Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Sections 51 and 71 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Refs: FTS/HPC/EV/20/1533 and FTS/HPC/CV/20/1534

Re: Property at 14 Knightsbridge Street, Glasgow, G13 2YN ("the Property")

Parties:

Rev William Heenan, St Columbus Manse, Lewis Street, Stornoway, HS1 2JF ("the Applicant")

Ms Carrie-Anne Mobeck, 14 Knightsbridge Street, Glasgow, G13 2YN ("the Respondent")

Tribunal Members:

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

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously :

1. **Finds that the Notice to Leave served by the applicant upon the respondent, dated 20 February 2020, is invalid; finds the eviction application cannot be entertained, and dismisses the eviction application. (in FTS/HPC/EV/20/1533)**

2. **By consent, makes a Payment Order against the respondent in the sum of £6,404.39 in favour of the applicant. (in FTS/HPC/CV/20/1534)**

Introduction

These two applications referenced, FTS/HPC/EV/20/1533 and FTS/HPC/CV/20/1534 were heard together. They relate to the same property and are between the same parties. The first application seeks an eviction order and is under Rule 109 and section

51, and the second application seeks an order for payment, relative to rent arrears, and is under Rule 111 and section 71. The Rules are contained within The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 and the sections are contained within the Private Housing (Tenancies) (Scotland) Act 2016, which govern the applications.

The applicant is the Rev. William Heenan. He is the landlord. The respondent is Miss Carrie-Anne Mobeck. She is the tenant.

Procedural History and Documentary Evidence

The applications are both dated 17 July 2020 and were received by the Tribunal on that same date electronically. Service of the applications and intimation of the first Case Management Discussion (CMD), to be held on 25 September 2020, were effected upon the respondent by Sheriff Officer delivery on 31 August 2020.

Both applications were accompanied by a copy of the written lease agreement, a copy of the Notice to Leave served upon the Respondent and a copy of the section 11 Notice issued to the local authority under the Homelessness etc (Scotland) Act 2003.

Directions in both cases were issued by the Tribunal on 10 August 2020. In the eviction application, supporting evidence to establish the ground for eviction relied upon was requested. In the payment order application a request was made for a relevant rent statement setting out payments due, payments received, and amount outstanding. Additionally, in both cases, written authorisation from the applicant's wife, Mrs Mairi Heenan, was requested as she is a co-owner of the property.

Written submissions were lodged on behalf of the Respondent in the eviction application raising a preliminary issue as regards the competency of the Notice to Leave served upon the respondent. This included the production of a previous Decision of the Tribunal, relied upon. Additionally, and in any event, it was submitted that the ground for eviction relied upon is not established. A time to pay application was completed and submitted by the respondent in the payment order application. This is dated 16 September 2020. This admitted the claim and offered to pay the amount sought at £5 per month. The sum originally sought in the payment application, which relates to rent arrears, was £4,640.

The parties were both represented at the initial CMD on 25 September 2020. Both expressed a wish to discuss matters and exchange information with a view to narrowing the issues and possibly resolving them. The applicant's representative also wished to consider obtaining independent legal advice, as she is not a legal representative. Matters were continued to a further CMD.

In advance of the further CMD an inventory of financial documents to support and vouch the Respondent's time to pay application was lodged.

A further CMD took place on 5 November 2020. Both parties were again represented. The applicant's representative advised then that neither she, nor the applicant were going to instruct any solicitor. Both parties positions had not materially altered. The

respondent maintained the previously stated position in respect of the eviction application. So far as the payment order application was concerned, it was stated that the respondent was due additional sums. Those however were not, and have not been, the subject of any formal Rule 14A amendment. Matters were continued to a two member full evidential hearing for determination of both applications.

In advance of the full hearing further documents and submissions were received from both parties. On 23 December 2020, the applicant's representative lodged a further written statement / submission together with, a formal rent statement, and correspondence with, and formal survey report by, Richardson and Starling. On 24 December 2020, the respondent's representative lodged further written submissions together with a further previous Decision of the Tribunal to be relied upon, together with a formal survey report by Allied Surveyors.

On the evening before the final hearing further emails were received from the applicant and his representative. These were mainly comments upon the most recent documentary material lodged on behalf of the respondent together with additional written submissions. All this was copied to the Respondent's representative.

In the course of the final hearing an updated rent statement was lodged with the Tribunal and copied to the respondent's representative.

The Hearing

The two member evidential hearing took place on 5 January 2021 at 10.00 am by teleconference. The applicant and his wife, Mrs Mairi Heenan, both joined the teleconference hearing. The applicant was represented by Ms Helen Hall of Macleod Lettings Limited. The respondent joined the teleconference hearing personally. She was represented by Miss Rona Macleod of Messrs Legal Services Agency Ltd, solicitors.

The Tribunal firstly set out with clarity the nature of the two applications which fell for determination and the extent of documentary evidence already received and considered by the Tribunal Members. The Tribunal set out the procedure which was to be adopted in the full hearing.

The Tribunal firstly considered the payment order application in which there was no longer any substantive dispute between the parties. It continued to be accepted on behalf of the respondent that substantial rent arrears were due. The time to pay application itself was withdrawn, but the admission of the claim remained valid. Discussions ensued about the level of outstanding rent arrears and the sums sought by way of payment order. An updated rent statement was lodged in the course of the hearing and an opportunity afforded to the respondent's representative to take instructions from the respondent. Ultimately it was agreed that a payment order should be made and the sum specified therein was also agreed.

The Tribunal then turned its attention to the eviction order application. Consideration was broken down into two distinct elements. Firstly, the competency of the application with regards to the validity of the Notice to Leave served upon the respondent and,

secondly the substantive merits of the ground for eviction relied upon. Both parties representatives were offered an opportunity of leading their respective clients in evidence and of asking questions of the other party. The Tribunal Members asked additional questions of each of the parties for clarification. Both parties representatives were afforded the opportunity of making concluding submissions.

The Tribunal reserved its decision in respect of the competency of the eviction application (and validity of the Notice to Leave) and of its determination of the eviction application at large.

Findings and Reasons

1. The Tribunal was satisfied that it had sufficient evidence upon which to reach a fair determination of the applications.

2. The property is 14 Knightsbridge Street, Glasgow G13 2YN.

3. The applicant, the Rev. William Heenan, co-owns the property with his wife, Mrs Mairi Heenan. They are the joint heritable proprietors and their interest is registered in the Land Register of Scotland under Title number GLA103815. These applications have been brought by the applicant in his sole name. The applicant's wife consents to both applications. She confirmed this by way of email to the Tribunal dated 20 August 2020 and she has participated in the proceedings. The respondent is Ms Carrie-Anne Mobeck, who is the tenant of the property.

4. The applicant and his wife entered into a private residential tenancy agreement with the respondent in respect of the property. The tenancy commenced on 4 January 2019. Rent was stipulated at £695 per month. A deposit in the sum of £795 was paid. The lease is governed by the Private Housing (Tenancies) (Scotland) Act 2016.

5. The property is a lower ground floor, two bedroomed flat, contained within a block of four flats, originally bult for local authority use. All of the flats are now privately owned. Glasgow City Council retains responsibilities as the relevant property factor. The applicant accepts that remedial work to the external fabric of the block is required. This involves insulation and rendering works. No agreement has yet been reached by all relevant owners of the block regarding such work.

6. The applicant has been aware of rising damp within the property for a number of years. He and his wife were both aware of this at the time that the lease was entered into with the respondent in January 2019. The respondent was not advised of this problem. Advice had previously been given to them that a damp proof course would be required in parts of the property. Instead of undertaking such work, the applicant and his wife had instructed redecoration of the property at some time in the last few years which had included a seal of the relevant walls where damp was evident and redecoration. No damp proof course had been instructed. The decoration in the flat is somewhat aged now.

7. The respondent fell into rental arrears. Arrears started to accrue from in or about April 2019. Arrears became more of a problem continuously and substantively from February 2020. As at the date the applications were made to the Tribunal, the total amount of rent outstanding was £4,640. This is confirmed in terms of the formal rent statement which has subsequently been produced to the Tribunal.

8. No formal Rule 14A amendment has been made to formally increase the sum sought, though arrears have continued to accrue. The applicant's representative updated the Tribunal at the final hearing. The sum now outstanding is £6,404.39. An updated rent statement was lodged with the Tribunal in the course of the hearing which reflects this. The respondent's representative was afforded an adjournment to consider the position. It was thereafter confirmed that there was no opposition to the amendment of the sum sought despite no formal Rule 14A amendment having been made. The respondent accepts that the issue of increased rent arrears has been highlighted at the former CMDs and that fair notice of the wish for an increased order had been given. The respondent did not dispute the current level of rent arrears claimed in the sum of £6,404.39.

9. When the respondent made the time to pay application, she offered to pay the sums due at the rate of £5 per month. She indicated at the time the application was made, in September 2020, to repay the full amount within 2 years in the hope of obtaining further employment. She was in employment until 1 January 2020 when she was made redundant. Given the level of arrears, it would take many years for the sum due to the applicant to be repaid at such a low rate. She remains unemployed. At the full hearing the time to pay application was withdrawn. No application was made for the respondent to pay by instalments.

10. The applicant is entitled to recover arrears of rent lawfully due under the lease. In the payment order application, the Tribunal, with the consent of the respondent, made a payment order in the sum of £6,404.39 being the sum sought, evidenced to be due, and being the sum unchallenged. The respondent has admitted she is liable to pay this sum. No claim for interest was made. The Tribunal relied upon the unchallenged documentary evidence including the rent statement which was found to be credible and reliable.

11. Following the respondent taking up occupation of the property an initial landlord's inspection was carried out in or about August 2019. The respondent had raised at that time with the inspector an issue which she had detected in respect of damp within the property. She is a qualified RICS (Royal Institution of Chartered Surveyors) surveyor. She is aware of the need to ventilate the property adequately and does so. The applicant and his wife did not disclose the pre-existing problem with dampness in the property to the respondent prior to her taking up occupation of the property. Despite the respondent raising within the inspector issues regarding that in or about August 2019, she received no communications from the applicants nor their letting agent until late February 2020 in the form of a Notice to Leave. She had informed the applicants' letting

agent in early January 2020 that she had been made redundant and that there would be some difficulty in her meeting the rental obligations but that she would be claiming relevant benefits.

12. By way of Notice to Leave dated 20 February 2020, the applicant served upon the respondent intimation of his intention to seek recovery of the property and, if necessary, raise eviction proceedings before the First-tier Tribunal. Reliance was placed solely upon ground 3 contained within Part 1 of Schedule 3 of the 2016 Act. This specifies that it is an eviction ground that the landlord intends to carry out significantly disruptive works to, or in relation to, the let property. The requirements are set out in full in ground 3(2)(a)-(c). The type of evidence which may be expected to establish the ground is referred to within subsection (3) of ground 3 and refers to (for example) any planning permission which the intended refurbishment would require or a contract between the landlord and an architect or a builder which concerns the intended refurbishment. The Notice to Leave specified that the nature of the refurbishment works were "damp proofing and other refurbishment works".

13. The Notice to Leave was prepared and served prior to the coming into force of the Coronavirus (Scotland) Act 2020 which extended the relevant notice periods for eviction orders. The period of notice which applies to ground 3, in the circumstances, was one of 84 days.

14. On the application of section 62(5) of the Act it is to be assumed that the tenant will receive notice 48 hours after the notice to leave is sent. The notice to leave is dated 20 February 2020, and was sent on that day. On the application of section 62(5) the respondent is deemed to have received the notice to leave on 22 February 2020. The 84 day period runs from that date and therefore it would end on 16 May 2020. On the application of section 62(4) of the Act the date to be specified in the Notice as being the day which the applicant landlord would expect to be in a position to make application to the First-tier Tribunal is the day after that ie 17 May 2020. The Notice to Leave specified the wrong day. It specified 16 May 2020.

15. The essential requirements of a Notice to Leave, which are prescribed by section 62(1) have not all been adhered to, because subsection (b) has not been met. This is because the specified day contained within the Notice to Leave, said to be the day on which the landlord expects to become entitled to make an application for an eviction order to the First-tier Tribunal, is one day early. There is no dispute between the parties that this is the case and that all the dates referred to in this Decision are correct.

16. The Tribunal considered the potential operation of section 73 of the 2016 Act which deals with minor errors in documents. Such section applies to errors which do not make the document invalid. Some errors do make documents invalid. Section 73 does not apply to errors which materially affect the effect of the document. Section 105 of the 2016 Act contains an explanatory note to Section 73 which states that any errors in specified documents do not invalidate the document, if they are sufficiently minor that they do not materially alter the

effect of the document. It is said that the purpose of section 73 is to ensure that a common-sense approach can be taken to meeting the requirements under the Act and that a party is not penalised for an obviously minor error. The protection applies equally to both landlords and tenants. Section 73(2)(d) makes specific reference to errors contained within a Notices to Leave.

17. The fundamental requirements of a Notice to Leave are to provide information to the tenant as to why and when proceedings may be raised against them. There is no suggestion that the Notice to Leave does not specify why. Ground 3 is clearly highlighted and some further degree of specification in narrative form is provided. The "when" part of the notice is clearly defective and the Tribunal finds that this is materially so. Properly calculated, the first day the applicant could have made application to the First-tier Tribunal was 17 May 2020. The Notice specified the wrong day – 16 May 2020. In fact, the application was not submitted until 17 July 2020 but that is immaterial and does not cure the defect.

18. The Tribunal has had regard to decisions of the First-tier Tribunal in other determined cases on similar points. Though not binding on the Tribunal, these are persuasive and in any legal jurisdiction it is important that the public have confidence in the impartial decision-making of Courts and Tribunals and that the public take comfort in knowing that they will be treated equally with other service users. The Tribunal has had specific regard to the decisions in FTS/HPC/EV/18/3231 and FTS/HPC/EV/19/3416, both of which have been produced, and are relied upon by the respondent. In the 3231 case the Notice to Leave specified the wrong date by 3 days. It was held to be invalid. In the 3416 case the Notice specified the wrong date by 1 day only, precisely the position in this application.

19. The Notice to Leave served upon the respondent does not specify "the day" on which the applicant was entitled to make an application for an eviction order to the First-tier Tribunal. It follows that the notice relied upon in this application is not a Notice to Leave in terms of Section 62(1) of the Act. One of the fundamental requirements clearly set out in the legislation at section 62(1) have not been met. Other erroneous references, mistakes and omissions are capable of being overlooked, but the four fundamental requirements in section 62(1) must be met precisely.

20. The Tribunal refers to and relies upon the reasoning provided by the Tribunal in the cases ending in 3231 and 3416.

21. It is well established law in Scotland that notices to quit must comply strictly with common law and statute, and the Tribunal's view is that the same approach should apply to the statutory notices to leave required to be served on tenants under the 2016 Act.

22. The Tribunal determined that the Notice to Leave served upon the respondent was not valid. The error within the Notice is a fundamental one. It is not a minor error. Accordingly, it cannot be a Notice to Leave which qualifies for the purposes of Section 52(2) of the Act. This requires the Tribunal to have before

it in an application for an eviction order, a Notice to Leave. A Notice to Leave is relied upon, but it is not valid.

23. The Tribunal determined that it had no power to entertain the application for eviction and, in the circumstances, dismisses that application.

24. For the sake of completion the Tribunal proceeded to consider the relevant evidence in respect of the merits of the eviction application. The Tribunal finds that the ground for eviction, relied upon by the applicant is not established. The burden of proof is upon the applicant. The standard of proof is a balance of probabilities. The applicant has failed to discharge the burden of proof.

25. The ground relied upon is that significantly disruptive works require to be undertaken in the property, to the extent which makes continued habitation of the property untenable. Ground 3 contains three specific requirements which are set out within Ground 3(2) (a), (b) and (c). There is no dispute that the applicant landlord is entitled to carry out proposed works. The relevant consideration for the Tribunal is firstly whether in terms of Ground 2(a) the applicant landlord intends to refurbish the let property and in terms of (c) whether it would be impracticable for the respondent to continue to occupy the property given the nature of the refurbishment intended by the landlord.

26. The Tribunal had the benefit of expert reports lodged by both parties in respect of such planned works. The reports are by Allied Surveyors and Richardson and Starling. The works are the replacement of the central heating boiler in the property and damp proof works to the two bedrooms. It is not disputed by or on behalf of the applicant that the replacement of the central heating boiler is only a one day job and would not preclude the respondent from continuing to live in the property. Reliance is placed upon the damp proof works proposed to be carried out by the applicant.

27. The report lodged by and on behalf of the applicant from Richardson & Starling makes reference to the damp proofing of one bedroom only. The applicant insists that this is erroneous and that the report was not properly prepared on the basis of clear instructions to evaluate both bedrooms within the property. The Tribunal accepts this. There was much discussion in the hearing about the extent of the works, including damp proofing works, which are required in the property. There is, in fact, nothing complicated or equivocal about this. A standard chemical damp proof course into specified walls of both bedrooms are required. This is standard work undertaken frequently.

28. The applicant complains that evaluative survey work has not been fully complete as yet. He suggested that this was because the property continues to be occupied. The Tribunal rejects that proposition. The applicants own report from Richardson & Starling is erroneous in its terms because it only covers one of the two bedrooms. Whilst there is reference to no survey having been carried out of relevant floor areas, this is not prohibitive in terms of the necessary work being undertaken. Neither is it precluded, by virtue of the respondent's occupation of the property.

29. The Tribunal ultimately concluded that the applicants intention to serve notice of leave upon the respondent, and to seek vacant possession of the property, was mostly fuelled by the respondent losing her job and the likely adverse effect this would have upon her ability to meet ongoing rental payments. The applicant had known about the condition of dampness in the property for a long time and certainly well before the respondent took up occupation of the property. Despite the respondent herself raising issues of dampness in the property in or about August 2019, it was not for some 6 months thereafter that Notice to Leave was served and this only occurred after the respondent being made redundant.

30. The applicant and his wife have not visited the property personally throughout the respondent's occupation. The Tribunal accepted that respondent's own evidence regarding her living arrangements and occupation of the property. The Tribunal found her account credible and reliable. Her evidence was not challenged by the applicant's representative, who chose to ask her no questions. She is a professionally qualified person. She lives alone. She is a neat and tidy individual. She has one dog. She ventilates the property on a frequent basis, having professional expertise in the necessity to do so, especially given the condition of damp which she herself has detected throughout her occupation of the property. In one of the two bedrooms the respondent has a double bed and two bedside cabinets. The room is otherwise tidy and does not have many possessions in it. The bed is capable of being dismantled and the respondent has undertaken that task herself previously as the bed belongs to her. In the second bedroom there is a wardrobe and a small desk. There are no other items of furniture. Again, there are few other items or possessions. The wardrobe also belongs to the respondent personally and can be dismantled. Both bedrooms are carpeted.

31. The Tribunal relies upon the conclusion contained within the report of Allied Surveyors that the necessary damp proof works identified as being necessary within the property can be done one room at a time, with the house being occupied. The author of that report considered fully that the two bedrooms require a damp proof course. This can be achieved by the respondent remaining in occupation of the property, with the limited items contained within each room being exchanged between one another and each room being sealed off whilst the work is carried out. The Tribunal also relied upon the respondent's own evidence in this respect together with the Tribunal's own special expertise.

32. There is no doubt that the provision of a damp proof course in any house is likely to be disruptive to some extent. However, the work is not of a nature that requires the house to be uninhabited, especially given the restricted and ring fenced areas of the property which require to be treated in this case. The work proposed, or at least required, by way of damp proof course, is not significantly disruptive, for the purposes of ground 3 of Part 1 of Schedule 3 to the 2016 Act.

33. The Tribunal was left with some reservations about whether or not the applicant still intends to refurbish the property as proposed in respect of the damp proof

works. Appreciating perhaps that there was a significant problem with the Notice to Leave served upon the respondent in February 2020, which the Tribunal has now found to be invalid, a fresh Notice to Leave has subsequently been served upon the respondent which is dated 13 October 2020. In that Notice to Leave the only ground relied upon by the applicant is that he intends to sell the property. The applicant himself indicated in his own oral evidence at the hearing that he could not be clear about the exact nature and extent of the works proposed to be carried out in the property. He has not yet settled on the exact nature of the works despite it being clear what these will entail. He referred to being unclear due to alleged ambiguity caused by the inability to have had a full survey report carried out. However the Tribunal does not accept that this is the case. It is clear what the nature and extent of the works required actually are, if the applicant has every intention of carrying them out. In the circumstances, the Tribunal finds that part (2)(a) of ground 3 is not established.

34. For the earlier reasons stated, the Tribunal finds that part (2)(c) of ground 3 is not established as the applicant has failed to evidence that it would be impracticable for the respondent to continue to occupy the property given the nature of the refurbishment intended. The works are not significantly disruptive.

35. The Tribunal has set out very clear reasons why the Notice to Leave served upon the respondent in February 2020 is invalid and cannot be relied upon in the eviction application. This is a legal point and regard cannot be had to other more general facts and circumstances. Accordingly, the eviction application fails on the grounds of competency. However, for the reasons as set out, even if the Tribunal had found that the Notice to Leave was valid and could be relied upon, the eviction application would have been refused in any event.

Observations

The Tribunal recognises the frustration which the applicant and his wife have in respect of progress of their intention to seek vacant possession of the property. The Tribunal formed the view that there has been a lack of proper focus to represent their interests adequately in achieving their ultimate aim. They regrettably appear to have been either misinformed or poorly informed about the legal requirements which require to be established and evidenced, and about how the proceedings would be conducted. The applicant and his wife may well feel that there is benefit in them seeking formal independent legal advice at this stage as regards their future intentions. Overall however the Tribunal does not feel that the applicant and his wife have been significantly disadvantaged. A payment order has been made in respect of the sums currently due in respect of arrears of rent. Ongoing future arrears of rent are now being covered by Discretionary Housing Payments and in terms of Housing Element payments of Universal Credit, which have now been set up to be paid directly to the letting agent.

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.

R Mill 06 January 2021

Legal Member/Chair **Date**