



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Housing (Scotland) Act 1988**

**Chamber Ref: FTS/HPC/EV/22/3108**

**Re: Property at 37 Moray Park Gardens, Culloden, Inverness, IV2 7FY (“the Property”)**

**Parties:**

**Mr Paul Gardner, 260 Cromwell Lane, Burton Green, Coventry, CV4 8AP (“the Applicant”)**

**Mrs Heather Grant, Mr Mike Grant, 37 Moray Park Gardens, Culloden, Inverness, IV2 7FY (“the Respondents”)**

**Tribunal Members:**

**Ms H Forbes (Legal Member) and Mrs F Wood (Ordinary Member)**

**Decision (in absence of the Respondents)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession should be granted.**

**Background**

1. This is an application dated and received on 29<sup>th</sup> August 2022 and made in terms of Rule 65 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended (‘the Rules’). The Applicant is the landlord of the Property, and the Respondents are the tenants, in terms of a tenancy agreement that commenced on 27<sup>th</sup> August 2017 at an agreed rent per month of £850. The Applicant is seeking an order for possession under grounds 8, 11 and 12 of the Housing (Scotland) Act 1988 (“the 1988 Act”)
2. The Applicant’s representative lodged a copy of the assured tenancy agreement, pre-action requirement correspondence, section 11 notice and evidence of service, Notice to Quit and Form AT6 with evidence of service, and a rent statement showing arrears in the sum of £33,150.

## The Case Management Discussion

3. A Case Management Discussion (“CMD”) took place by telephone conference on 19<sup>th</sup> December 2022. The Applicant was not in attendance and was represented by Mr Duncan Swarbrick, Solicitor. The Respondents were in attendance, and indicated they were opposing the application as they had not paid rent due to repairs required to the Property. It was not clear whether this was a defence of withholding rent or a defence that an abatement of the rent due should be granted. The Respondents said they had not put the full rent aside, and did not have the sum to pay the arrears. The Respondents said they would be in a position to lodge email evidence of communication with the Applicant, and a timeline of relevant dates and events.
4. The Tribunal indicated to the Respondents that they must take suitable advice as soon as possible, in order to draft a formal note of defence, which should set out, in full, their defence to the action, including whether the grounds are met, the level of any abatement claimed, and the issue of reasonableness. The note of defence was to be lodged by 20<sup>th</sup> January 2023. The Respondents confirmed there were no other issues in terms of reasonableness, such as medical issues, benefit issues, or issues with dependents. The Respondents indicated they would be making proposals for payment of rent, and agreed to liaise with the Applicant’s representative in this regard.
5. By email dated 19<sup>th</sup> January 2023, the Respondents requested an extension to the time allowed to submit their note of defence, due to ill health, stating that they had not been able to finalise the information with their caseworker at Shelter. The period allowed for lodging their note of defence was extended for a further 14 days.
6. No note of defence was lodged by the Respondents.
7. On 16<sup>th</sup> February 2023, parties were notified that a hearing had been scheduled for 20<sup>th</sup> March 2023.
8. By email dated 16<sup>th</sup> February 2023, the Respondent, Mrs Grant, stated the following:

*We were advised to tell you immediately if we cannot make the date. I am at a conference for work on the 20th, 21st and 22nd March. We have no other days that we cannot attend.*
9. The Respondents were informed that they were required to make a proper application for postponement of the hearing, in terms of the Rules. A further reminder was issued to the Respondents on 2nd March 2023 reminding the Respondents that the Tribunal was awaiting their response and pointing out that if they still wished to apply for a postponement of the hearing, they must respond as a matter of urgency, or it was likely that the hearing would proceed in their absence.

10. No further application for postponement was received from the Respondents.
11. By email dated 8 March 2023, the Applicant's representative lodged an inventory of projections.
12. By email dated 17th March 2023, the Applicant's representative lodged a second inventory of productions and authorities.

### **The Hearing**

13. A hearing took place by telephone conference on 20<sup>th</sup> March 2023. The Applicant was in attendance and was represented by Mr Swarbrick. The Respondents were not in attendance.
14. The Tribunal asked whether there had been any recent correspondence between the parties. The Applicant said he had asked a British Gas engineer to carry out a service of the boiler and a repair to the oven in the Property. The oven was repaired on 8th February 2023. The engineer was due to attend at the Property on 14<sup>th</sup> February 2023 in order to service the boiler. That date was not convenient to the Respondents. On 28<sup>th</sup> February 2023, British Gas attempted to access the garage to carry out the service. They could not get into the garage as it was full of boxes. The Respondents told the engineer they were in the process of moving out of the Property. The Applicant said he contacted another contractor who agreed to carry out a Gas Safety inspection. The second contractor was also informed by the Respondents that he would not be able to access the garage as they were in the process of moving out of the Property. No date for moving out was given.
15. The Tribunal heard from Mr Swarbrick as to whether the hearing should proceed in the absence of the Respondents. It was his position that the hearing should proceed. Both Respondents were aware of the hearing. Mr Swarbrick had not seen the email sent by the Respondents regarding Mrs Grant's availability.
16. The Tribunal asked Mr Swarbrick why the second inventory of productions was late in being lodged. Mr Swarbrick said he lodged it for completeness. It contained correspondence between the parties regarding payment discussions, and it brought matters up-to-date. It would not be prejudicial to the Respondents to allow it to be lodged.
17. The Tribunal adjourned to consider whether to proceed in the absence of the Respondents, and whether to allow the late lodging of documents.
18. The Tribunal considered the terms of Rule 29. The Tribunal determined that the Respondents had been given reasonable notice of the time and date of the hearing, together with details on joining the telephone conference. The Tribunal determined that the requirements of Rule 17(2) had been satisfied.

19. The Tribunal noted that the Respondent, Mrs Grant, had previously stated that she was not available on 20<sup>th</sup> March 2023 due to having to attend a work conference, however, despite two requests for a proper application for postponement, nothing further had been received. The Tribunal decided that good reason as to why an adjournment was necessary had not been shown, in terms of Rule 28, neither had any evidence been provided to substantiate the request for a postponement. The Tribunal considered it would have been a simple matter to have provided evidence of another engagement, such as a work conference, and no such evidence had been provided. No reason had been provided as to why Mr Grant was not in attendance.
20. The Tribunal took into account the level of arrears. The Respondents have not paid rent since June 2019 and the arrears are now £38,250. The Tribunal considered there was a significant risk of prejudice to the Applicant if the hearing was postponed, considering the level of arrears.
21. The Tribunal determined, in all the circumstances, that it was appropriate to proceed with the application in the absence of the Respondents upon the representations of the Applicant and the material before the Tribunal.
22. The Tribunal determined that it would allow the late lodging of the second inventory of productions as it contained correspondence from the Respondents, of which they were aware.

### **The Applicant's position**

23. Mr Swarbrick led evidence from the Applicant. He is a civil servant. He is the owner of the Property. He is a registered landlord and has been registered since January 2022. He did not register as a landlord at the start of the tenancy, as he was unaware of the need for this. His sister and her husband had lived in the Property. The Respondents were friends of his sister. They were looking to rent a property with a view to purchasing it. As a favour to his sister, he decided to let them move in. It was done on a goodwill basis. The tenancy agreement showed that the tenancy started on 27<sup>th</sup> August 2017, at a rent per month of £850. The rent was never increased. It was due to be paid monthly in advance.
24. The Applicant said the Respondents had some work carried out in or around 2019. They sent him an email with three invoices attached, and a deduction to the rent was agreed at that time to cover the cost of the work. These sums were not included in the rent statement showing the rent outstanding. At November 2022, the arrears outstanding were £35,700.
25. There was email correspondence between the parties in July 2019. The Applicant decided at that time that he wanted to sell the Property due to arrears of rent. It was becoming difficult to maintain the Property. The Respondents said they were moving out of the Property in September 2019. The Applicant decided, at that time, not to go ahead with eviction as the

Respondents were supposed to move out. The pandemic then hit. The Respondents did not move out.

26. As at February 2023, the arrears of rent were £38,250. The Applicant said he had checked his bank account on the day of the hearing and no further rent had been paid. The Applicant said that, when he became aware that the Respondents intended to move out in 2019, he decided to wait until they had moved out before carrying out any repairs. He also considered selling the Property at a price to reflect the repairs required. It was always his intention to carry out the work. More recently, it was impossible to get access to service the boiler due to boxes in the garage.
27. Mr Swarbrick took the Applicant through the list of repair issues as set out in the CMD note. The Applicant said he had not been notified that there was any issue with the faulty extractor fans. He had not been notified that the heating system required the insertion of a sharp object before it would work. He had not been informed that the fridge was rusted and did not work. He said there was a washing machine in the Property, but he had never been informed of any issues with it. He had not been informed that the oven door would not close and that there was no seal, until he received the CMD note. He had since instructed a repair to the oven. He was not aware that the dishwasher was broken. He was not aware that the carpet was ruined by a flood in the downstairs toilet. The Applicant said he was aware that there had been a bathroom leak, and referred to his earlier evidence about a deduction from the rent in 2019. The electrical system was checked in January 2022. An EICR was produced and it was satisfactory. Other than the three invoices previously received, the Applicant was not aware of any other tradespeople who were paid by the Respondents. He had not received another request of this nature. He would have been happy to deduct any costs of repairs from the rent. The Applicant said he accepted that there was a defect with the shower and he apologised for this. He had asked two tradespeople for a quote to repair the shower and nothing had been received. The Applicant said he had never had an offer to pay £500 per month rent from the Respondents, as claimed at the CMD.
28. The Applicant said the arrears have had a massive effect on him. His mortgage repayments on the Property are £1176 per month. He is struggling financially to upkeep the Property. It is having a serious financial impact. He said he accepted he was naive as a landlord. He let the Property as a favour to his sister and his late brother-in-law. He has learned a very serious lesson. The Applicant said that his partner had breast cancer during Covid and this impacted on the situation.
29. Responding to questions from the Tribunal regarding the payments of £850 and £1700 referred to by the Respondents in emails to Mr Swarbrick as having been paid in December 2022 and February 2023, the Applicant confirmed that these payments have not been received.

30. Responding to questions from the Tribunal as to why the Applicant thought it was acceptable not to carry out repairs when the Property was occupied, he said he had not done the work due to financial hardship and the fact that the Respondents had said they were moving out. The Applicant said he had not heard anything further from the Respondents regarding the issues since 2019. Responding to questions from the Tribunal, he accepted that his focus may have slipped due to his partner's cancer and his brother passing away.
31. Responding to questions from the Tribunal as to whether there had been any further correspondence from the Respondents regarding the issue of withholding rent, which was mentioned in an email of 1<sup>st</sup> July 2019, the Applicant said not to the best of his recollection. The Applicant said he could not understand why the Respondents were not paying rent over such a long period. He was upset about this. They were friends of his sister. He then decided to take the eviction route. The Respondents had said he would have to evict them before they would leave.
32. Responding to questions from Mr Swarbrick, the Applicant said there was an ensuite shower room and upstairs bathroom with a shower and a downstairs toilet in the Property. Regarding the issues set out in the Respondents' email of 1<sup>st</sup> July 2019, the Applicant confirmed the boiler had been fixed. He had not been provided with an invoice in regards of the water heater being fixed. He accepted the shower repair had not been resolved. The downstairs toilet cistern had been repaired, and he was not aware of damp in the main bathroom.

### **Submissions for the Applicant**

33. Mr Swarbrick referred to the matter raised by the Respondents, as set out in the CMD note, that no rent should be due if the landlord has not registered. In terms of section 94 of the Antisocial Behaviour etc. (Scotland) Act 2004, a notice must be served by the local authority before any rent would not be payable. That is the appropriate remedy, and it had not happened in this case.
34. Mr Swarbrick submitted that the onus was on the Respondents to prove that the rent was not due. He referred to the Tribunal case FTS/HPC/EV/18/3196, which supported his position.
35. Mr Swarbrick referred to the Inner House case of *Stobbs & Sons -v- Hislop* 1948 S.C. 216. The last paragraph on page 12 showed the test for retention of rent to be one of whether the property was reasonably fit for habitation. Referring to page 282 of Adrian Stalker's *Evictions in Scotland*, Mr Swarbrick said the case of *Stobbs & Sons* held that the remedy of retention cannot apply to a statutory tenancy. This tenancy became a statutory tenancy on 28<sup>th</sup> August 2022, therefore, the remedy of retention could not apply thereafter.
36. Mr Swarbrick referred to the case of *Renfrew District Council -v- Grey* 1987 which held that retention of a portion of the rent was a remedy if the tenant did not get full use of the property. It would only be in cases such as that of a fire

that the full rent could be withheld. Quantification must be based on the estimated loss.

37. Mr Swarbrick referred to McBride – *The Law of Contract* - at page 566, where it states if the tenant's claim is worth less than the rent due, the whole rent cannot be withheld.
38. There is an onus on the Respondents to prove that the rent is not due. The Respondents have been given the opportunity to set out a defence and take advice. They did not do that. In this case, one ensuite shower room could not be used. Mr Swarbrick said the Respondents may have a legitimate argument regarding abatement of a specified sum in respect of the shower room, but they had not set this out. Even if the Tribunal took the view that some rent could be withheld, there are two other bathrooms in the Property. Rent was lawfully due. No application has been made for payment of the arrears of rent at this stage. It may be open to the Respondents to argue that some of the rent was not due if such an application is made, but that does not affect this particular application. The Respondents have failed to displace the onus and there are substantial arrears.
39. Mr Swarbrick submitted that the grounds of eviction were met. The Notice to Quit terminated the contractual tenancy on 27<sup>th</sup> August 2022. The grounds have all been met. The pre-action requirements have been complied with. There is an ongoing obligation upon the Applicant to pay his mortgage and this is causing him significant hardship. The Respondents admitted that they did not have the rent saved. This was relevant to a claim of retention. If they were generally retaining the rent, they would have set it aside. Mr Swarbrick said he was not aware of any substantial prejudice to the Respondents in granting the eviction order, given the scale of the arrears. They have had a considerable period of notice of the application. They have been given an opportunity to engage and defend the application. The Tribunal should be satisfied that the grounds are met and it is reasonable to grant in order

### **Findings in Fact and Law**

40.
  - i. Parties entered into an assured tenancy agreement in respect of the Property commencing on 27<sup>th</sup> August 2017, at an agreed rent per month of £850, due in advance.
  - ii. Forms AT6 were served upon the Respondents on 4<sup>th</sup> October 2021, giving 6 months' notice to 5<sup>th</sup> April 2022.
  - iii. Notices to Quit were served upon the Respondents on 9<sup>th</sup> June 2022 requiring the Respondents to remove from the Property on or before 27<sup>th</sup> August 2022.
  - iv. The contractual tenancy ended on 27<sup>th</sup> August 2022.

- v. As at the date of service of the Forms AT6 there was in excess of three month's rent outstanding.
- vi. As at the date of the CMD there was in excess of three month's rent outstanding.
- vii. As at the date of the hearing there was in excess of three month's rent outstanding.
- viii. The Respondents have persistently delayed paying rent which has become lawfully due.
- ix. Rent lawfully due from the Respondents is unpaid on the date on which the proceedings for possession were begun, and at the date of service of the Forms AT6.
- x. The Applicant has complied with the pre-action requirements set out in schedule 1 of the Coronavirus (Scotland) Act 2020.
- xi. There was no evidence before the Tribunal that the arrears of rent were due to a delay or failure in the payment of a relevant benefit.
- xii. The Applicant has failed to carry out a repair to the shower room in the Property despite being notified by the Respondents.
- xiii. The Applicant has suffered financial loss as a result of the Respondents' failure to pay the rent lawfully due.
- xiv. It is reasonable to grant an order for possession.

### **Reasons for Decision**

- 41. The Tribunal was satisfied that the forms AT6 and Notices to Quit had been correctly served and that the contractual tenancy ended on 27<sup>th</sup> August 2022.
- 42. In considering whether the grounds were met, the Tribunal had regard to the representations made by the Respondents at the CMD, and the evidence heard at the hearing. The Tribunal noted that no note of defence was lodged by the Respondents despite a request by them for additional time to lodge the same. No evidence was lodged by the Respondents to substantiate their defence. It was not clear whether they were putting forward a defence of having withheld the rent to compel the Applicant to carry out repairs, and/or a defence that they were entitled to an abatement of rent due to a failure on the part of the Applicant to repair and maintain the subjects.
- 43. The Tribunal noted that the Respondents had stated in an email of 1<sup>st</sup> July 2019, which listed some repairing issues, that they would pay the rent 'when issues are resolved'. It seemed from the evidence of the Applicant that the



only issue that remained unresolved was the en-suite shower room. The Tribunal considered that the Respondents' email could be considered as notification that rent was being withheld; however, the Respondents said at CMD that they had not retained the rent to make payment to the Applicant when repairs were carried out. The Tribunal took the view that the Respondents were not acting in good faith by failing to retain the rent, so that it could immediately be paid when the repairs were carried out. By their own admission, the Respondents were in financial difficulty due to Mrs Grant becoming unemployed from 2019 until 2022. The Tribunal took the view that financial difficulty was a significant factor in their failure to pay the rent over such a considerable period. In any event, the Respondents said at CMD, and again in recent emails to the Applicant's representative, that they intended to commence making payment of rent. This appeared to contradict any claim to be withholding the rent pending repairs.

44. The Tribunal considered that there may have been a legitimate claim for an abatement of rent in respect of the Applicant's admitted failure to address all repairs timeously, however, it was clear that the Property was habitable, and an abatement of the full rent could not possibly be justified in respect of the repairing issues mentioned. No quantification of the abatement claimed was put forward on behalf of the Respondents.
45. The Tribunal found that grounds 8, 11 and 12 were established. There was no information before the Tribunal to suggest that rent was outstanding as a consequence of a delay or failure in the payment of a relevant benefit.
46. In assessing reasonableness, the Tribunal took into account the Respondents' submission at CMD that there were no medical issues, benefit issues, or issues with dependents. The Tribunal took into account the considerable level of rent arrears which have been outstanding for a lengthy period. The Respondents claimed in recent emails to the Applicant's solicitor that they had made payment towards the rent, yet no payment was received. The Tribunal took into account the significant financial hardship caused to the Applicant by the Respondents' failure to pay the rent on a mortgaged property. The Applicant has suffered significant loss as a result of the Respondents' failure to pay rent lawfully due.
47. The Tribunal considered it was reasonable in all the circumstances of the case to grant the order sought.

## **Decision**

48. An order for possession is granted.

## **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.**

# H Forbes

**Legal Member**

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**20<sup>th</sup> March 2023**  
**Date**