

**Housing and Property Chamber**  
First-tier Tribunal for Scotland

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**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/22/1008 and FTS/HPC/22/0265**

**Re: Property at 34/2 Balcarres Street, Edinburgh, EH10 5JF (“the Property”)**

**Parties:**

**Ms Judy Cheverton, Pontrhydfendigaid, Ystrad Meurig, Ceredigion, SY25 6ET (“the Applicant”)**

**Mr Alan Redpath, 34/2 Balcarres Street, Edinburgh, EH10 5JF (“the Respondent”)**

**Tribunal Members:**

**Melanie Barbour (Legal Member) and Helen Barclay (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it should refuse to grant an order for eviction under either section 18 or section 33 of the Housing (Scotland) Act 1988.**

**BACKGROUND**

1. Two applications had been received under Rule 65 and Rule 66 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”) seeking orders for eviction under sections 18 and 33 of the Housing (Scotland) Act 1988.
2. The applications contained:- a copy of the tenancy agreement; AT5 Notice; section 33 notice; AT6 Notice; notice to quit; evidence of service of the notices; section 11 notice and evidence of service; a copy of the Respondent’s rent

statement; and letter in relation to pre-action requirements. Both parties submitted further paperwork. The applicant submitted an inventory of productions. . The respondent submitted an inventory of productions including a written submission

3. The Applicants' representative Mr Robertson from Gillespie McAndrew LLP appeared on behalf of the Applicant. Mr Wilson from Community Health and Advice Initiative (CHIA) appeared for the respondent.
4. The matter proceeded to a hearing on 13 October 2022; the case was adjourned on that date. It was reconvened on 23 January 2023 when the final witness gave evidence, and then the parties' agents proceeded to make submissions.
5. It should be noted that there were two separate applications one seeking an order for eviction under section 18 and the second under section 33. The cases have been conjoined as the evidence has been the same for each application. The legal requirements for eviction under each section are slightly different, but both require the tribunal consider if it is reasonable to grant an order even if the statutory requirements are met. The legislation and relevant law is referred to below in the parties submissions and the Reasons for Decision.

## THE HEARING

### *The applicant*

6. The applicant gave evidence first. She advised that she was 52. She was retired. She did not have a pension. Her income came from letting property, this property and also, a share of a flat owned by her sister which they let together. The other property let with her sister was situated on the Isle of Wight. She

received from the let about £250 per month and the rent from this property at Balcarres Street. She confirmed that she owned it, and there is no mortgage. She is the registered landlord. She has owned it for 15 years; and has been a landlord for 15 years.

7. Mr. Redpath was her tenant. She had had a couple of tenants before Mr. Redpath. She has always managed the tenancy by using letting agents, Craigflower, Braemore, and then latterly DJ Alexander.
8. There were no disputes with the tenancy agreement. It commenced on 27 May 2011. It was a short, assured tenancy.
9. She confirmed that there were two applications before the HPC both seeking eviction. One relying on the non-payment of rent and the other section 33, termination of a short assured tenancy. She was aware the tribunal would have to decide if it was reasonable to grant an order for eviction in both cases.
10. In terms of the rent application, she advised that it had been the letting agents who had managed rent payments and dealt with the respondent. Braemore, dealt with payments, and in the initial stages issues with rent not being paid on time. Initially, there had been no issues with rent payments as far as she was aware. There had been an email from Craigflower advising that the respondent had lost his job, and his rent was delayed but apart from that she had no other recollection of non-payment. She thought that was possibly 2/3 years into his tenancy. Generally, rent was received on time, and until 2020 there had been no problems.
11. In 2020, initially June's rent was not paid and when she asked the letting agent, he said it was the bank and a problem with the standing order; the rent came in July. Then August's rent was late, and September, she was told the tenant had

been furloughed and then made redundant and could not pay his rent. She advised this was resolved, and she agreed to a re-payment plan for £100 to the arrears when he was in work, and this was to start in October 2020. She had no issue agreeing on a repayment plan at that time as it was a difficult time for everyone.

12. She explained that October and November rent came in as agreed and on the date, we agreed, and the extra £100 in both of those months; but after November no further payments were made and that went on until the end of April 2021. She referred to Production 1: Which appears to show the missed payments until 28 April 2021. She said that she was not told why no rent paid for many months, as the letting could not make contact with the tenant.

13. In her view there had been a significant time between the rent not being paid and being told why it was not paid; there had been months between the letting agent chasing the respondent and then finding out he was on remand; the letting agent eventually went to social services and someone in Braemore found out where he was.

14. She said she was very worried during this period, they could not get into the property and she had no explanation about the rent arrears. She was not able to speak to her former letting agents, and it was a huge worry to her with no prospect of income coming in.

15. She advised that she rented out the property as an investment for her future, for income for herself, for investment and security as she got older. She was hugely worried when the rent was not coming in, especially as she had to recently give up work and she did not know what to do about getting rent. She

had to reduce her work in 1998, and she was not able to return to work in 2021. She had been furloughed in 2021.

16. In 2021 she was informed of the reason payments had been missed and advised that the respondent was on remand. She found out in March 2021 that he was on remand. She was not sure at time when she would receive rent payments. Rent then started to be paid in April 2021 however, she received a lump sum to cover 5 months of arrears, then a payment in May and then after that it stopped again and there was nothing until 8 October 2021. Again she advised that she felt very worried about it, she was not sure if she would get paid. She phoned Universal Credit and they confirmed that they would only pay rent for 6 months in this situation when someone was on remand. She was not sure what to do, she did not know who would be liable for the rent and if it would be paid. She contacted the letting agents to try and get answers. They could not tell her however when she would get paid again.

17. At that point she began looking into getting into the property to see the condition of it and to get the property back; she asked letting agents about when Universal Credit was paid and how she could get the property back. The letting agent thought that the tenant had maybe just left the property altogether. She decided to proceed with giving notice to get the property back.

18. She advised that she wanted to get the property back, because her income comes from it, and there was no guarantee that she would receive any further income from it. She had the notice to quit served in July 2021. The rent arrears were then £1300. When the notice expired she was contacted by the letting agent who advised her that the tenant had said he would not be leaving. The tenant had advised this on 27 January 2022. She asked the letting agent,

Braemore, what she had to do next and to proceed with whatever the correct thing was to get possession of the property. She was advised that she had to make an application to the housing and property chamber for eviction. She advised them that she wished to pursue applications for eviction. The letting agent raised the proceedings. There were still rent arrears at 27 January 2022, when the application was lodged at the tribunal, and at that time, the rent arrears were £2,267.52 as shown on the rent statement. At the date of the hearing date the rent arrears had been cleared, but at the date of the proceedings being raised there were still arrears. At the time of serving notice to quit, there were still arrears.

19. She said that she accepted that the arrears had now been cleared. However, there were payments missed in the past and at the time of raising the application and she was worried it could all happen again with non-payment of rent. She said that she does not feel secure, and she does not want to keep going through this non-payment of rent and worry.

20. She advised that the arrears appeared to have cleared as the respondent had started to pay rent on a monthly basis, and odd other payments had been received. The odd sums had been payments by the council or a grant payment.

21. She advised the matter had gone on for so long, She could not continue being a landlady and she planned to sell the property.

### *Section 33 ground*

22. Turning to the “No-fault” eviction ground - section 33. She said that it was not a matter of dispute that this was previously a mandatory ground of eviction if the technical requirements were met, the tribunal had to grant eviction. She

accepted however that it was now a discretionary ground and the tribunal needed to assess if it was reasonable to grant the order.

23. She advised that she no longer worked, she was not able to work, her health had deteriorated and she could not do the hours; she has arthritis and it is getting progressively worse she struggles to perform day-to-day tasks, she could not carry or hold things, she had been a waitress and housekeeper. She managed her arthritis through a pain management course at first, but now she just manages it on a day-to-day basis. She said that chronic pain is exhausting, she knows when she needs to stop; she has no one living with her; she has no help. She lives in mid-Wales, and she is not local to Edinburgh. She has no one who can assist with the property.

24. She said that trying to get the property back was very worrying and quite frightening, a situation out of her control, and she doesn't feel can manage it anymore.

25. She wanted the order granted as she now needs to sell the property, the rental income is not reliable, not just financial and it is also a huge financial worry. She had asked for valuations, and they had advised there was nothing she could do until the property is recovered. She has contacted McEwan Fraser, they could sell it if the flat was vacant and in reasonable condition. She advised them they cannot see it at the moment. She said that the valuation was about £180,000 - £190,000. She also contacted a company called Portfolio which sells tenanted property in Scotland and asked if they could sell with the tenant and what the value would be, she was advised that it would be around £185,000 and it could sell for about £175,000 if it was in very good condition. She told them there were issues with the property, and they told her she would have to sell off-

market with someone taking a punt on it. She was making enquiries about selling the property as she was concerned about rent not coming in; not having her original agent Craigflower acting for her; not living in Scotland; and not being local. She was not able to manage it anymore.

26. If the tribunal would not grant the order, she would have two options either to try and sell it to get rid of it and get rid of worry or just continue to feel very insecure about it. Due to all that has happened, she had endless sleepless nights and she was worried. When Mr. Redpath was on remand, at that time she had no idea what was happening with the property. The agents had tried to get access and applied to the tribunal but it was refused, she had no idea what the condition was, and she had asked the letting agents to go in but the letting agent said not unless the tribunal granted a right of access. She had no valid insurance, as it was vacant and no idea about the condition.

27. The respondent returned to the property on 15 September 2021, since then the applicant had accessed the property once, and they did an inspection end of September. Access since then has been sporadic. She advised that there were issues arising from the inspection, black mould; condensation; there appeared to be water ingress in the ceiling; and the front door had been broken, smashed in by the police. The current state of the property was that there were significant problems with it, the main one being mould, and it was confirmed that there was no mould or dampness in the building. The mould had been allowed to form by the respondent, and the front door is still in the same condition (although she noted that the police had accepted responsibility for breaking the door down). There was a mould report, which said that the floor of the bathroom was showing high damp readings and the possibility of leaks and tiles coming off



the roof. She referred to an email from Amy Taylor letting agent dated 6 October 2022.

28. She advised that she had no reports previous to that inspection that there were problems with the property. Mr. Redpath had not ever notified her of any problem. She said it is a huge amount of money and it is a lot to pay for, she has to clean up the mess and put a fan in, if she had known about it sooner she could have prevented it. She said she didn't know why not heard known about it sooner. She said that the tenant should have notified her sooner. She said that she had had conversations with the Craigflower (her first agents) and asked about the condition of the flat, as far as they were aware it was fine. She said it had been a bit of a shock to find out the flat was not in a good condition, she always told me the condition of the flat was good. She would ask if work was needing doing. She had been told that the bathroom and kitchen needed to be updated only, she accepted the letting agent on this, and she took their word for it, it was a shock to find it was not fine inside. She advised that she did not think the tenant responds to the letting agent and now all communication comes through the respondent's agent, and he appears not to choose to communicate about these issues, it would help if he did.

29. She advised that there had been issues with getting the gas meter certificate. She had not been 100% sure about this issue until she read the case management note and asked for an update. She had been advised that the situation was still outstanding and still no safety certificate in place. She said it made her feel quite worried, both the debt and the lack of a gas certificate, she thought it invalidates her insurance and if not compliant it may make the property totally unsaleable. She would like the property back to avoid this

outcome, and she thought she would lose a lot of money if she sold the property as it is.

30. Under cross-examination, she advised that the tenancy started in 2011 and there were no problems with the tenant prior to 2020. So, for 9 years he had been fine. Issues in June were a standing order mistake and it had been sorted. In September there was a change of job during the pandemic, and one month's rent was missed. Payments had been made from October onwards. She had been advised the tenant was on remand in March 2021. The letting agent had to trace him through social services. Social services contacted his mother and then found out he was on remand. She was asked if the advice given about rights to gain entry if the tenant abandoned, and she said no, she spoke to a variety of people who were not able to answer the question. In April she had gotten the bulk payment. The rent was paid the next month. Then Universal credit stopped and the letting agent had not helped, she had to find out herself about the benefits. Then rent started in October 2021 and the agent told her it was Universal Credit.

31. It was put to her that although she worried about non-payment of rent, in January 2022 she had said she wanted repossession as she was not sure where the money was coming from, but she had served notices earlier? She decided to go to the tribunal in January 2022, as she was not able to deal with the whole situation anymore, worry too much about herself and could not contact the tenant. The situation was more than she could handle.

32. She was asked what she wanted to do with the flat in January 2022. She advised she was not specific about what she wanted then, she just wanted to be in control of it.

33. Her agent had told her said continual non-payment or late payment of rent would be a reason for eviction. She admitted that at that time the arrears were being addressed. The agents kept her up to date about where payments were. They had not advised her the entire arrears cleared. She said she had not known that universal credit and direct deduction from universal credit to arrears was being paid and also, that discretionary housing payments were being made. She was not aware the arrears would be cleared in full at any time. She was asked about the 6-month limit on universal credit and given the council had awarded discretionary payments monthly why should she be worried about rent, when rent was getting paid and the debt was getting paid off? She said that she thought there was a lot of money owing and was not sure if it would get paid off.

34. She was asked if she had only decided in the last two weeks if she had decided to sell the property. She advised it was a decision she was entitled to make when she wants.

35. She was asked if regular maintenance was factored into the rental payments she had received. She said she had never quibbled to do maintenance as needed. She denied she had decided to stop carrying out maintenance. It was put to her letting the agent says she had stopped doing maintenance and she was referred to production 6. She had not bought a fridge freezer until March despite it being reported in the previous November. It was put to her that her letting agent told the respondent and his agent that she was not prepared to carry out repairs. She advised that she had said at that time she was not willing to do anything then and there, and she wanted to check options to see what she was required to do. She had to get a solicitor, she was getting confused

advice and when told she had to replace the fridge and it was purchased. She said it was her decision not to purchase it, then and there, as she had been told not to have to do it as the contract was terminated.

36. It was put to her that the repairs were reported before the contract terminated, she advised she could not recall when she had gotten the advice. It was put to her that the repairing standard required that appliances had to be in good working order. She said yes when the flat was occupied and the rent was being paid. It was put to her it was being paid at that time and the arrears were addressed. She was asked if there were issues about communication, in January she had wanted possession of the flat, and if so why continue with the action after the case had been the case management discussion, after all, was getting rent and arrears paid. She advised that she could not deal with the disruption of the rent not getting paid. No idea what she wanted to do with the flat in January. She wanted it back as she can't cope with the condition, can't contact the tenant and was worried about late rent payments.

37. It was put to her that the decision to sell seems to have been made between the case management discussion and the hearing and at no point did she say that she was going to sell it; prior to this did not get reports, she said she wanted to sell it and it needs repair work, but can't sell without vacant possession. She said that it will affect the value. She said as she had kept the rent low it was not possible to sell it at market value.

38. She agreed that she could have increased the rent and decided not to. She was asked if she wanted the tenant to lose his home. She advised that she doesn't want to see him lose his home, but she cannot be responsible for his life, she needed to look after herself, and she can't look after him and his future.

39. She was referred to production 7 there had been no contact with the tenant. She said she found it more difficult once the tenant had instructed CHAI and she had to get a lawyer.
40. She was asked if she knew how many inspections had taken place. She said no, apart from the most recent one, the agents had been slightly evasive about the inspections. She accepted that. She was content the agent had ensured that the gas inspections were done.
41. She said she had been aware that the arrears were reducing at a certain point. She said that she had no plans to sell the jointly-owned rental property.
42. She was asked about the tenant's refusal to allow access to the property. It was put to her that the tenant did not refuse access. She advised she was not sure but just does not respond to phone calls. She was aware that he did not want people to enter the property, and did not like people going in. Craigflower said no major issues with the property; Braemore took over as the letting agent in November 2020.

*the respondent*

43. Mr. Redpath the respondent then gave evidence.
44. He said that the delay in paying rent in late 2020 was when he changed jobs; he had rectified it in one month. The delay with rent was only while on remand. It was not easy, it was difficult to get advice on remand, he said he had a flat and needed to get it sorted, and his mum tried to contact Craigflower. She could not find out about his rent and it was only later that they found out it was Braemore who were the new letting agents. They managed to get help to get

the benefits sorted out while on remand and his mum managed to get it backdated until December 2020 and paid until May, and then it stopped again.

45. He said that when he was released in September 2021 the same day he made an application for universal credit. He had to make a brand new claim and he took a universal credit loan to pay that month's rent and he made manual payments to get the rent paid. He was not aware of what the exact arrears were.

46. He advised that he asked the letting agents and they started sending amounts to him, but they were differing amounts. He advised that he tried to get the arrears cleared any way her could, universal credit and also arrears direct, and he was trying to get help from agencies including the local authority, to assist him with getting a smaller portion of the arrears paid, he was applying left right and centre. The Council had a fund that cleared the arrears in full, he advised there was a delay in getting the funds as the letting agents would not give him an up-to-date figure to get the arrears agreed, and the council were concerned that they were running out of time to make the application for him, as Braemore were taking so long to come back to them.

47. He was released in mid-September and paying his rent manually since 8 October. He paid the advance straightaway. universal credit credit pays two different amounts for housing costs and these are paid directly to letting agents. He arranged for payments to go direct to the letting agent. He was asked and he said that was a good idea.

48. He gave evidence about repairs. He said that there was mould in the bathroom. He advised that he had reported it many years ago. He had been concerned about it and was told by the letting agent, it was not damp and therefore fine.

He was sent instructions to deal with the mould, the same as the housing department, used to send for the mould spray. He had tried to get a mop up to it to get the mould off. He was asked if it was tackled when re-decorated, and he said it had not been decorated since he had moved in in 2011. He was about maintenance and he said it was not really a thing either. He had reported things, but it would go unanswered or there would be a severe delay: he had told the letting agent about the bathroom sink needing to be replaced as it looked cracked, he was told that they had asked the landlord and he had just waited for her to get back to him.

49. He advised that the oven was broken in 2020 and reported it to Craigflower, it was pandemic time and nothing followed up with anyone coming to look at it.

50. In terms of access, he said he was not refusing to give access. He did not know that there was any issue with the keys. He assumed that the letting agent had access and a key. Anytime asked to get in they have got in if asked or it was rescheduled. He would like to be at the property at the time they came in but that was all. The front door was replaced in February 2022 at the police cost. He said there had been people accessing the property since then.

51. He advised that there was debt on the gas account, and he accepted that you cannot get a safety certificate as there is debt on the gas account. There was debt as he had no income for nine months and he had not had the money to clear the debt. He had been asking organizations to get help. He has a bankruptcy application on hold, to ensure that it did not swallow up the rent arrears. It was discussed in December 2021 last year that he did not have an income to deal with debts piling up and he could get his own sequestration, but

he had not sought it, as he wanted to make sure the rent arrears were paid. Now they were paid he was looking for bankruptcy.

52. He was asked about his health. He advised that before this happened, he had been a full-time worker, and only a month or two in the past 20 years he had not worked. Since last year, his health had deteriorated, and he now suffered from anxiety and stress, social anxiety, and great difficulty going outdoors to go and get food, he has no contact with anyone, he needs a trusted friend to go out with. [REDACTED]

53. He was asked about moving home. The thought of it caused him quite severe panic attacks. He was been barely sleeping and trying to manage how he feels about it. He has not been coping with it.

54. He said that he wished communication with Braemore had been better, they had been quite aggressive to him, and he asked Chai to deal with it as he could not manage it. They had not offered him any advice.

55. The applicant's agents asked questions in cross-examination. He accepted that he was aware accepted that he missed the rent payment in June 2020 due to a standing order being missed and he paid that back. He accepted that there were no payments from September 2020 until January 2021. He accepted looking at Production 1 page 4 that there had been a payment of £200 then nothing until 28 April 2021. He accepted that there had been no payments in June, July, August and September 2021. He accepted he had received the notice to quit in June 2021, but not sure of the date as he was on remand at that time. He accepted the notice to quit stated he had to leave the property in January 2022. He had had 6 months to leave the property. He returned to the



property in September 2021. Now in October 2022, he knew that the applicant wants it back. He said yes but there was nowhere available for him to move to, he can't afford the outlay for a private let, and he can't get social housing. He would have to wait for a decade. He said that he had made inquiries to that effect. He accepted that he had not lodged any evidence to support that position. He said that this property had been home for over 10 years. He would rather stay here. He has done all needed to do to try and get the rent up to date. This is his home.

56. He accepted that he had been aware for a year the landlord wanted the property back. He was asked what steps were taken by him. He said that since September, he had taken advice about what he could do to maintain the property and stay here, he wanted to stay here, as this is his home, and this is where he felt safe and secure.

57. He was asked when he had notified the landlord about mould. He said that didn't recall when but it was going back years. Whenever Craigflower came out. He had tried to keep up with it and he had pointed out that it was now out of control. He was asked when the new letting agent was out to do an inspection. He said September last year. He said that he had told the letting agent in September that the mould needed to be resolved and he also, mentioned the fridge and the oven, but nothing was done to repair these issues.

58. Production 7 for the applicant was put to him, and the repairs had been agreed upon. He said that not the mould in the bathroom. Nothing was done about the mould in the bathroom. He said he had notified the letting agent, Amy Taylor, at the inspection. He said he didn't think he had to keep chasing major

problems. He said that he had been raising the issue every year and nothing is done about it. It was an ongoing issue for years.

59. He was asked if he should have continued to contact Braemore. He said that he informed them during the inspections, and he had also told Craigflower. The current letting agent, Amy told her she would need to get back to him but she had not done so.

60. He was asked if he accepted that the applicant may wish to sell the property. He advised that this was news to him that day. He said he accepted that she was entitled to make that decision, but he had not known she wanted to. He accepted that rental income only source of income for the landlord. He accepted that instances of rent not paid, that there had been 4 months and this had been repaid. He accepted not getting rent would be a worry, but it was also a worry to be homeless and his life had been on hold for two years, and if he was evicted his life will be on hold for an indeterminate time. He had done his best to get the landlord what was due to her and he believed that he had done that. He could not apologise enough that it has happened. He will ensure that it is never done again. He had not failed to pay his rent for the first 9 years. He confirmed that he lived alone in the house.

61. He was asked if there was any discussion about putting the rent up. He said no, he was quite surprised by that, he was used to a yearly increase in rent, and every year he had waited for the increase but he never received one.

*Ms. Amy Taylor of D J Alexander, Letting Agents*

62. Ms. Amy Taylor of D J Alexander, Letting Agents gave evidence on behalf of the applicant. She confirmed she was employed DJ Alexander (formerly

Braemore). They were a sales, letting and property management company. She had worked there since 2019. She is a property manager. This involves being a portfolio team manager. She manages over 1000 properties and manages the team that works for her, there are another five managers under her.

63. She had experience with this property. It is still in her portfolio. The extent of her involvement was managing the property. The agents have an account team and maintenance team. She carries out inspections and liaises with tenants and landlords with any questions and fields questions to the relevant teams. She makes sure all certifications are up to date and do check-ins and check-outs.

64. This property is managed on behalf of the landlord. Since she started with Braemore in 2019 the property had been in her portfolio.

65. From managing the property since 2019 the rent position was set out in the rent statement, there were payments made of rent and then a period when rent fell into arrears, and it caused major concern to the landlord and the letting agents. She was asked about the actual amount and she advised she knew it was over £2000 but would need to go over accounts to double-check.

66. She was asked if there were discussions with the applicant regarding the concerns, and she advised that there was a period of time when there was talk in the accounts team about the arrears, but there had been a lack of response from the tenant. Then it was confirmed that the tenant had been in prison and no rent was paid during that period of time.

67. She had been in contact with the landlord and advised her of the position regarding the rent arrears. She said that there were times during covid when the letting agents' hands were tied, and when we felt the time was right, we then put the application into the tribunal. She filled in the application form and then

progressed the application after that. She was not sure when she prepared and processed the application.

68. She said that there was contact with the tenant after the application had been lodged. The arrears team would chase him for the outstanding balance. She was not aware of the tenant contacting the letting agent to discuss the arrears, but she saw that letters were sent to the tenant. She did not think those letters were successful in getting a response from the tenant.

69. She was asked about communication generally.

70. In describing her experience with the tenant, she said that it had varied. More recently, he has emailed and texted her more often, He has been willing for the letting agent to attend the property to let us in and his agent will always respond on his behalf. When he was in prison, the letting agents did not get a response from him, however, his mother did contact her to update her. When he was released from prison he made her aware that he was out. She said that 9 out of 10 times, he would respond or Mr. Wilson his agent would.

71. She thought the proceedings were raised in about March 2022, they had served notice on the tenant but he did not move out. She said that after the notice to quit was served there was no contact from the tenant regarding the notice.

72. She was asked about the condition of the property.

73. First, regarding the gas safety certificate, she said that the certificate had expired for some time, and the compliance team had been trying to get into gain access, but there had been no response, but then it transpired that the gas meter was in a debt of £300 and due to his situation, the letting agent could not do a safety check if he was in arrears.

74. It was only at the end of 2022 that the gas safety certificate was completed on 14 November 2022. It was outstanding for a year, and we had to send out a right-to-entry letter, we were contacted, to advise that he was still in debt and therefore we would not be able to get the gas safety check done. She advised that it is there is duty that properties have to comply and have the safety checks done every year, there are massive implications for the landlord and the letting agents if they are not done. If anything was to happen to the tenant then we would be liable for the fines and implications on both parties, in terms of landlord registration, they have to comply to ensure that all the certificates are in place.
75. She said there was a note in 2021 that there was gas debt on the system at that time, and there was further communication, she had contacted the landlord to advise about the situation and keep them up to date. The landlord was concerned to make sure the correct certificates were in place.
76. The respondent's agent then put questions in cross-examination of Ms. Taylor.
77. She was asked if the respondent was a difficult tenant before he has been on remand. She advised that there had not been much contact with the respondent prior to him being on remand. She agreed that if she had a large portfolio if she did not hear much from a tenancy then you could presume that "things were ticking over as normal". She agreed that rent had been paid last year when he was on remand.
78. It was put to her that the tenant had been trying his best to pay rent, and had been making payments, which that then been halted due to a change in his welfare benefits, and then it started again in October 2021 and was it usual for tenants to go for a few months without paying rent? Ms. Taylor advised that

they have to make sure the rent account is over a certain balance before they are pursuing recovery of the rent.

79. She advised that in terms of the landlord's position, any landlord relying on the property for income there would be an element of concern, she had her own financial commitments, and much would depend on the landlord's personal circumstances. She was asked if the landlord had explained why she wanted a section 33 notice issued as well as the notice to quit and AT6 Notice. She said that she presumed it was done to recover the property.

80. She accepted that the rent had been cleared in full before the first hearing and since then the gas debt had also been addressed.

*The parties' agents then proceeded to make submissions.*

81. *The applicant's agent*

82. The applicant's agent advised that the applicant seeks possession of the property under rules 65 and 66 of the tribunal rules relating to sections 18 and 33 of the Housing (Scotland) Act 1988. He submitted that for the applicant to succeed it is necessary to establish that it is reasonable to grant the order. He submitted that as a matter of law the grounds for both applications had been met and in all circumstances of the case it was reasonable to grant an order for eviction.

83. Rule 66 is related to a section 33 application. He said it was not disputed that the applicant owns the property, she had bought about 15 years ago and since then rented it out as an investment and as income as she got older. It was not disputed that the parties entered into a short assured tenancy agreement in 2011; it had ended terms after 6 months and then it continued under tacit

relocation on the 27<sup>th</sup> of each month thereafter. A section 33 notice and a notice to quit had been served in July 2021 and it sought vacant possession by 2022. He advised that the focus was on the reasonableness of whether to grant the order.

84. He submitted that the case of *Alan v Ross* [citation not noted] referred to *Cumming v Danson* [1942] 2 All ER 653 which required that the tribunal should take into account all relevant circumstances at the date of the hearing and when the tribunal comes to its conclusion. The tribunal had to be satisfied that it must be reasonable in all the circumstances. He also referred to *Cresswell v Hodgson*, [1951] 2 KB 92 in determining the issue of reasonableness, the tribunal should consider the effect of the order on each party.

85. He referred to page 537 of *Evictions in Scotland* by Adrian Stalker, where it states “the whole point of an action under section 33 is that the landlord does not require to have a ground for possession or show it is reasonable to grant an order. He merely needs to show that the technical requirements are met of section 33 have been met.” He went on the landlord does not need a ground, but must show it is reasonable to grant an order and section 33 may apply where there is a reason, but it is not a ground contained in schedule 5 of the 1988 Act. He referred to footnote 38 on page 537 of *Stalker* such as where the landlord wants to sell the property.

86. He submitted that in this case, the applicant has given sufficient reasons to grant the order for eviction. He submitted in this case the reasons related to 1. The landlord’s personal circumstances; 2. Why the landlord wants the house back; and the circumstances of the respondent.

87. He said that the landlord is 52 years of age, lives alone, and does not work or have a pension: the property is the only source of income she has. Her sister deals with the other property. She does not live near the property, and she has no one close to her, to assist with the property except the letting agent. She also has arthritis and has to deal with pain in everyday life. The rent arrears had been significant for a significant period of time. No payment of rent had made her very worried. She has health issues. She had lost her main source of income. She said in evidence that she felt out of depth and living in an uncertain economic climate the rent arrears caused her to be anxious. He submitted that it was reasonable to assume that she would want to take steps to avoid this happening again.

88. He submitted that the respondent's circumstances were such, that the landlord had the uncertainty of relying on rent being paid by a third party. The bankruptcy proceeding put on hold were not an issue for the landlord. The applicant wants the house back to remove stress and worry and to decide what to do next with the property.

89. The agent explained the landlord's next steps if the order were granted. She had contacted agents to sell the property, she was advised it would be better for her to have vacant possession and for the property to be in a reasonable condition. She had contacted Portfolio (if the tenant remained in the property) and been advised that the only route to sell was off-market and relying on someone "taking a punt on it". She had the property valued as she was concerned about the rent situation and if the order was not granted she would need to think about her next steps and she may have to sell at a reduced amount.



90. He submitted that the reason she wanted to consider selling was that even if the rent was being paid, as she said, she had to make a decision which was right for her. She was entitled to take all relevant factors into account. We are in a cost-of-living crisis and rent had not been paid, and she has shown that she might sell the property if the order is granted. She will need to have vacant possession to value the property, she is not responsible for the tenant. She needs to take steps for her herself.
91. The respondent's situation is not easy, but although he has taken steps to pay rent there had been rent arrears for a significant time. The lack of a gas certificate could lead to fines and it had been outstanding for a year, and the landlord did not want to have to live with the worry.
92. The notice to quit expired two years ago, in that time the respondent has been unable to secure alternative accommodation, however, there had been no evidence given that he has not been able to find alternative accommodation. The case of *Howie* can be distinguished, from the case here, there is no evidence that the tenant has made any efforts to find alternative accommodation, and the tribunal has heard evidence that the applicant does want the property back. The tenant has the ability to ask for help and he has not done so. He submitted that the tribunal should grant an order of eviction under rule 66.
93. Moving on to the rule 65 application, he referred to section 18 which states the tribunal shall not make an order unless there exists one of the grounds in Schedule 5. He submitted that both grounds 11 and 12 were satisfied. He accepted that both grounds were discretionary.

94. In 2020 an arrangement to repay the arrears was entered into. The rent arrears were repaid. However, while the respondent was in police custody, until the court dismissed the charge, at no point were the arrears repaid. During that time the landlord had to deal with the uncertainty, lost significant investment, and was stressed and anxious. As the rent had been outstanding, the tribunal needed to consider the effect that had on the applicant.

*The respondent's agent*

95. The respondent's agent referred to his written submissions in support of the respondent's submission. In terms of his oral submission in respect of reasonableness, he submitted that rent arrears were addressed by the tenant as soon as he was able to do so. The tenant had suffered from a series of unfortunate circumstances: being on remand; the impact of covid; and changes to welfare benefits. There was a perfect storm of arrears.

96. In terms of grounds 11 and 12, the tribunal had to consider the culpability of the parties involved. In reasonableness, he agreed with the summing up of the landlord's agent, the tribunal needed to consider the effect that the decision would have on each party. He submitted that the effect on the tenant is that he loses his home, and has no idea where he will stay. Finding a private let will be difficult. The effect on the landlord is that she keeps her property and keeps getting the rent.

97. For the section 33 application, the tribunal has only been told that the landlord wanted the property back; this was only after she had taken legal advice, that she decided that the reason for wanting the property back were that she wanted to sell it. He submitted that her position was not credible.

98. Further, he submitted that the evidence that she would not be able to obtain the full value of the property, if she sells it with a sitting tenant, given that the condition of the property, has to be considered against the fact that the landlord has spent no money on the tenancy for over a decade. The landlord had not redecorated or even carried out simple repairs. What is the effect on each party and is it reasonable in the circumstances? He submitted that the balance should fall in favour of the respondent.

## FINDINGS IN FACT

99. The tenancy agreement commenced on 27 May 2011 and until 27 November 2011. It was to continue on a monthly basis thereafter.

100. Clause 3 "Rent" of the agreement provided that rent was £500 per month payable in advance.

101. The tenancy was signed on 27 May 2011

102. There was an AT5 Notice signed and dated 27 May 2011.

103. An AT6 notice addressed the respondent, Alan Redpath, to the referred to grounds 11 and 12. It was dated 21 July 2021 and the first date when proceedings could be raised was 27 January 2022. It stated that the reasons it was being served were that "rent was not being paid. Payments received from universal credit, but that has now stopped as they are only paying a maximum of 6 months."

104. A Section 33 notice addressed to the respondent was dated 21 July 2021 and provided 6 months' notice.

105. A Notice to quit addressed to the respondent dated 21 July 2021 told the tenant that he had to quit the property by 27 January 2021.
106. That there was evidence of service of the three notices by sheriff officers on 22 July 2021 on the respondent at his home address and also, at HMP Edinburgh.
107. There was evidence of a section 11 notice being sent to the local authority.
108. There were pre-requirement letters regarding the rent arrears on 4 August 2021 and 5 October 2021.
109. There appears to have been no rent arrears due by the tenant until around September 2020, due to a standing order issue. Those arrears were resolved sometime in November 2020.
110. When the notices were served on 21 July 2021 rent arrears were £1,001.49.
111. When the proceedings were raised on 27 January 2022 rent arrears were £1,512.49.
112. When the hearing took place on 13 October 2022 rent arrears had been cleared.
113. The respondent was held on remand from December 2020 until September 2021.
114. The respondent applied for Universal credit while on remand.
115. The respondent applied for Universal credit when he was released from remand in September 2021.
116. The respondent applied for and obtained discretionary housing payment to be used towards the rent arrears.

117. The respondent arranged for his housing cost element from his universal credit to be paid directly to the landlord.
118. The applicant bought this property as an investment and uses the rent from it as an income.
119. The applicant has a one-half share in one other rented property which is jointly owned by her sister.
120. The applicant sought an order for eviction as she is worried about rent not being paid. She is considering selling the property.
121. The respondent wants to remain in the property as it has been his home for 11 years. He believes it would cause him anxiety to leave the property. He feels safe in the property.
122. There was mould and condensation in the bathroom. Repairs were outstanding to the property.
123. There had been annual inspections carried out on the property by the letting agent.
124. The annual gas safety check had been outstanding until around November 2022. This was due to outstanding debt on the gas meter. The outstanding debt had been repaid by the respondent.

## REASONS FOR DECISION

125. There were two eviction applications before this tribunal. The same evidence was led for each application. The preceding sections of each decision are in the same terms. As there is a difference in the statutory requirements under section 18 and section 33 this section refers to both relevant sections.

Both sections require to consider reasonableness and we consider that we were entitled to consider all matters raised as relevant to this questions when considering whether to grant and order for eviction under either section 18 or section 33. This approach considering all relevant matters, and doing so at the date of the decions, is the approach required by the case law which we were referred to,

126. *Section 18*

The section 18 application is based on two grounds set out in Schedule 5 of the 1988 Act. .

*Ground 11*

*Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.*

*Ground 12*

*Some rent lawfully due from the tenant— (a) is unpaid on the date on which the proceedings for possession are begun; and (b) except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings.*

127. Relevant parts of Section 18 are in the following terms:

18.— Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3)-(3A) ...

(4) If the First-tier Tribunal is satisfied that any of the grounds in [ Part I or II of Schedule 5 ] 3 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

...

128. We find that ground 11 was met in terms of the fact from December 2020 the tenant had persistently delayed paying rent which was lawfully due. We also find that ground 12 was established as there was some rent lawfully due from the tenant when the proceedings had begun, which I consider was when the application was accepted by the tribunal. There were also some arrears when the notice was served in July 2021.

129. *Section 33*

Section 33 is in the following terms

33.— Recovery of possession on termination of a short assured tenancy.

(1) Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the First-tier Tribunal may make an order for possession of the house if the Tribunal is satisfied—

- (a) that the short assured tenancy has reached its end;
- (b) that tacit relocation is not operating; ...
- (c) that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house, and
- (d) that it is reasonable to make an order for possession.

130. We find that the section 33 order also met as we find that there was short, assured tenancy between the parties, and it had reached its end; that tacit relocation was not operating; and the landlord had given to the tenant notice stating that he required possession of the house.

131. *Reasonableness*

132. The tribunal notes the submission by the parties on the law relating to this issue. We would agree with the approach adopted by the parties. For clarity, while the tribunal understands why the applicant would seek to also bring an application under section 33, we consider that the actions by the tenant in terms of addressing the rent arrears and his history of rental payment, would be relevant supportive criteria in favour of the tenant when considering both the section 18 application and the section 33 application.

133. The case law requires the tribunal to consider all relevant matters in relation to the position of both parties. We have therefore adopted the approach that the issue of reasonableness for both applications can be considered together.



134. That then leads to the question of whether it would be reasonable to grant an order for eviction under section 18 or under section 33.
135. We find that there are compelling competing arguments on both sides. We found all the witnesses to be reliable and credible in their evidence. We thought they all did their best to give honest answers. However, we on the whole preferred the evidence of the respondent.
136. We placed weight on the fact that this property is one of only two properties owned by the applicant. (The second property the landlord has a joint share in). She rents out both properties. The landlord advised that she relies on the rent of this property as a source of income. We consider it important for the applicant to ensure that this property provides her with an income source. We accept that she would be worried and anxious when this income source was stopped for some reason.
137. She advised that she had to give up work for health reasons and also, that she intended to sell the property. While we considered that she was credible in her evidence. We note that she presented no documentary evidence to support either matter. We did place weight on those issues; however, we could only do so basing it on her oral submission. Further, in terms of her submission regarding selling the property, it was not clear to us whether she would proceed to sell it or, whether she only wanted to recover the property in order so that she could take stock and consider her next steps. She may sell but this did not appear to be a definitive position.
138. What we did find was that the landlord has lost faith and trust in the tenant due to the time that he had not been able to pay his rent and rent arrears. This appeared to weigh very heavily on her thinking. It appears that the non-

payment of rent had caused her worry and she had not gotten over this fact. She did not appear to be prepared to review what had happened to the tenant as unfortunate but ultimately resolved by him as soon as he was able to do so.

139. It struck us that the landlord had wanted the property as an income but was not prepared to accept any risk, which may, in reality, be unrealistic, as an element of risk is something which comes with being a private landlord. It appeared from the evidence that her role as a landlord had been at “arm’s length” with limited involvement. This had not only involved rent collection but also in relation to ensuring repairs, redecoration and general upkeep were addressed.

140. While we accept that the annual gas inspection should have been carried out, we had sympathy for the tenant who decided that he would prioritize payment of rent first, rather than unpaid gas charges. In this regard, we note that the tenant was prepared to live without gas in the property until he paid his rent. We did not consider it properly fair to penalize him for this choice, and we would suggest that this was something that the landlord could have addressed herself. We also note that there did not appear to be any history of the landlord or letting agents not being able to carry out gas safety inspections in the past. This aspect appeared to us to be another part of the “perfect storm of factors” which had worked against the tenant in 2021. We do not consider that this would be a factor in support of the applicant’s position.

141. We consider that the three letting agents who had managed the property, had all to some degree, not kept either party up to date on the tenancy situation both in terms of rent collection and also repairs and redecoration; we thought

that there could have been better communication and that may have benefited both parties, and reduced some of the landlord's anxiety.

142. We note that the applicant wishes us to place weight on the condition of the property in terms of the bathroom. It appears to us however that this matter was not the fault of the tenant. We consider that if the annual inspections were carried out then it was the responsibility of the landlord and not the tenant to address these matters. We preferred the evidence of the tenant in this regard, and we consider that he probably did make efforts at every inspection to raise issues about the property but they were not subsequently addressed by the letting agent.

143. In terms of the condition of the property we were not convinced that this had been caused by any damage by the tenant, the letter submitted in support suggested that the tenant should not open a window in the bathroom as it would allow people to see into his bathroom and would be a security risk.

144. We note that there had been no redecoration to the property during the course of the tenancy.

145. We preferred the evidence of the tenant that he was surprised that there had been no rent increase, and we did not consider that the position of the applicant was credible in terms of not increasing rent. It does not appear that there had even been any discussion with the tenant about a rent increase, if there had been, a rent increase may have been something that he could have afforded, or would have received benefits to pay for.

146. We note that there had been no rent arrears during the first nine years of the tenancy. It appeared to the tribunal that the tenancy had carried on, without any issue for the first nine years, with the landlord taking a hands-off

approach and leaving matters to the letting agents, and the tenant appearing to comply with the terms of the tenancy conditions and taking a low key approach in complaining about repair issues. The tenant appeared to us to have been a good tenant until he was remanded for something which was subsequently dismissed in court. His actions after he was released also demonstrate a responsible attitude towards his duties as a tenant.

147. We have sympathy for the landlord for the time when the rent arrears started to accrue in December 2020, however, we found the tenant's position to be honest and credible. The tenant had taken action to address the arrears and had continued to repay them. We find that he had done all that he could do to ensure that the rent arrears were repaid and the landlord was not prejudiced for any longer than had been necessary. It appeared from the evidence that the landlord would have received repayment of the rent arrears earlier if the letting agents had provided information more timeously to Mr Wilson at CHAI. While we accept that the landlord was worried about rent payments, we are unclear as to why she should still be worried about rent payments now, given the clear and responsible actions taken by the tenant to address future rent payments, by putting in place direct rent payments from his benefits. It appears to us that there may have been a failure in communication from the letting agents and perhaps a lack of advice given to the landlord about how future rent would be paid. Had the landlord been given timeous advice from the letting agents this may have helped address her concerns.

148. We note that the landlord had only recently decided to consider selling the property, and this was sometime after the notices to leave were served and the proceedings were raised.

149. We note that the tenant has repaid the arrears. He had a long history of paying rent on time. We believe that he did allow the letting agent into the property to carry out inspections, and it was only latterly that the tenant asked CHAI to be his contact and this may have led to a more adversarial relationship between the parties.
150. The tenant had submitted a letter from his psychologist who supported him remaining in the property. We placed weight on his evidence that this was his home and that he felt safe and secure living there. We note that he advised the hearing of other health issues he has, and while there was no independent evidence to support those further issues, we place some weight on that evidence.
151. We note that the tenant advised that he would struggle to find other accommodation. This was challenged by the applicant's agent that there had been no evidence lodged in support of this position. The tribunal prefer the evidence of the tenant on this point. In our experience, it is extremely difficult for many people, particularly single men, to find suitable alternative accommodation, and this lack of suitable accommodation is exacerbated in the Edinburgh area.
152. We are required to consider whether it would be reasonable to grant the order on the date that we make our decision. At present we do not consider it would be reasonable to grant an order for eviction either under section 18 or section 33. On balance, we consider that the reasons for the tenant wanting to remain in the property as set out, are more compelling and should be given more weight than the reasons for the landlord wishing to recover the property. Importantly we note that there are no longer any arrears and future rent is paid

directly from the tenant's benefits, and the respondent can evidence a long history over a number of years of being a responsible tenant. We consider the impact of evicting this man from his home will be of greater detriment to him than it will be on the applicant in refusing both her applications. We did not consider that the applicant had a definite intention to sell the property, and if she did she could sell it with the tenant remaining within it. Having regard to all the evidence before us we refuse to grant either order for eviction at this time.

## DECISION

153. We refuse to grant an order in favour of the Applicant against the Respondent for recovery of possession of the property under either section 18 or section 33 of the Housing (Scotland) Act 1988.

### 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.**

# M. Barbour

15 February 2023

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Legal Member/Chair

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Date