



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 (“the 2016 Act”) and Rule 109 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”)

Chamber Ref: FTS/HPC/EV/22/3444

Re: Property at Flat 7, 10 Montrose Street, Clydebank, G81 2JF (“the Property”)

Parties:

Miss Marzena Kurnicka, care of Source Property (Scotland) Ltd, 65 Kilbowie Road, Clydebank, G81 1BL (“the Applicant”)

Mr Andrew Smith, Flat 7, 10 Montrose Street, Clydebank, G81 2JF (“the Respondent”)

Tribunal Members:

Nicola Weir (Legal Member) and Ann Moore (Ordinary Member)

Decision (in absence of the Respondent)

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

Background

1. By application dated 20 September 2022, the Applicant sought an order for eviction against the Respondent in terms of Ground 12 of Schedule 3 to the 2016 Act, namely rent arrears for three or more consecutive months. Supporting documentation was submitted in respect of the application, including a copy of the lease, the Notice to Leave served on the Respondent, the Section 11 Notice to the local authority in terms of the Homelessness (Scotland) Act 2003 and a Rent Statement showing the balance of rent arrears owing at the time of the application being made of £1,000 and copies of correspondence to the Respondent from the Applicant’s letting agent in respect of the rent arrears.

2. The application was subsequently accepted by a Legal Member of the Tribunal acting with delegated powers from the Chamber President who issued a Notice of Acceptance of Application in terms of Rule 9 of the Regulations. Notification of the application was then made to the Respondent and the date, time and arrangements for a Case Management Discussion (“CMD”) were intimated to both parties, advising of the date by which any written representations should be lodged (19 December 2022). Said notification was served on the Respondent by Sheriff Officer on 1 December 2022. The Respondent made a postponement request in advance of the date set for the CMD which was refused. He also submitted some written representations in advance of the CMD.
3. A separate application for payment of said rent arrears was also lodged with the Tribunal on 20 September 2022 (Chamber Reference FTS/HPC/CV/22/3445), in respect of which a Payment Order in the sum of £1,000 was granted against the Respondent following a CMD on 23 January 2023.
4. This application also called for a CMD on 23 January 2023 in front of the same Tribunal members. The Respondent had renewed his request for a postponement of the CMD just before it but this was again refused at the outset of the CMD. Following the CMD, an Evidential Hearing was fixed. A CMD Note dated 23 January 2023 was issued following said CMD, detailing the discussions which had taken place at the CMD and explaining the reasons the application had been continued to an Evidential Hearing. Reference is made to paragraph 8 of said CMD Note where it is stated as follows:-

“Although the Respondent had not submitted any representations specifically in relation to the application for eviction nor attended the CMD, the Tribunal considered that further information and evidence was required in order that the Tribunal could consider whether all aspects of Ground 12 have been met, particularly with regard to the Respondent’s benefits position and the reasonableness of granting an eviction order. The Tribunal considered it would be beneficial to have further information regarding both parties’ financial and personal circumstances in order to fully assess reasonableness and also to provide the Respondent with an opportunity to make representations in respect of the eviction order sought, should he wish to do so. Given that the Respondent had made a payment proposal in respect of the linked payment application and that a payment order had been made by the Tribunal in that application today, the Tribunal also considered that an update on the payment situation during the intervening period may well be relevant to the Tribunal’s consideration of reasonableness at the Evidential Hearing”.

5. The parties were subsequently notified of the date, time and arrangements for the Evidential Hearing which was set to take place on 24 April 2023 at 10am. In advance of the Evidential Hearing, the Applicant’s agent submitted written representations by email on 10 April 2023, updating the Tribunal on the position and providing some financial information concerning the Applicant and an updated Rent Statement. The Respondent emailed the Tribunal in response on 20 April 2023, reiterating his position and the payment offer he had previously

made in respect of the rent arrears. The Applicant's agent responded to that by further email on 21 April 2023 and the Respondent further responded by email in the early hours of the morning of 24 April 2023 (the day of the Evidential Hearing). All representations were circulated to the Tribunal Members and the opposing party prior to the Evidential Hearing.

Evidential Hearing

1. The Evidential Hearing ("Hearing") took place before the Tribunal Members by telephone conference call on 24 April 2023, due to commence at 10am. Only the Applicant's letting agent, Mr Kris Brown of Source Property (Scotland) Ltd joined the call. The start of the Hearing was delayed for 5 minutes to allow an opportunity for the Respondent to join late but he did not do so.
2. After introductions and introductory remarks by the Legal Member, the Applicant's agent confirmed that he was not intending to lead any witnesses and that the Applicant is still resident in Poland. He confirmed that he had received the recent written representations submitted by the Respondent by email and had no issue with these (or the other late representations from both parties) being accepted by the Tribunal.
3. The Applicant's agent was asked to address the background to the application and to update the Tribunal as to any further developments since the CMD on 23 January 2023 and as to the Applicant's position in respect of the application for eviction. Reference was made to the background to the application, which remains the same as had been stated at the CMD and as detailed in the CMD Note, namely that the Applicant is seeking an eviction order under ground 12 of the legislation and rule 109 of the Regulations in respect of more than 3 months' rent arrears; that the arrears had accrued since January 2022 at the rate of £125 per month following the Applicant increasing the rent from then from £400 to £525 per month; that the application was brought appropriately, following service of the proper Notice and compliance with the pre-action requirements; that the Tribunal granted a payment order of £1,000 in respect of the rent arrears against the Respondent at the CMD on 23 January 2023; that the Respondent continues to make payment of rent at the original rate of £400 per month, rather than the lawfully increased rate of £525 and has stated his intention to continue doing so, even though he does not dispute the rent increase; that although the Respondent has made an additional lump sum payment of £1,000 towards the rent arrears in April 2023, there are still outstanding arrears of £875 which will continue to rise at the rate of £125 per month if the Respondent persists in making monthly rental payments of £400; that the Respondent's stated payment proposals in respect of the ongoing rent and towards rent arrears is not acceptable to the Applicant; and that the Applicant accordingly still seeks the eviction order. In response to a question from the Tribunal, he explained that they had not taken any steps to enforce the payment order against the Respondent and that they had opted instead to wait and see whether the Respondent would make the £1,000 lump sum payment that he had stated he would in April (which he did). As to the other issues raised in respect of this application, the Applicant's agent confirmed that the

Respondent is still not engaging with them or cooperating in their wish to access the Property for the purposes of inspection and is still alleging that they are not doing their job properly as letting agents, particularly with regard to alleged repairs issues. Although they were hoping to get access to the Property this week, the Respondent has still to get back to them in this regard. As to his financial position, the Applicant's agent stated that they are no further forward in ascertaining what the Respondent's financial position is, why the fact that he is on Universal Credit means that it is "not practical" for him to pay the increased rental payment of £525 regularly every month or how he proposes to afford the future lump sum payments of £1,000 that he has offered to make.

4. The Applicant's agent was then asked to address the question of reasonableness, it having been explained to him that, in addition to the eviction ground being met, the Tribunal now also requires to be satisfied that it is reasonable for the Tribunal to grant an eviction order today. The Applicant's agent stated that they and the Applicant never wanted to have to try and evict the Respondent, whom there was previously a good relationship with. However, following the rent increase in January 2022, this is no longer the case. The Respondent does not communicate properly with them, has not allowed them access to the Property since they first requested this in June 2022 and has made various allegations about repairs issues not being attended to. Their position remains that they were not notified of repairs issues by the Respondent, contrary to what he has claimed in his written representations to the Tribunal, that they have attended to any repairs issues appropriately and as far as they are aware, there is nothing outstanding. They wish to gain access to the Property to verify that position and also to assess the general condition of the Property. The Applicant's agent confirmed that he was aware that the Tribunal could not make any orders in that respect today and also that there is a separate process, available under different legislation, to a landlord who can apply to the Tribunal for assistance in obtaining access to a property where the tenant is not cooperating with this.
5. As to the impact of the rent arrears on the financial situation of the Applicant, the Applicant's agent referred to the written submissions submitted on behalf of the Applicant by email dated 10 April 2023. He stated that the reason for the increase in the rent is clear, in that there was a shortfall between the original rental payment of £400 per month and the mortgage payments and other outlays associated with the Property that the Applicant had to meet every month. He stated that this was the first time the rent had been increased since the start of the tenancy several years ago and that, even with the rent increased to £525 per month, the Applicant would only make a very small profit every month, after the outgoings were met. However, as a consequence of the Respondent continuing to pay only £400 per month, the Applicant is experiencing financial hardship. The Applicant is having to cover the shortfall of £125 every month whilst the rent arrears continue to increase. In response to questions from the Tribunal, the Applicant's agent confirmed that the payment of £1,000 made by the Respondent in April has helped in that it reduced the debt that has built up but stressed that the payment did not clear the arrears which currently still amount to £875. It is also difficult for the Applicant as there is no guarantee that the future lump sum payments the

Respondent has offered to make of £1,000 in August 2023 and a further £1,000 in December 2023, will be made. The Respondent has not provided the details required regarding his own financial position and has not attended either the CMD or Hearing which would have allowed these matters to be more fully addressed. If there is to continue being a shortfall in the monthly rental payments, the Applicant may require to sell the Property. The Applicant's agent clarified that it is not yet decided whether the Applicant would sell the Property, in the event that possession is recovered from the Respondent. He explained that the current market would have to be considered and conceded that it may be that the Applicant would decide to let the Property out again, but probably at an increased rental. The Applicant's agent stressed that they would not be at the Tribunal with this application, had the Respondent made arrangements to agree an acceptable payment plan but that the current situation is not satisfactory to the Applicant as it is pushing the Applicant into further debt. He submitted that he does not consider that the Respondent has adopted a reasonable approach in his recent dealings with them, nor in relation to the Tribunal proceedings. In response to further Tribunal questions, the Applicant's agent stated that he is unaware of the Applicant's full financial circumstances. He thinks that the Applicant herself is working, whereas her partner is not, but he has no further details on their family or financial circumstances. He does not know for definite whether the Applicant owns or lets out any other properties, either here or in Poland, although he thinks not. In explanation, he advised that he had sought full financial information from the Applicant for the purposes of the Hearing but that the information he obtained was restricted to the information he submitted to the Tribunal by email dated 10 April 2023. He thinks this may be down to communication difficulties, due to the Applicant being Polish and now having returned to live in Poland. He is aware that other applications to the Tribunal may be possible on behalf of the Applicant, such as for a further payment order or for eviction on another ground but hoped not to have to go down that route. He summed up and requested that the Tribunal find that it is reasonable to grant an eviction order today on ground 12, the requirements of which he submitted had been met.

Findings in Fact

1. The Applicant is the joint owner and landlord of the Property.
2. The Respondent has been the tenant of the Property since 2014, currently by virtue of a Private Residential Tenancy which commenced on 30 October 2018.
3. The Respondent continues to occupy the Property.
4. The rent in respect of the tenancy was initially £400 per calendar month.
5. The Applicant increased the rent to £525 per calendar month using the process available in terms of the Private Housing Tenancies (Scotland) Act 2016 and outlined in the tenancy agreement.

6. The increased monthly rental applied from 1 January 2022.
7. Since the rent increase was applied, the Respondent has continued to make payment regularly, but at the rate of £400 per month, resulting in a monthly shortfall in the rental payments being made of £125.
8. When this application was made to the Tribunal on 20 September 2022, the rent arrears amounted to £1,000.
9. The rent arrears have continued to accrue at the rate of £125 per month as the shortfall is still not being paid.
10. Apart from continuing to make regular payments of £400 per month towards rent, the Respondent also made a lump-sum payment of £1,000 on 1 April 2023.
11. The current rent arrears amount to £875, as at the date of the Evidential Hearing.
12. The Pre-Action Requirements were duly carried out on behalf the Applicant.
13. A Notice to Leave dated 18 August 2022 referring to Ground 12 of Schedule 3 to the 2016 Act, was served on the Respondent by email on that same date, in accordance with the terms of the lease, at which point there had been rental arrears owing for in excess of 3 consecutive months.
14. The date specified in the Notice to Leave as the end of the notice period was 18 September 2022.
15. The Tribunal Application was received by the Tribunal on 20 September 2022.
16. The Respondent has not properly engaged with the Applicant's letting agents for some time nor made a payment proposal acceptable to the Applicant in respect of the ongoing rental payments or rent arrears.
17. The Respondent did not attend the CMD nor Evidential Hearing in respect of this Tribunal application.

Reasons for Decision

1. The Respondent did not attend the CMD or the Evidential Hearing. Despite the terms of the CMD Note inviting him to do so, the Respondent did not explicitly state that he wished to contest the eviction order sought by the Applicant. However, having considered the written representations that the Respondent lodged with the Tribunal before both the CMD and Evidential Hearing, the Tribunal were satisfied that he was implicitly opposed to eviction and wished to

continue occupying the Property. He had made a payment proposal prior to the CMD and reiterated the terms of that prior to the Evidential Hearing. He had also maintained his regular payments of £400 per month towards the rent and made a lump sum payment of £1,000 towards arrears on 1 April 2023, as per the terms of his previous payment proposal. The overall amount of the rent arrears outstanding as at the date of the Evidential Hearing had been reduced to £875. The Respondent did not dispute the rent increase, the rent arrears, nor how they had arisen and nor did he dispute any of the technical aspects of the application for eviction.

2. The Tribunal was satisfied that the Notice to Leave was in correct form, served by appropriate means, gave the requisite period of notice at the relevant time), that these Tribunal proceedings were thereafter brought timeously, after the date specified in the Notice to Leave and all in accordance with the terms of the Lease and the relevant provisions of the 2016 Act.
3. The Tribunal was also satisfied from the information contained in the application and supporting documentation, together with the oral submissions made by the Applicant at the CMD that all aspects of Ground 12 of Schedule 3 to the 2016 Act, as amended, had been met, all as set out below, other than the requirement in Ground 12(3)(b) that it is reasonable to grant the eviction order:-

“Rent arrears

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

(2).

(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—

(a)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, and

(b)the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers in regulations.

(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.

(6) Regulations under sub-paragraph (4)(b) may make provision about—

(a) information which should be provided by a landlord to a tenant (including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy),

(b) steps which should be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,

(c) such other matters as the Scottish Ministers consider appropriate.”

4. In respect of the ‘reasonableness’ test (Ground 12 (3)(b) above), the Tribunal considered the whole circumstances of the case before it as outlined above including weighing the impact on the Applicant (as far as known) if the eviction order were not to be granted against the impact on the Respondent (as far as known) of the eviction order being granted. The Tribunal considered the monthly financial outlays of the Applicant in respect of the Property; the stated reason for the increase in rental from January 2022, the process for which had been carried out properly on behalf of the Applicant; the inconvenience and ‘cash-flow’ difficulties resulting from the shortfall in the regular monthly rental payments being made by the Respondent; the fact that the ‘pre-action requirements’ had been properly carried out by the Applicant’s letting agent on her behalf; the failure of the Respondent to engage properly with the Applicant’s letting agent since the rent increase was implemented; the length of time the rent account had been in arrears and the fact that arrears are continuing to accrue every month in respect of the shortfall in rental payments of £125 per month. In addition, there was nothing to indicate to the Tribunal that the arrears were due to a failure or delay in benefits being paid to, or on behalf of, the Respondent who has been in receipt of the housing element of Universal Credit for some time and has not indicated any delay/failure in payment of benefits, simply stating that it is “not practical” for him to pay the full monthly rental. On the other hand, the Tribunal considered the relatively modest amount of the rent arrears at the time the Tribunal application was lodged (£1,000) and at the present time (£850), equating to less than 2 months’ rent; the fact that the Respondent had maintained monthly payments towards the rent of £400 throughout and is continuing to do so; the fact that he appears to have accepted that the increased rent requires to be paid, has made a payment proposal in respect of the arrears which have accrued and will continue to accrue and has adhered to his payment proposal so far in that he made his first lump-sum payment of £1,000 on 1 April 2023; the Respondent has indicated an intention to continue making regular rental payments of £400 per month, plus two further lump-sum payments of £1,000 in August and December 2023 which he stated

would clear the arrears by December 2023, which, by the Tribunal's calculation, is correct. The Tribunal considers this a reasonable period over which to clear the remaining arrears. Taking all these factors into account, the Tribunal considered that the consequences for the Respondent if he were to be evicted from the property he has occupied since 2014 outweigh the inconvenience and stated cash-flow type issues being experienced by the Applicant as a consequence of the Respondent's payment pattern. The Tribunal did not consider that it had sufficient information on the Applicant's financial and personal circumstances to find that the Applicant was suffering financial hardship. The Tribunal recognises that the Respondent's position and lack of communication is frustrating to the Applicant and her letting agents and it is hoped that the Respondent will continue to adhere to his payment proposal in clearing the remainder of the arrears and that his communication and engagement with the Applicant's letting agents will improve. If not, clearly other remedies may be available to the Applicant. In all the circumstances, the Tribunal was not satisfied that it would be reasonable to make an eviction order.

5. The decision of the Tribunal was unanimous.

Decision

The Tribunal accordingly determined that an order for possession of the Property should be refused.

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.

N. Weir

Legal Member/Chair

24 April 2023
Date