



**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 (“2016 Act”)**

**Chamber Ref:** FTS/HPC/EV/21/0588

**Re:** 43 Broomknowes Road, Flat 0/1, Springburn, Glasgow, G21 4YP (“the Property”)

**Parties:**

**Mrs Haiping Cui Opoku Agyeman, 232 Spinney Hill Road, Northampton, NN3 6DR (“the Applicant”)**

**Mr James Sehar, Mrs Margaret Sehar and Mr Christopher James Sehar, all of 43 Broomknowes Road, Flat 0/1, Springburn, Glasgow, G21 4YP (“the Respondents”)**

**Tribunal Members:**

**Pamela Woodman (Legal Member) and Leslie Forrest (Ordinary Member)**

**Present:**

The case management discussion in relation to case reference FTS/HPC/EV/21/0588 took place at 10am on Tuesday 1 June 2021 by teleconference call (“**the CMD**”). The Applicant was not present but was represented by Rosslyn Lithgow of Pacitti Jones Legal Limited (“**the Applicant’s Representative**”). The Respondents were not present nor represented at the CMD. The clerk to the Tribunal was Craig Gemmell. This case was conjoined with case reference FTS/HPC/CV/21/0589 and heard at the same time.

**DECISION (in absence of the Respondents)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:**

**BACKGROUND**

1. The Applicant made an application to the Tribunal under section 51(1) of the 2016 Act and in terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“**HPC Rules**”) which are set out in the

schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, ("**2017 Regulations**"). More specifically, the application was made in terms of rule 109 (*Application for an eviction order in relation to a private residential tenancy*) of the HPC Rules.

2. The order sought from the Tribunal was an eviction order against the Respondents in respect of the Property.
3. The application was dated 15 March 2021, was submitted by the Applicant's Representative and was accompanied by various documents, including copies of the following:
  - a. Notice to leave to James Sehar dated 1 September 2020, which:
    - i. noted that an application for an eviction order would not be submitted to the HPC before 4 March 2021;
    - ii. stated one ground for eviction, namely that "Your Landlord intends to refurbish the Let Property (6 months)";
    - iii. noted that the reasons for the Applicant believing the ground to have arisen as being set out in an e-mail dated 31 August 2020; and
    - iv. noted that the evidence to support the eviction action could "be provided on request".
  - b. Notice to leave to Margaret Sehar dated 1 September 2020, which was otherwise in the same terms as the notice to leave to James Sehar;
  - c. Notice to leave to "CJ Sehar" dated 1 September 2020, which was otherwise in the same terms as the notice to leave to James Sehar;
  - d. Section 11 notice submitted on 15 March 2021 to Glasgow City Council;
  - e. Defect diagnosis report issued in respect of the Property by WMR Contractors dated 27 August 2020 ("**Report**");
  - f. Note entitled "Evidence showing that the eviction ground or grounds has been met"; and
  - g. Rent schedule from 22 August 2019 to 28 February 2021.
4. In connection with case reference CV/21/0588, the Tribunal was provided with a copy of the private residential tenancy agreement between the Applicant and the Respondents dated 22 August 2019 ("**Tenancy Agreement**").
5. In response to a request from the Tribunal made by letter dated 26 March 2021, the Applicant's Representative provided further information, including copies of:
  - a. a rent schedule in a more easily readable format, with the information in it updated to 30 March 2021;

- b. e-mail correspondence between the Applicant's Representative and two of the Respondents between 9 September 2020 and 25 November 2020, with regard to seeking to arrange access for a contractor;
  - c. e-mail correspondence between the Applicant's Representative and Glasgow City Council's section 11 team providing further information;
  - d. covering e-mail dated 1 September 2021 from the Applicant's Representative to the two e-mail addresses noted in the Tenancy Agreement for service of notices, purporting to attach the three notices to leave;
  - e. e-mail dated 31 August 2020 from the Applicant's Representative to the two e-mail addresses noted in the Tenancy Agreement, referring to remedial works and condensation, and being the e-mail to which the Applicant's Representative referred in the notices to leave.
6. A notice of acceptance of the application was issued by the Tribunal dated 12 April 2021 under rule 9 of the HPC Rules, which confirmed that the application paperwork had been received by the HPC between 16 March 2021 and 31 March 2021.

7. The possession/eviction grounds stated in the application form were as follows:

*"GROUND 3 – THE LANDLORD INTENDS TO REFURBISH THE LET PROPERTY*

*\*AND GROUND 12 – TENANT IS IN RENT ARREARS OVER THREE CONSECUTIVE MONTHS*

*\*THIS GROUND DEVELOPED AFTER REFURBISHMENT GROUND ISSUED"*

8. A notice of direction had been issued by the Tribunal on 12 April 2020 in the following terms:

*"The tribunal, on its own initiative and for the purpose of making inquiries, give the following Direction to the Applicant/Respondent as to the conduct and progress of this Application in terms of Section 16 of Schedule 1 to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017:*

*The Applicant is required to provide:*

*At the Case Management Discussion the Applicant will have to address the Tribunal on the matter of including Ground 12 (rent arrears) into the application.*

*The Respondent is required to provide:*

*At the Case Management Discussion the Respondent will have to address the Tribunal on the matter of including Ground 12 (rent arrears) into the application.*

### *Reason for Direction*

*The Notice to Leave only stated as the ground of eviction Ground 3. The application also refers to Ground 12 and the explanation given is that this ground arose after the notice to leave had been served. In terms of S52 (5) (b) of the Private Housing (Tenancies) (Scotland) Act 2016 the Tribunal may only consider such a ground if it has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought. It will be a matter for the Tribunal at the Case Management Discussion to deal with this issue."*

9. The Tribunal Members had received a copy of the three certificates of intimation issued by David Dempster (sheriff officer) from Davidson Dempster LLP which confirmed that the letters with enclosures from the Tribunal dated 28 April 2021 had respectively been served on each of the three Respondents on 29 April 2021. This letter notified each Respondent of the date and time of the CMD, requested written representations by 19 May 2021 and enclosed a copy of the application.
10. At the commencement of the CMD, the Applicant's Representative confirmed that, as far as she was aware, the Respondents continued to be in occupation of the Property.
11. The Tribunal was satisfied, on the balance of probabilities, that the Respondents had been provided with proper notification of the CMD and so it could proceed, notwithstanding their absence.
12. The Respondents had been invited to provide written representations by 19 May 2021 but had not done so.
13. The Tribunal noted that the Applicant was the registered proprietor of the Property (title number GLA69565) and the registered landlord of the Property.
14. This decision arises out of the CMD.

### **PRELIMINARY ISSUES**

15. The first preliminary issue related to the discrepancy in stated eviction grounds as between the application form (which included, in addition to ground 3 (refurbishment), ground 12 (rent arrears)) and the notices to leave (which did not – they included only ground 3). This issue was the subject of the notice of direction issued on 12 April 2021. There is an exhaustive list of eviction grounds which are set out in schedule 3 to the 2016 Act. All references in this decision to numbered eviction grounds are to the eviction grounds with the corresponding number in schedule 3.

16. In terms of section 52(5) of the 2016 Act, “The Tribunal may not consider whether an eviction ground applies unless it is a ground which – (a) is stated in the notice to leave accompanying the landlord’s application in accordance with subsection (3), or (b) has been included with the Tribunal’s permission in the landlord’s application as a stated basis on which an eviction order is sought.”
17. The Applicant’s Representative was asked to address the Tribunal in relation to the direction issued on 12 April 2021 so as to provide authority to support the request that an additional eviction ground (ground 12) be permitted by the Tribunal to be included for consideration and to make submissions as to why the Tribunal should do so.
18. In summary, the Applicant’s Representative noted that there had been historic arrears but, prior to the notices to leave being issued, the Respondents were committed to paying and were paying, albeit sporadically. However, she noted that the payments became more sporadic and eventually stopped after the notices to leave were issued. She also noted that, as at the date of the CMD, the rent arrears were £3,875, no payment had been made by the Respondents since 8 January 2021 and the Respondents were not responding to attempts to communicate with them. The Applicant’s Representative stated that the decision was taken not to issue a further notice to leave (including both grounds 3 and 12, to replace the notice to leave including only ground 3) because it would be “counter productive” and that, if ground 12 were not to be allowed to be considered at the CMD, this would “prolong the period” (i) for which the Respondents were in the Property, (ii) for which rent arrears were accruing and (iii) before which the refurbishment works could be carried out.
19. In response to a question, the Applicant’s Representative confirmed that at no point prior to the Tribunal sending the copy of the application and attachments to the Respondents (when they were informed of the CMD) were the Respondents made aware that the Applicant also wanted to seek to rely on ground 12 (rent arrears) as an eviction ground.
20. The second preliminary issue related to evidence of service of the notices to leave. At clause 4 of the Tenancy Agreement, these could be served by e-mail to the addresses specified respectively for the Respondents in the Tenancy Agreement. However, the e-mail dated 1 September 2020 which purported to send the notices, a copy of which had been provided to the Tribunal, did not appear to indicate that there had been any attachments. The Applicant’s Representative noted that it may have been because they were sent from their system, rather than through Outlook, but agreed to provide a copy of what was sent during the short adjournment to allow for further consideration by the Tribunal of the validity of service.
21. After a short adjournment, the Tribunal confirmed their decision on the first preliminary issue and refused permission for ground 12 (rent arrears) to be included for consideration as an eviction ground in the current case. The Tribunal were cognisant of section 52(5) of the 2016 Act and, given that it was not referred to in the notices to leave, did not consider it to be fair or reasonable for this ground to be added when the Respondents had not been given due notice of this eviction

ground. In addition, the spirit and intent of the Coronavirus (Scotland) Act 2020 (and related legislation) would otherwise be circumvented.

22. With regard to the second preliminary issue, the Applicant's Representative provided information relating to the sending of the 1 September 2020 e-mail but it was not apparent, on the face of it, whether or not there had been attachments. The Applicant's Representative was asked to confirm if the three notices to leave had, in fact, been attached to that e-mail and she confirmed that they had. She also pointed to another e-mail which made reference to the tenancy terminating in March 2021, which reference was not questioned by the Respondents. The Tribunal accepted, on the balance of probabilities, that the notices to leave were attached to the said e-mail and so had been validly served by e-mail.
23. The Applicant's Representative had also taken the opportunity, during the short adjournment, to check correspondence on a couple of other points which had arisen earlier in the CMD. She noted that, whilst she had been told that "everyone in [the] household had lost [their] jobs", Mr James Sehar continued to e-mail her from a work e-mail address after that time (including in January 2021). She noted that advice was provided as to where the Respondents might be able to get advice / help if they were having difficulty paying. This was supported by e-mail correspondence provided to the Tribunal in the case papers.
24. The Applicant's Representative stated that one of the Respondents had e-mailed her on 10 February 2021 to indicate that they had found another property and she confirmed that this was the last correspondence which she had received from the Respondents. She also noted that, on 16 March 2021, she had e-mailed to inform the Respondents that an application for eviction was going to be made.

## **PROCEEDINGS, NAMELY THE CMD**

25. The Applicant's Representative was asked to address the Tribunal with regard to ground 3 (refurbishment) and the basis on which she submitted that the requirements for establishing it had been met.
26. The Applicant's Representative referred to the Report from an "approved contractor" whom her company worked with "quite regularly". She drew the Tribunal's attention in particular (but not only) to the last paragraph on page 4 of the report, which read as follows (**emphasis added**):

*"Condensation is the most common form of dampness within buildings, it is also the **most difficult to control and accurately diagnose**. If left untreated condensation can lead to damage and deterioration of building fabric, continuous mould growth and wood rotting fungi. This combined with its **ability to inflict unhealthy living conditions** means the **source or sources of the issue must be rectified**. In order to adequately diagnose and undertake appropriate remedial works it is **important that the causes of condensation are understood**. Moisture which condenses on internal surfaces is derived from the internal air and is generally produced by the building occupants' activities. Air at all temperatures absorbs moisture, but the higher the*

*temperature the more moisture it can retain. However, air at any temperature will ultimately reach a state where it cannot absorb any more and it will therefore have reached saturation point. Condensation will occur when the warm air is cooled to a temperature known as its “dewpoint” temperature, either by being brought into contact with the cold surfaces (such as an external wall or window) of the structure or by passage into a cooler part of the building. Condensation will also occur on absorbent surfaces but will not always show until the surface is very damp. In such cases mould growth will appear, this form of growth can also form on clothing etc, stored in unventilated rooms and cupboards.”*

27. The outline of remedial works identified as being required (as set out in the Report) included items under four headings:

- a. Installation of Passyfier Vents - estimated cost of £860.50 plus VAT
- b. Mechanical Extraction - estimated cost of £803.25 plus VAT
- c. Bathroom Works (including “Trace & access works to source further issues within the bathroom”, “Expected 2hrs for Joiner & Plumber” and “It is likely due to its current condition that more in depth repairs will be required to the bathroom including replacement of tiles, and repairing damaged plaster (no cost provided as yet”) – estimated cost of £220 plus VAT
- d. Décor Works – estimated cost of £3,350 plus VAT

28. The Applicant’s Representative suggested that the contractor had indicated to her in conversation (but she accepted that this was not in the Report nor set out in any other document provided to the Tribunal) that the remedial works “would take quite a lot of manpower and time”. She was unable to give an indication as to what that might mean in terms of timescales. Therefore, there was no evidence or information available to the Tribunal as to whether the works (even if only those referred to in the Report) would take hours, days, weeks or months to complete.

29. When asked if the contractor could work around the Respondents, the Applicant’s Representative responded “no, not really” but it was later accepted by her that, until the contractor was in and had done the tracing work in the bathroom, it was not known what the full extent of the works would be (beyond those set out in the Report). Therefore, it was not yet known whether or not any further works would be required. Therefore, as at the date of the CMD, there was no information available (either to the Tribunal or the Applicant / Applicant’s Representative) as to the full extent of the works required. In addition, no evidence was provided to the Tribunal as to whether or not the remedial works set out in the Report were capable of being carried out while the Respondents remained in occupation (i.e. whether or not it was possible or practicable, rather than simply more convenient or easy).

30. In response to questions around what alternative options were explored by the Applicant and/or Applicant’s Representative with the Respondent, the Applicant’s Representative confirmed that (other than giving the Respondents advice around how to reduce/avoid compensation) no options were explored and the Respondents had not been asked if there was anywhere else that they could stay on a temporary basis (should it have been necessary for them to vacate the Property in order for any remedial works to be done), nor was the Applicant able

to provide alternative accommodation (either through other premises owned by her or through insurance cover).

31. The Applicant's Representative suggested that the way in which the Respondents were living was contributing to the condensation/damp issue and that there were more people living in the Property now than when the Tenancy Agreement was entered into. She indicated that it would be "better to get the tenants out and do the works". She confirmed that there had not been any issue with black mould prior to the Respondents moving in.
32. As to how the Report came to be instructed, the Applicant's Representative confirmed that the condensation/damp issue had been raised by the Respondents. An e-mail exchange had been provided to the Tribunal in the case papers which supported the submission of the Applicant's Representative that repeated attempts were made by the Applicant's Representative to arrange for access for a tradesman after the Report had been issued. She confirmed that these works would have been temporary remedial works because "no responsible landlord would leave it untreated" but that more permanent works would be carried out after the end of the tenancy in March 2021.
33. In terms of future intentions in relation to the Property, the Applicant's Representative noted that no definite instruction had been given to her by the Applicant but that it was likely that the Applicant would look to re-let the Property. In response to a question about any thought having been given to the Respondents moving out temporarily and then moving back in once any works had been completed, the Applicant's Representative indicated that the Applicant may consider that but noted again that the way in which the Respondents had been living had contributed to the problem. The Tribunal interpreted this to mean that the Applicant would be reluctant to allow the Respondents to return to the Property in such a situation.
34. The Applicant's Representative queried what the Applicant should do if the order for possession was not granted because the Respondents were not allowing the Applicant (or her contractor) access to the Property and were not responding to communications but were living in a sub-standard property and had been claiming that their health was affected. In response to a question, the Applicant's Representative confirmed that no consideration had been given to applying to the Tribunal for an order to require the Respondents to allow access to the Property for repairs.
35. The Applicant's Representative confirmed that the Applicant was seeking an eviction order on the basis that the Applicant intended to carry out refurbishment works (ground 3).

## **FINDINGS IN FACT**

36. The Tribunal found, on the balance of probabilities, that the Applicant and/or the Applicant's Representative:



- a. did not have any evidence determining, and so did not know, how long it would take to complete the works identified (and costed) in the Report;
- b. did not have any evidence determining, and so did not know, whether or not the works identified (and costed) in the Report could be carried out with the Respondents remaining in occupation of the Property;
- c. did not (and, without investigation, could not) know if further works will be identified as being required (beyond those set out in the Report) once the tracing works in the bathroom have been undertaken – the Report indicates that the requirement for further works “is likely” but does not predict what those works may be, nor how long they may take to complete, nor whether or not they are likely to affect occupation; and
- d. (should it have been determined that the works identified (and costed) in the Report could not be carried out while the Respondents were in occupation of whole or part of the Property) did not explore any alternative options with the Respondents so as to allow the Respondents to continue as tenants following the completion of the works (such as temporary alternative accommodation (whether or not provided by the Applicant)).

37. The Tribunal made no finding with regard to whether or not it was sufficient for the details required in the notice to leave to be contained in a previous e-mail (which was not attached to the notice to leave) or only to be made available if requested by the tenant.

## **REASONS FOR DECISION**

38. Ground 3 set out in schedule 3 to the 2016 Act (updated as at 7 April 2020 and as currently in force) is in the following terms:

“Landlord intends to refurbish

- (1) It is an eviction ground that the landlord intends to carry out significantly disruptive works to, or in relation to, the let property.
- (2) The First-tier Tribunal may find that the eviction ground named by subparagraph (1) applies if—
  - (a) the landlord intends to refurbish the let property (or any premises of which the let property forms part),
  - (b) the landlord is entitled to do so,
  - (c) it would be impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord, and
  - (d) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.”

39. In terms of section 51(1) of the 2016 Act, “The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.”

40. The Tribunal found that, based on the evidence and information provided to the Tribunal, ground 3 (the only ground to be considered) had not been established. In particular, the Tribunal was not provided with any evidence (as opposed to unsubstantiated claims) to support an assertion that the works would be “significantly disruptive”, nor that it would be “impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord”. Moreover, the only works to be considered at the time when the notices to leave were served were those identified (and costed) in the Report.

## **DECISION**

41. Accordingly, the Tribunal refused the application under section 51(1) of the 2016 Act for an eviction order based on ground 3 (refurbishment) of schedule 3 to the 2016 Act.

## **Right of Appeal**

**In terms of Section 46 of the Tribunals (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.**

*P S Woodman*

*2 June 2021*

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**Legal Member (chair)**

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**Date**

Pamela Woodman