



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

**Chamber Ref: FTS/HPC/EV/21/1059**

**Re: Property at 12/1 Albany Street, New Town, Edinburgh, EH1 3QB (“the Property”)**

**Parties:**

**Mr Malcolm Johnston, Mrs Karen Johnston, 5/F, B5 GREENERY GARDEN, 2A MOUNT DAVIS ROAD, POK FU LAM, Hong Kong (“the Applicant”)**

**Mr Delroy Bernard, 12/1 Albany Street, New Town, Edinburgh, EH1 3QB (“the Respondent”)**

**Tribunal Members:**

**Fiona Watson (Legal Member) and Mary Lyden (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondent for eviction of the Respondent from the Property under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016, under ground 12 under schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016.**

- Background
- 1. An application dated 5 May 2021 was submitted to the Tribunal under Rule 109 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”). Said application sought a repossession order against the Respondent on the basis of rent arrears accrued by the Respondent under a private residential tenancy, being Ground 12 under Schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016 (“2016 Act”).

- Case Management Discussion
2. A Case Management Discussion (“CMD”) took place on 8 July 2021. The Applicant was represented by Ms Caldwell of TC Young solicitors. The Respondent appeared personally and represented himself.
  3. The Applicant’s representative moved for the Order to be granted as sought. The parties had entered into a Private Residential Tenancy Agreement (“the Agreement”), which commenced 19 December 2019. The Respondent was resident in the United Arab Emirates prior to commencement of the tenancy and agreement was reached that rent would be paid in 6-monthly instalments totalling £7,050, payable in advance. The initial instalment was paid, and nothing further was paid thereafter. A Notice to Leave had been served on the Respondent on the basis of Ground 12 of Schedule 3 to the 2016 Act, on 19 September 2020. The Respondent had been in continuous arrears for at least 3 months and the arrears at the date of the CMD stood at £21,150. Nothing had been paid at all since service of the Notice to Leave. There was no reason to believe that the arrears had accrued as a result of any issues with benefits payments not being received.
  4. The Applicant’s representative submitted that the Pre-Action Requirements (“PARs”) had been complied with in terms of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020. A timeline of contact with the Respondent was lodged, which showed steps taken by the Applicant to reach payment agreements with the Respondent since the arrears commenced. The most recent letter of 29 June 2021 signposted the Respondent to various advice agencies for help and support with financial matters.
  5. The Landlords had taken all necessary steps to try and engage with the Respondent and reach agreement on payment of the arrears, none of which resulted in any payments being forthcoming. Offers of payment had been made by the Respondent but none adhered to. A payment order had been granted by the Tribunal on 4 March 2021 under reference FTS/HPC/CV/21/0059. A Time to Pay Application had been made by the Respondent in relation thereto, and which had been granted. In terms of same the Respondent was to pay the full sum due by 29 April 2021. Nothing was paid. The Applicants do not consider that the Respondent can afford to remain resident in the Property.
  6. The Applicants attended at the property to meet with the Respondent personally and discuss what could be done to reach agreement on payment of ongoing rent and arrears, to allow the Respondent to remain. He had offered to pay £500 as a gesture of goodwill. This offer was revoked by the Respondent the next day. They noted that the Respondent and his partner lived a “lavish lifestyle.” The Applicant’s representative submitted that the Respondent’s partner was a lifestyle blogger with a high number of YouTube subscribers and

Instagram followers. It was suggested that he could be paying towards the rent but was not doing so.

7. The Applicant's representative submitted that the Applicants are resident in Hong Kong. They had saved to purchase the Property in order to use the rental income to fund their own retirement. They have two children at University in the UK and incur annual costs of £12,500 in fees per child and £5,000 in accommodation costs per child. They have a mortgage against the property which they were servicing from their own funds. The loss of rental income was causing a significant financial burden on the Applicants.
8. The Respondent submitted that he did not dispute the facts as put forward by Ms Caldwell, other than he stated that he had made the offer of £500 to the Applicant as he felt pressured from them to put something forward, and they refused to accept it, and that he disputed that he led a "lavish lifestyle." He advised that he arrived in the UK at the commencement of the lease in good shape financially. His business had not grown as he had anticipated and he had no income. He referred to his partner's business having "grown exponentially" but that they could only afford to pay for food and utilities since the start of the lease, and could not afford to pay the rent. In the last 4 or 5 months he has secured two high net investors in his business but that has not immediately translated into income. He is at least 6 weeks away from any income. He had put forward an offer to the Applicants that his partner (or ex-partner as had been explained but that they still live together) take over the lease in his name and with a Guarantor in place, and on that basis the Respondent would pay £5,000 per quarter towards the arrears accrued. This was refused. He admitted that no evidence had been put forward to the Applicants as to the partner's financial stability and income levels, nor how the Respondent would find the £5,000 per quarter. He submitted that he was happy to leave the property and was trying to source alternative accommodation but needed time to do so. He suggested that by the end of August he should be able to move.
9. Upon being asked by the Tribunal for more information regarding his financial position, the Respondent confirmed that his business deals with selling distressed assets in the hospitality and leisure industry. This has dried up since the start of the pandemic and he has no investors willing to buy. He has now started a real estate investment with an overseas business partner which begins in August, and a new franchise in leisure in the Middle East. No further details were given on these businesses. Whilst he has no income currently, he projects his income from September 2021 to be £150k per annum. No documentary evidence was lodged by the Respondent to support this projection.
10. The Respondent confirmed that he had taken some advice on his financial position but as he had no registered business in the UK when he arrived and no registered tax status due to living abroad for the previous 9 years, he was not entitled to any government assistance. His Partner had obtained Universal Credit. He did not wish to rely on the state for assistance.

11. The Tribunal explained the timescales to the Respondent in relation to the earliest point at which any Repossession Order (if granted) could be enforced. He confirmed that he should be able to source alternative accommodation by mid-August, if not earlier.

12. The following documents were lodged alongside the application:

- (i) Copy Private Residential Tenancy Agreement
- (ii) Copy Notice to Leave
- (iii) Proof of service of the Notice to Leave
- (iv) Section 11 notification to the local authority under the Homelessness etc. (Scotland) Act 2003
- (v) Rent statement
- (vi) Copy Payment Order issued by the Tribunal
- (vi) Correspondence with the Respondent by email and letter regarding payment agreements and signposting to advice agencies.

- Findings in Fact

13. The Tribunal made the following findings in fact:

- (i) The parties entered into a Private Residential Tenancy Agreement (“the Agreement”) which commenced on 19 December 2019;
- (ii) In terms of Clause 8 of the Agreement the Respondent was due to pay rent to the Applicant in the sum of £7,050 per six months payable in advance;
- (iii) The Applicant has served a Notice to Leave on the Respondent on the basis of Ground 12 of Schedule 3 to the 2016 Act, and which was served on 19 September 2020;
- (iv) The Respondent has been in continuous arrears of rent since June 2020;
- (v) The Respondent is in arrears of rent amounting to £21,150 at the date of the CMD;

- Reasons for Decision

14. Section 51 of the 2016 Act states as follows:

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

*(2) The provisions of schedule 3 stating the circumstances in which the Tribunal may or must find that an eviction ground applies are exhaustive of the*

*circumstances in which the Tribunal is entitled to find that the ground in question applies.*

*(3) The Tribunal must state in an eviction order the eviction ground, or grounds, on the basis of which it is issuing the order.*

*(4) An eviction order brings a tenancy which is a private residential tenancy to an end on the day specified by the Tribunal in the order.*

15. Ground 12 of Schedule 3 to the 2016 Act states as follows:

*12(1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.*

*(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if—*

*(a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant—*

*(i) is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that day, and*

*(ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and*

*(b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.*

*(3) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—*

*(a) for three or more consecutive months the tenant has been in arrears of rent, and*

*(b) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order.*

*(4) In deciding under sub-paragraph (3) whether it is reasonable to issue an eviction order, the Tribunal is to consider whether the tenant's being in arrears of rent over the period in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.*

*(5) For the purposes of this paragraph—*

*(a) references to a relevant benefit are to—*

- (i) a rent allowance or rent rebate under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971),*
  - (ii) a payment on account awarded under regulation 91 of those Regulations,*
  - (iii) universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,*
  - (iv) sums payable by virtue of section 73 of the Education (Scotland) Act 1980,*
- (b) references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.*

16. The Tribunal was satisfied that a Notice to Leave had been served on the Respondent and which specified that ground, in accordance with the requirements of section 52 of the 2016 Act. The Tribunal was satisfied that the terms of Ground 12 of Schedule 3 to the 2016 Act had been met, namely that the Respondent has been in continuous arrears of rent for at least three months up to and including the date of the CMD and further that the arrears of rent are an amount which is greater than the amount due to be paid as one month's rent. The Tribunal was satisfied that there was no information before it to suggest that the tenant's being in arrears of rent over that period was either wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

17. Schedule 1 of the Coronavirus (Scotland) Act 2020 which is in force at the time of determining this application, sets out at section 1 as follows:

- 1(1) The Private Housing (Tenancies) (Scotland) Act 2016 applies, in relation to a notice to leave within the meaning of section 62 of that Act served on a tenant while this paragraph is in force, in accordance with the modifications in this paragraph.*
- (2) Section 51(2) (First-tier Tribunal's power to issue an eviction order) has effect as if the words "or must" were repealed...*
- (3)...(i) (in paragraph 12 (rent arrears), sub-paragraph (2) were repealed.*

18. The Tribunal is accordingly required to determine the reasonableness of the Order being sought, regardless of the level of arrears.

19. The Tribunal was satisfied that it was reasonable to grant the Order sought. Whilst the Respondent put forward submissions regarding his new business having had no income as result of the pandemic, no financial evidence had been lodged to give any substance to the statements made regarding why multiple promised payments had not been paid, or why the Respondent expected to be earning £150,000 from September 2021. No bank statements nor other business-related documents were lodged. No submissions were made regarding any attempts having been made by the Respondent to gain alternative employment to bring in even a basic income, nor evidence of any steps taken to obtain advice on his options for either state benefits or emergency funding provided by the Government to tenants during the pandemic. A number of promises to make payment had been made by the Respondent with no payment being made. It was clear that whilst the Respondent's partner appeared to earn an income, no payments (not even small payments to show willing) had been made towards the rent. The Respondent was somewhat vague regarding the basis of his business, its earning potential and how that was calculated, and where any future income stream was coming from. The Tribunal accepted the statements put forward on behalf of the Applicants regarding the financial impact the failure of the Respondent to make payment of any rent was having on them. It was unfortunate that the Respondent had taken the view that he did not wish to "rely on the state" for assistance, when clearly if he has no income as he has put to the Tribunal, this is the time when such assistance should be taken. It was clear that he had not explored his options regarding any option of housing by the local authority and simply wished to remain in an upmarket property such as this one. The Tribunal did not consider this to be a reasonable position to take. However, ultimately the Respondent confirmed that he did not consider that he had any basis to defend the application before him and that he was sourcing alternative accommodation for him and his partner and would be able to remove from the property by mid-August (or earlier) if an Order was indeed granted.

- Decision

20. The Tribunal granted an order against the Respondent for eviction of the Respondent from the Property under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016, under ground 12 under schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016.

## **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**

**8 July 2021**