



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 16A(d) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/EV/19/0089

Re: Property at 35 Kilrymont Road, St Andrews, Fife, KY16 8DE (“the Property”)

Parties:

KKAJS Limited, c/o The Fortress Group, 4th Floor Exchange House, 54/62 Athol Street, Douglas, Isle of Man (“the Applicant”)

Mr James McGrory, Mrs Anne McGrory, 35 Kilrymont Road, St Andrews, Fife, KY16 8DE (“the Respondents”)

Tribunal Members:

Fiona Watson (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application under Rule 16A(d) is granted and the execution of the Order for Repossession granted on 31 October 2021 is delayed for a period of four weeks from the date of this decision.

- Background
 1. An application was submitted by the Respondents under Rule 16A(d) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”) seeking a delay in the execution of an Order for Repossession (“the Order”) granted against the Respondents by the Tribunal at a Hearing dated 31 October 2019.
 2. Whilst the Tribunal does not consider that the background to the original application which led to the Order being granted requires to be rehearsed in this decision, it considers it helpful to set out the background to the contractual relationship between the parties. The Property was previously owned by the Respondents and their children. In order to fund a dispute with Clydesdale Bank

in relation to a financial mis-selling claim, a company was set up, based in the Isle of Man. That company is the Applicant in this case. The Respondents entered into an arrangement with the Applicant whereby title was transferred to the Applicant in return for a sum of money paid to the Respondents via a loan from Barclays which was secured over the Property, and a tenancy agreement entered into between the parties with the rental under said agreement being paid either fully or partially towards the Barclays loan repayments (this is an issue which is disputed between the parties).

- The Hearing
3. A Hearing took place on 13 September 2021. Mr Fairgrieve of Thorntons Law LLP appeared on behalf of the Applicant. Mr Fairbridge of Pollock Fairbridge Schiavone Solicitors appeared on behalf of the Respondents. Written submissions had been lodged in advance by both parties, setting out their respective positions to the application. Both parties sought to adopt those written submissions at the Hearing so as to avoid any necessity of rehearsing same.
- **The Respondents' submissions**
4. The Respondents submitted that at the Hearing at which the Order was granted, the Respondents could not argue that there wasn't three months of arrears in existence at the date of the notice being served and the date of the Hearing taking place and therefore there was no alternative than for the Order to be granted. However, it was submitted that an agreement had been reached between the parties that the order would not be enforced if two conditions were met: firstly, for payment of a sum of money in relation to arrears of rent and secondly, a further sum being paid to discharge a loan with Barclays. Funds were available and attempts were made to satisfy the second condition but the Respondents' ability to do so was frustrated by the Applicant's actions. The Applicant had failed to provide full accounting to show the sum due to be repaid to Barclays which meant that the Respondents could not do so. It was submitted that on this basis it was "unsafe" for the Applicant to proceed with enforcement of the Order.
 5. Reference was made to the cases of *Brown v Brown [1971] SC 22* and *City of Edinburgh Council v Smith (2016 Hous LR 31)*, copies of which had been lodged prior to the Hearing. Whilst initial submissions were made regarding there having been a new lease created following the granting of the Order due to payments having been accepted by the Applicant following the granting of the order, after clarification by the Tribunal it was confirmed by the Respondents' representative that no argument was being put forward as regards a new lease being created post-Order (as per the said case of *City of Edinburgh Council v Smith*) and that the Respondents' position was reliant purely on seeking a delay in enforcement of the Order in terms of Rule 16A(d) of the Rules.

6. It was submitted that the circumstances which had arisen post-Order were relevant considerations for the Tribunal to take into account when considering the grant of a delay in execution of the Order. Since the granting of the Order, the Respondents' only source of income, a guesthouse, had been forced to close due to the pandemic. Their income dropped to zero as a result. They have been unable to source alternative accommodation. The guest house is in the process of being sold and is due to settle on 28 September 2021. This would free up sufficient funds to allow the Respondents either to deal with repayment of the Barclays loan or to find alternative accommodation if necessary. The Respondents require a few weeks delay to allow the sale to go through.
7. It was submitted that Rule 16(A)(d) was relatively new and whilst in the few occasions it has been used, it has been used at the point an Order is granted by the Tribunal, there was nothing to prevent this Rule from being relied upon at a time following the granting of the Order. Rule 16A(d) says that the Tribunal can order "a delay in execution of an order by the First-tier Tribunal at any time before it is executed." It was argued that "execution" is when diligence has been successful, and not just where diligence has been attempted. The Order had not been fully implemented, in that an eviction had not yet been carried out, and accordingly it had not yet been "executed" in accordance with this Rule. It was submitted that Rule 16(A)(d) did not exist at the time the Order was granted and therefore delay could not be sought at that point.
8. It was submitted that since the Order was granted, the Respondents' circumstances have changed. Mr McGrory's health has deteriorated. The closure of their guest house has ceased any income. The Respondents were trying to rectify matters by way of sale of the guesthouse which would free up funds to allow them to repay Barclays. They had previously been in funds to enable them to do this but the funds had not been paid over as the Applicant had failed to confirm the full accounting details that the Respondents had requested to enable settlement. When their income ceased due to closure of the guest house, some of these funds had to be used for living costs. The Applicant hadn't taken steps to enforce the Order so far and therefore there would be no prejudice to the Applicant in delaying the enforcement for a period of time, due to the Respondents' change of circumstances.

- **The Applicant's submissions**

9. The Applicant's representative submitted that it was inappropriate for the Respondents to make this application to the Tribunal. Submissions were made regarding the opposition to any written argument made regarding the Order not being capable of being enforced with reference to the said case of *City of Edinburgh Council v Smith*, however the Tribunal does not consider it necessary to rehearse these arguments here given that it was then clarified by the Respondents' representative that such arguments were no longer being relied upon.
10. It was submitted that the Respondents had consented to the Order for Repossession being granted on 31 October 2019. The Respondents' version of events surrounding the discussions which took place between the parties on

that date were not accepted by the Applicant. It had initially been agreed that the Respondents would firstly pay their rent arrears within 28 days of the Order being granted (by 28 November 2019) and thereafter they would clear the debt due to Barclays. They failed to comply with either. They paid only half of the arrears by 6 December 2019. The Applicant then agreed not to enforce the Order over the Christmas period, so as not to render the Respondents homeless during the Christmas holidays. The remaining arrears were repaid in January 2020. The Respondents had also agreed that they would repay the sums due to Barclays but failed to do so. The Respondents repeatedly asked for detailed accounting between the parties and were conflating two separate issues – the debt due to Barclays and the accounting between the company and them as shareholders of the company. The Respondents had been in a position to repay Barclays and didn't do so. They instead chose to put forward arguments regarding a separate matter of accounting between the company and them as shareholders, which was an entirely separate issue. They could have repaid the debt and chose not to do so.

11. It was submitted that the Tribunal's overriding objective was to deal with proceedings justly. Proceedings are concluded, with the Order for Repossession having been granted with consent of the Respondent and therefore proceedings are at an end. It was submitted that Rule 16A is not a continuing power and its placement within the Rules is important. It was introduced into the Rules after Rule 16 (which Rule deals with the issue of Directions) and therefore should only be utilised at the point of granting the order itself, and not afterwards. It should only be used in the context of live proceedings. To do so afterwards, it was submitted, would "open up a can of worms." It was not appropriate for the Tribunal to grant the application and it should be refused.
12. It was explained, after questions from the Tribunal, that the Order had not been enforced essentially due to the pandemic and the restrictions this brought. The Order was granted on 31 October 2019 and produced in early December 2019. The Respondents had made payment of half of the arrears in early December 2019, and it was agreed not to enforce the Order over the Christmas period. An eviction was set for 10 January 2020 and cancelled as the Respondents paid the other half of the arrears balance and had sought further time to repay the sum due to Barclays. Due to their failure to repay Barclays as promised, a further eviction date was fixed at the end of March which had to be cancelled due to lockdown, and then it was submitted, "nothing could be done." No rent had been paid since January 2020. It was questioned by the Applicant's solicitor as to why a further delay hadn't simply been asked for to allow the sale of the guesthouse to complete, which could have been discussed between the parties, rather than raising this application.

- **Reasons for Decision**

13. The Tribunal noted that whilst there appeared to be a number of issues raised in the Respondents' written submissions regarding the question of personal bar and inability to enforce the order due to a new tenancy having been created, it

was clarified at the hearing that these were not being relied upon and that the only position being taken by the Respondents was their seeking a delay in enforcement of the Order in terms of Rule 16A(d) of the Rules. On that basis, the Tribunal does not see the need to set out its position in relation to those other points set out in the written submissions and simply seeks to address the question of whether delay can be sought and if so, whether it is granted.

14. It was noted that there was disagreement between the parties as to what was agreed at the Hearing to lead to the Respondent consenting to the Order being granted. The Tribunal doesn't consider this to be entirely relevant. No conditions were set out in the Decision of the Tribunal nor in the Order itself. The Order was not granted conditionally on any steps being taken by either party. It was an open Order for Repossession and consented to as such by the Respondents.
15. The Tribunal would disagree with the Respondents' contention that Rule 16A(d) did not exist at the point the Order was granted, and therefore couldn't be sought at the time. Rule 16A(d) was introduced under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Amendment Regulations 2018, which came into force on 20 February 2019. Therefore, they were indeed in existence at the date the Order was granted. The Respondents were either unaware of its existence at the time or, were aware of its existence and chose not to rely upon it.
16. The Tribunal would also disagree with the Applicant's contention that Rule 16A(d) cannot be relied upon on in these circumstances, i.e., at a point after the Order has been granted. The wording of Rule 16A(d) states "*the First-tier Tribunal may regulate its own procedure, including... (d) ordering a delay in execution of an order by the First-tier Tribunal at any time before it is executed.*" The Tribunal considered the meaning of this to be that at any point before the Order is executed, it can order a delay in execution. There is nothing to suggest that this power is only limited to being used on the date upon which the Order itself is being granted, as this of course would always be prior to its' execution. The Tribunal is satisfied that the wording of the Rule is such that it allows a party to make an Application under this Rule at any point up to the execution of the Order, whether at the point of the Order being granted or at a time thereafter and prior to execution. The Tribunal was satisfied that the Order had not yet been "executed", with no eviction having yet been carried out.
17. The Rule itself does not set out the considerations that the Tribunal must consider in determining whether delay should be granted or not. Accordingly, the Tribunal has considered whether it is reasonable in the circumstances to do so. Whilst it is accepted by the Tribunal that the pandemic and lockdown has had an impact on the Applicants' ability to enforce the Order, the Tribunal was not persuaded by the Applicant's position that "nothing could be done" following the cancellation of the eviction planned for the end of March.
18. The Health Protection (Coronavirus) (Protection from Eviction) (Scotland) Regulations 2020 came into force 11 December 2020. These Regulations

prevented (except in specified circumstances) carrying out an eviction order in relation to a residential tenancy in Scotland. Thereafter, from 22 January 2020, the prohibition on carrying out an eviction order (again except in specific circumstances) was only in relation to those areas in tier 3 and 4 restrictions. It was noted by the Tribunal that the local authority area in which the Property is situated (being Fife) had entered into tier 2 restrictions by the start of November 2020, and therefore there was no apparent reason why the Order had not been enforced since then. Whilst the Tribunal assumes that the Applicant was hoping that the additional time would enable the Respondents to gather the necessary funds to settle the debts due, the statement made by the Applicant's representative that "nothing could be done" did not appear to be entirely accurate.

19. On the basis that the Applicant has not shown any real urgency to enforce the Order since the cancellation of the last planned eviction in March 2020, the Tribunal does not consider that there would be any significant prejudice to the Applicant in a delay in enforcement of the Order being granted. It was noted that the sale of the guest house was hoped to be completed on 28 September 2021 and the resultant sale proceeds could enable the Respondents to meet their financial obligations thereafter.

- Decision

20. The Tribunal grants the application for delay in enforcement of the Order in terms of Rule 16A(d) and delays enforcement of the Order for Repossession for a period of 4 weeks from the date of this Decision.

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.

**Fiona Watson
Legal Member/Chair**

**20 September 2021
Date**