



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1988**

**Chamber Ref: FTS/HPC/EV/21/3003**

**Re: Property at 37 Gartmore Road, Airdrie, ML6 9BH (“the Property”)**

**Parties:**

**Mr Stephen McFadyen, Mrs Christine McFadyen, 2 Sandhead Terrace, West Craigs, Blantyre, G72 0JH (“the Applicant”)**

**Mr Godfrey Aigbokhabho, Miss Joanne Lo, 37 Gartmore Road, Airdrie, ML6 9BH (“the Respondent”)**

**Tribunal Members:**

**Alison Kelly (Legal Member) and Angus Lamont (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it was reasonable to grant an order for eviction.**

**Background**

On 1<sup>st</sup> December 2021 the Applicants lodged an application with the Tribunal in terms of Rule 66 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), seeking an order for eviction of the Respondents.

Lodged with the Application were:

1. Copy Tenancy Agreement
2. AT5 Notice
3. Section 33 Notice
4. Notice To Quit
5. Recorded Delivery Slip
6. Section 11 Notice and evidence of service

## 7. Copy Rent Statement

### **Case Management Discussion**

A Case Management Discussion (“CMD”) took place by teleconference on 14<sup>th</sup> March 2022. It took place simultaneously with a CMD in relation to Case Number FTS/HPC/CV/21/3004, which was an application seeking to evict the Respondents.

The Applicants were represented by Miss Sadiq of TCH Law, Solicitors. The First Respondent represented himself and the Second Respondent.

Reference is made to the Case Management Discussion Note for that CMD. The First Respondent gave his reasons why it would not be reasonable to evict him. These were:

- a. He and his partner had been tenants for 8 years, and he estimated that he had paid the landlords around £50,000 for rent during that time;
- b. They had a baby in the home;
- c. He had travelled to Nigeria just before lockdown in 2020 and he had been unable to return from Africa, he had been there for a year, was therefore unable to work, could not afford to pay the rent during that period, and this was why there were rent arrears;
- d. His partner had been receiving Universal Credit while he was in Nigeria and he had paid some of that to the rent;
- e. He was now working and paying the rent regularly;
- f. He had made an offer to pay the arrears, however this had been more problematic to pay as he was struggling to afford the arrears repayments together with his other outgoings;
- g. If he was not evicted, he would be able to find money to repay the arrears, if he was evicted he could not commit to paying the arrears as quickly as he would have to pay to find another property to live in.

The case was continued to a Hearing for evidence to be lead.

### **Hearing**

A Hearing took place by teleconference on 25<sup>th</sup> April 2022.

The Applicants were represented by Miss Sadiq of TCH Law, Solicitors. The First Respondent represented himself and the Second Respondent.

The Chairperson explained that the purpose of the Hearing was for the Tribunal to hear evidence which would assist them to decide whether or not it was reasonable to grant the order for eviction. The ground of eviction being used was usually a mandatory ground, but due to the Coronavirus legislation the Tribunal now had to consider reasonableness.

The Tribunal asked Miss Siddiq to confirm the current level of arrears. She said that it was £1520.48. The First Respondent disputed this. He said he had made a payment of £550 on 21<sup>st</sup> April 2022. The Tribunal adjourned for 10 minutes to allow Miss Siddiq to check the position. She was able to confirm after checking that the payment had been received and that the arrears stood at £970.48. That figure was agreed by the First Respondent.

Miss Siddiq started by giving an overview of the situation. She referred to the Rent Statement lodged with her Second Inventory of Productions. She highlighted that there was a consistent history of late payments. The rent had never been paid on the due date and there were arrears before the Covid pandemic. These had occurred once in 2015 and once in 2018. She highlighted that after the start of the pandemic payments became erratic and that the Respondents had been in arrears ever since. She said that the Applicants had served Notices To Quit on three occasions; on 13<sup>th</sup> March 2018, on 11<sup>th</sup> October 2018 and on 21<sup>st</sup> February 2020. They had not proceeded to Tribunal following on any of these Notices.

Miss Siddiq went through the email correspondence and telephone notes lodged with her Second Inventory of Productions. She highlighted the number of emails and letters sent, including those which complied with the Pre Action Requirements. She said that the Respondents had not been quick to respond to any correspondence. There had been several promises to pay and several broken payment arrangements.

Miss Siddiq pointed out that it was a joint tenancy and they had also attempted to contact the Second Respondent.

The Tribunal asked the First Respondent if he accepted that the correspondence lodged and referred to had taken place and he confirmed that it had.

Miss Siddiq took evidence from her clients.

The First Applicant said that he was a joint owner of the property. He and his wife had employed Property Bureau to manage the tenancy. He confirmed that the rent payment date at the commencement of the tenancy was the 7<sup>th</sup> of the month. He said that the date payment was actually made fluctuated. He said that he had no other rental properties and there was no mortgage on this property. He said that he had retired at the end of 2018 due to ill health but was not due to receive his small personal pension until later this year. He turns 65 in June 2022. The only other income he has is around £75 per month for some work at a local college. He will not receive his state pension until his 66<sup>th</sup> birthday in 2023. The property was purchased in 2010 with the intention of the rental income providing him with retirement income, it is effectively his pension pot. The Second Applicant is effectively the main earner in their household. He said that they do intend to keep the property and rent it out again.

The First Applicant was asked if he accepted that the pandemic produced difficulties for tenants in paying rent. He said that he did, but that it was difficult for everyone. He did not think that the Respondents' issues were solely down to Covid.

The First Respondent did not ask any questions in cross examination.

The Second Applicant gave evidence. She said that she was the sole earner in the household but was currently on sick leave. She had been off for six months, and her salary was due to end this month. Her sick leave was renewed until July, but she wasn't sure that she would have any income. She had assumed that the rent for the property would be one source of income. She was not aware of any reasons for the Respondents being late with payments. She had been willing to engage with them throughout.

The Second Respondent said that she had no intention of retiring. She works for an IT company as a delivery manager. She is 55 years of age.

The Tribunal asked the Second Respondent to confirm her average monthly income for the last six months. The Second Respondent was not willing to do so. The Tribunal pointed out that the information was relevant to allow the Tribunal to assess reasonableness and granted a short adjournment for her to discuss it with her solicitor.

After the adjournment the Second Applicant said that she could confirm that her monthly income had covered the cost of the couple's monthly outgoings. She said that that situation was likely to change when she went on to Statutory Sick Pay. She would not be drawn any further on figures.

The First Respondent did not have any questions in cross examination.

The First Respondent gave evidence. He said that he had never been in arrears prior to the pandemic. He said that he was the one handling the rent, he did not wish to put it in the Second Respondent's hands. He said that his wages could cover the rent but he did not get jobs from his employers every week. Sometimes his shifts would be cancelled. He said that he did mainly CCTV work for Securigroup. The second Respondent works for TK Maxx and has done for 14 years. She is a team leader. The Respondents have one child, a daughter aged 7. The First Respondent said that he was stuck in Nigeria for a year during lockdown. He got back home in December 2020. He did not have any work in Nigeria, the whole country was in lockdown. The Second Respondent was not working for parts of lockdown, but she did receive furlough pay.

The First Respondent made it clear that he did not wish to criticise the Applicants. He said that he had not planned to get in to arrears, and he understood the Applicants' position. He said that he was confused by the payment plans proposed. He was in Nigeria and he agreed because he did not want the Second Respondent to be evicted.

The First Respondent said that the arrears could be paid off within three months.

The Tribunal asked the First Respondent about the family's finances. It had been suggested at the CMD that he may wish to fill out a Time To Pay Application form, but he had not done so.

The First Respondent said that the Second Respondent received £1600 per month after tax. He received a minimum of £400 per week. They also had child benefit. Outgoings were rent, gas, electric, phone, council tax and credit cards. He said that

the Second Respondent had a car that cost £400 per month, and travel to work costs. She works in Stirling.

The Tribunal asked the First Respondent why he had not made good on his promises to pay off the arrears. He said that he had had some unexpected bills, for example £700 for electricity when he came off his fixed contract. He said that on other occasions other bills, for example the credit card, would need to be paid.

Miss Siddiq cross examined the First Respondent. She tried to get him to accept that he had consistently been late with paying the rent. The First Respondent said that he was not arguing with anything that had already been said. He confirmed that the Respondents do not have a joint account. He was vague about how their finances were managed. He said that she did not ask him if he had paid the rent, and he did not ask her for money to do so. If he did, he would treat it as a loan from her.

The First Respondent said that he travelled to Nigeria at the end of February 2020. He did not know how much money the Second Respondent had received during furlough. He said that she had high expenses but did not specify what these were apart from £400 per month for her car.

The First Respondent said that he did not approach any agencies for help with the rent. He would not wish to do so. In any event, he was in Nigeria, in lockdown. He said that he could not check his emails every day as he was trying to preserve his data. Everything was in arrears. He did not want to take the Second Defender's money to pay the rent, she was paying for food and her car.

The First Respondent returned to the UK in December 2020. He did not work until March 2021. The country was in another lockdown. The family's income has been steady however since June 2021.

Miss Siddiq asked the First Respondent why he had not paid off the arrears by the end of March 2022, despite saying at the CMD that he would do so. He said that he had made the offer because he thought they would cancel the eviction action, and when they did not he decided not to pay.

Miss Siddiq asked the First Respondent if he had surplus funds in his account that would allow him to pay off the arrears now. He said that he did not. He would have managed to get the funds if the eviction had been cancelled.

Miss Siddiq asked how he would propose to make payments on time in the future. He said that the Second Respondent would set up a standing order from her wage.

Miss Siddiq was asked to sum up why the Applicants considered it reasonable for the order to be granted. She said that the Respondents' difficulties were not related solely to the pandemic. There had always been delays in making payments. Proposals had been made, been agreed to and not been adhered to. The Respondents never responded to any correspondence quickly. She said that the Second Respondent had an equal responsibility to pay the rent. They had not taken any advice from advice

agencies. She said that the Tribunal needed to consider the position throughout the tenancy and not just the position now.

The First Respondent was asked to sum up why he thought it was not reasonable to grant the eviction order. He said that he was not challenging anything the Applicants had said. He understood if they wanted to take their house back. He would need time to clear the arrears.

This brought the Hearing to a conclusion.

The First Respondent had to pick up his daughter from school. The Tribunal adjourned and said that they would issue a written decision.

### **Findings In Fact**

1. The parties entered in to a Short Assured Tenancy Agreement commencing on 20<sup>th</sup> February 2014;
2. An AT5 was served prior to the commencement of the tenancy;
3. A Notice to Quit and a Section 33 notice, dated 1<sup>st</sup> March 2021 with date to quit of 20<sup>th</sup> September 2021 were served on the Respondents;
4. A section 11 Notice was served on the local authority;
5. The monthly rent was £550;
6. At today's date the rent arrears stood at £970.48.
7. The Respondents did not, throughout the tenancy, pay the rent on the same date each month;
8. The First Named Applicant is retired and has no pension income at present;
9. The First Named Applicant earns £75 per month from employment with a local college;
10. The second Named Applicant is on sick leave and her full pay is about to stop;
11. Both Respondents are in employment with a combined net income of £3200 per month;
12. The Respondents have their seven year old daughter living with them.

### **Reasons For Decision**

Granting an application for eviction based on sections 18 and 33 of the Housing (Scotland) Act 1988 in relation to a Short Assured Tenancy, provided that the notices are correct and have been served correctly, is normally mandatory. However, in terms of Section 2 and Schedule 1, Paragraph 3 of the Coronavirus (Scotland) Act 2020 makes the ground discretionary and the Tribunal has to consider reasonableness. The section is as follows:

*3(1)The Housing (Scotland) Act 1988 applies, in relation to a notice served on a tenant under section 19 or 33(1)(d) of that Act while this paragraph is in force, in accordance with the modifications in this paragraph.*

*(2)Section 18 (orders for possession) has effect as if—*

*(a)subsections (3) and (3A) were repealed,*

*(b)in subsection (4), for “Part II” there were substituted “ Part I or Part II ”,*

*(c)in subsection (4A), after the word “possession” there were inserted “ on Ground 8 in Part I of Schedule 5 to this Act or ”.*

*(3)Section 20 has effect as if subsection (6) (no discretion where landlord entitled to possession) were repealed.*

*(4)Section 33 (recovery of possession on termination of a short assured tenancy) has effect as if in subsection (1)—*

*(a)in the opening words, for the word “shall” there were substituted “ may ”,*

*(b)after paragraph (b), the word “and” were repealed,*

*(c)after paragraph (d) there were inserted “, and*

*(e)that it is reasonable to make an order for possession.”.*

*(5)Schedule 5 (grounds for possession of houses let on assured tenancies) has effect as if for the heading of Part I there were substituted “ Certain grounds on which First-tier Tribunal may order possession in relation to the period of the Coronavirus (Scotland) Act 2020 ”.*

The Tribunal has to consider all the circumstances relevant when deciding on reasonableness.

The Applicants gave evidence that rent payments had been consistently late, there had been arrears for a long time and that they relied on the rental income for their own needs. The Second Applicant was very reluctant to discuss figures in relation to income and outgoings. The Tribunal found this odd given that it was a material factor in the Applicants’ argument. The Tribunal however, accepted that the First Applicant was credible, and that he had no income of his own apart from the £75 per month mentioned.

The Applicants’ solicitor made much of her contention that the Respondents had been consistently late with payment, and that they had been in arrears several times in the past. She established that previous notices had been served. The Tribunal notes from the rent statement that although rent payments were rarely, if ever, paid

on the same date each month, they were, in the main, paid in the month that they were due, and pre pandemic the rent fell in to arrears on only two occasions. The Applicants would have been likely to have had difficulty in persuading a Tribunal that it was reasonable to evict if they had used late payment as a ground of eviction.

The First Named Respondent told the Tribunal that both Respondents were in employment and had a combined income of £3200 per month and child benefit. They live together with their seven year old daughter. The First Named Respondent said that the difficulties had come about because of Covid. He was stuck in Nigeria for a year and was not earning. The Tribunal notes from the rent statement that during this time the monthly rent was mostly paid, although nothing was paid towards the arrears. The problem seems to have worsened after the First Respondent returned. It was clear from the First Respondent's evidence that he had considered the rent payment to be his responsibility, and not that of the Second Respondent. It appears from what he said that he did not ask her to pay towards the rent and that her salary was used for other things, including paying for her car. He said during his evidence that the rent payment was a priority, but he also said that at other times other bills, including credit card payments, were a priority. He was vague when asked to clarify his outgoings and could not be pinned down to answer fully.

The First Respondent accepted that he had made offers to pay but had not adhered to them. He made an offer to pay the arrears by the end of March 2022. He was clear in his evidence that he had not made the payment because it would not lead to the cancellation of the eviction action.

The Tribunal has sympathy with both sides. The pandemic has indeed been difficult for everyone. The Applicants' solicitor urged the Tribunal to look at the conduct of the tenancy as a whole when considering reasonableness. Right up until the action was raised the Tribunal would have considered that it was not reasonable to grant the order. However, the conduct of the Respondents since then has led to the Tribunal deciding that it is reasonable. The Tribunal have taken in to consideration the family circumstances and that there is a young child, but on balance consider that the Respondents have a joint income which would have let them clear the arrears by the Hearing date if they had chosen to do so. Paying the rent is a joint obligation when it is a joint tenancy. It should have been a priority for both Respondents and it was up to them to organise their joint finances to allow them to make payment. Although ongoing rent has, in the main, been met there is no solid payment plan in place, and there has been no attempt to clear the arrears between the date of the CMD and the date of the Hearing, despite the promise to do so.



## 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.

Alison Kelly

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Legal Member/Chair

25 April 2022

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Date