable proprietor of the property. His interest is registered in the Land Register. The respondents' position, taken at its highest, is that the applicant has taken advantage of them and their daughter. This may or not be the case, but this tribunal cannot look behind the applicant's ownership and has no jurisdiction to do so. There may be remedies available to the respondents (and the tribunal does not speculate as to what

these may be) but it is noteworthy that the tenancy arrangements have persisted for a period now over 10 years following the breakdown of relations between the applicant and the respondents' daughter. The respondents' daughter has had access to legal advice regarding the property and the implementation of the written agreement between herself and the applicant which made conditional provision for the applicant to transfer it to her sole name. She previously raised proceedings in the Sheriff Court seeking to compel the applicant to transfer the home to her in accordance with the Minute of Agreement between them but these proceedings were dismissed when she failed to lodge caution for the applicant's expenses.

54. The tribunal has however attached weight to the fact that the originating source of the applicant's funds to purchase the property arise from a cumulo compensation payment in the sum of £135,000 paid to the respondents and their daughter, Ms Martin, following the tragic death of the respondents' son in January 2010. The applicant does not dispute the source of his funds.
55. It seems more likely than not to the tribunal that the respondents, their daughter and the applicant all freely and willingly agreed that the compensation money would be used by the applicant to buy the property in his sole name as it suited them all at that time. It obviated the respondents having capital which would have disqualified them from receiving State benefits and further allowed a situation to develop whereby a contrived lease arrangement was put in place which enabled the respondents to claim housing benefit and further enabled the applicant to receive an income in the form of rent.
56. It was submitted on behalf of the applicant that the landlord/tenant relationship has irretrievably broken down which favoured the tenancy arrangement being brought to an end. Reference was made to the history as set out within the tribunal's findings in fact. Despite the sour relations between the parties, the tenancy has subsisted now for some 10 years after the break up of the relationship between the applicant and the respondents' daughter. The respondent made no complaints regarding the respondents' tenure of the property until 2018 when he commenced measures to seek to evict them. The respondents at all times have made payments of rent despite the significant rent arrears which did accrue. Payments of rent were in fact very regular with no payments ever being missed and the previously agreed £320 per 4 weeks being made.
57. It was submitted on behalf of the applicant that all of the facts and circumstances required to be seen through the prism purely of a commercial arrangement only and that, to that extent, the applicant's personal circumstances ought not to be taken into account. The tribunal rejected that proposition given the background of the family relationship between the parties, the applicant's source of funds and the informal arrangements between the parties at the time that the tenancy was created. The property was specifically chosen by the respondents, not the applicant, with funds that belonged to the respondents (and their daughter). The tribunal requires to consider the whole circumstances of both parties.

58. The applicant is a man of means. He works offshore as a manager in the oil industry and has a substantial income from this source. He owns ten other rental properties, the title of some are taken in his own name as an individual, and the title to others is taken as a limited company which he has formed. The outstanding mortgage for this is around 50% of the property value. The monthly mortgage payments are affordable. The applicant was not placed in financial hardship as a consequence of the previous non-payment of rent. The applicant has profited significantly from the arrangements which the parties agreed. He has suffered no financial loss.
59. The applicant was clear in his oral evidence that the only reason he sought to evict the respondents is because the relationships between the parties has broken down. His written evidence does refer to rent arrears but the tribunal found that his real motive is to break the ties he has with the respondents to suit his own circumstances. The application for eviction is based upon rent arrears and yet surprisingly that was not the focus of the applicant's own oral evidence. The relationships deteriorated from at least 2013 and yet he took no steps to seek to evict the respondents until 2018, some 5 years later. The tribunal could not find that there has been a significant deterioration in relations in 2018 to justify the applicant's approach.
60. It is unclear to the tribunal why the respondents did not, of their own volition or with support from another source, timeously make application to increase the level of their financial housing support or other income to cover all or part of the increase in rent in 2020. The tribunal found that this was most likely due to their respective health difficulties and poor understanding as to the legal rights and obligations arising from the complex and unusual history. The tribunal found that the respondents did not withhold the full rent to be wilfully difficult or to cause the applicant difficulties.
61. The substantial arrears payment of over £17,000 of the respondents' Employment and Support Allowance is not a 'qualifying benefit' for the purposes of section 18(4A) of the 1988 Act. It is not a payment of the relevant housing benefit or relevant Universal Credit. However, taking a broad and reasonable evaluative approach those substantial benefit arrears is a matter which the tribunal took into account. It reflects that for the specific period over which the tribunal were considering, the respondents ability to afford the increased rent was restricted as they were not in receipt of funds they were entitled to. This is also in the context of the considerable increase from £320 every four weeks, to £625 per month. This issue of affordability is now resolved.
62. The tribunal attached significant weight to the poor health of both of the respondents. Their health is set out earlier in this decision. A requirement to move home would have a detrimental impact upon both of the respondents mental and physical wellbeing. The property was chosen by the respondents at the time of purchase as it met their individual needs. It continues to meet their needs. The respondents have now lived in the property for almost 12 years.

63. The tribunal found that unlike the pessimism adopted by the applicant that relationships may further deteriorate, which is purely speculative, that relations ought to improve after this legal process is completed.
64. The respondents have allowed access recently. Such problems are historic. The tribunal found that it is unlikely that the applicant has fully committed to his landlord obligations over the years and this was not the subject of clear documentary evidence to establish this. The respondents have maintained aspects of the property at their own expense including the gas boiler. This demonstrates their full commitment to the property. There is no suggestion or evidence that they are failing to adequately maintain the property. Their recent denial of entry to a gas engineer was based upon a misapprehension given that they had already had the boiler checked. They must understand that the applicant does need the necessary Gas Safety Certificate however. It was further noted that the applicant has successfully renewed his landlord registration.
65. The applicant may wish to consider employing a letting agent who can act as a professional intermediary. He works offshore and his complaints regarding lack of communication with the respondents could easily be mirrored by the respondents who will be unable to contact him for blocks of time when he is offshore.
66. In all of the circumstances the tribunal found that it would not be reasonable to evict the respondents. The tribunal therefore dismisses the application.

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.

Richard Mill

7 July 2023

Legal Member/Chair

Date