Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/21/2433

Re: Property at Burnhead Farmhouse, Killochan, Girvan, Ayrshire, KA26 9QE ("the Property")

Parties:

Alex Paton & Sons, Cairnhill Farm, Girvan, KA26 9RE ("the Applicant")

Mr Douglas Scott, Burnhead Farmhouse, Killochan, Girvan, Ayrshire, KA26 9QE ("the Respondent")

Tribunal Members:

Graham Harding (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be refused.

Background

1. By application dated 7 October 2021 the Applicant's representatives, Fraser Coogans, Solicitors, Prestwick applied to the Tribunal for an order for the possession of the property in respect of an alleged breach of Grounds 13 and 14 of Schedule 5 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Applicant's representatives submitted copy Notice to Quit, Form AT6, Section 11 Notice and photographs in support of the application. They subsequently submitted a copy of the tenancy agreement and proof of service of the Notice to Quit, AT6 and Section 11 Notice.

2. By Notice of Acceptance dated 14 January 2022 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion ("CMD") was assigned.

3. The Tribunal issued a direction dated14 January 2022 requiring the Applicant to provide written submissions on the validity of the Notice to Quit and whether the Applicant was entitled to rely on section 18(6) of the 1988 Act.

4. By email dated 27 January 2022 the Applicant's representatives provided their written response to the Tribunal's direction.

5. Intimation of the CMD was served on the Respondent by Sheriff Officers on 9 February 2022.

6. By email dated 28 February 2022 the Respondent's representative, Mr Tierney of Ayr Housing Aid Centre submitted written representations on behalf of the Respondent.

7. By email dated 8 March 2022 the Applicant's representative Mr De Abreu submitted written representations and documents on behalf of the Applicant.

8. By email dated 18 March 2022 the Respondent's representative submitted further written representations to the Tribunal. The Applicant's representative also submitted written representations objecting to the Respondents written representations being allowed due to them being lodged late.

9. A CMD was held by teleconference on 21 March 2022. Both parties were represented and given the nature of the dispute between the parties it was agreed that the application should be continued to a video conference hearing. As there was an issue over intimation of the Section 11 Notice to South Ayrshire Council, Mr De Abreu agreed to send a further copy of the Notice to the Council.

10. A hearing assigned for 17 May 2022 was postponed at the request of the Applicant's representative due to the Applicant's ill health.

11. By email dated 9 May 2022 the Respondent's representative submitted a further Inventory of Productions on behalf of the Respondent.

12. A further hearing assigned for 22 July 2022 was postponed due to the non-availability of the Applicant's Representative and a further hearing assigned.

The Hearing

13. A video conference hearing was held on 7 September 2022. Mr Alex Paton attended for the Applicant and was represented by Mr De Abreu. The Respondent also attended and was represented by Mr Tierney.

14. Mr De Abreu commenced by explaining that the parties had entered into a Short Assured Tenancy which in terms of Clause 1 endured for a period of 6 months and then continued by tacit relocation for a further 6 months and after a third 6 months became an Assured Tenancy.

15. Mr De Abreu said that in terms of Clause 17 of the agreement the Applicant could serve a Notice to Quit and bring the tenancy to an end under certain circumstances and referred the Tribunal to Clause 17 (c) and(d). It was the Applicant's position that the Respondent had allowed the condition of the property to deteriorate as evidenced by the photographs submitted and had been in breach of Clause 8 of the agreement by failing to properly maintain the property as required by that clause. Mr de Abreu went on to say that as a result of the Respondents breaches of the Tenancy agreement a valid Notice to Quit had been served on the Respondent.

16. Mr De Abreu went on to say that the Respondent had suggested that there were two leases one for the farmhouse and one for the shed and yard. He said that this was not the Applicant's position who maintained that there was only one lease of the whole property. Mr De Abreu drew the Tribunal's attention to the title boundary plan submitted with the case papers as support for the proposition that this did not show any boundary division between the farmhouse and the shed and yard.

17. Mr De Abreu pointed out that the Respondent had in the agreement accepted that the property was in good and tenantable condition at the commencement of the lease and the obligation to repair and maintain it in like condition throughout the tenancy fell wholly on the Respondent. He said that since the photographs showing the condition of the property had been submitted the situation had not improved and it was therefore reasonable to grant the order for eviction. One photograph of the exterior of the property was submitted in support of this.

Cross-examination of Mr Alex Paton

18. Mr Tierney asked if January 2012 was the first occasion Mr Paton met with the Respondent. Mr Paton thought that could be correct.

19. Mr Tierney asked if that had been in connection with the Respondent leasing a shed for the purpose of storing his classic cars. Mr Paton said that was not correct as the farmhouse and shed were always let together. Mr Paton went on to say that he vaguely remembered having discussions but it was a very long time ago. Mr Scott denied that there had ever been a commercial lease or that there had ever been two leases. He said there had only ever been one lease and he had never seen a commercial lease in respect of any of his properties.

20. Mr Tierney asked if the lease commenced in June 2012. Mr Paton said that he had no idea as he could not remember and it was now 2022 and he was not good with dates. He accepted that if the tenancy agreement said the tenancy commenced on 1 June 2012 that would be when the Respondent would have been given the keys.

21. When asked if he agreed that 6 months to agree a Short Assured Tenancy was a long time, Mr Paton said that it took him 4 months to agree a price increase with a supermarket and then went on to say that this was a legal matter and

that he could not say. He also spoke of it taking time as the house was being renovated to be put in good order before letting.

22. Mr Tierney referred Mr Paton to the Respondent's diary entries (Productions 1-6) and asked if he recalled any conversation with the Respondent regarding leasing only the yard and shed. Mr Paton again said no he did not and that he was not in control of what the Respondent wrote in his diary. Mr Paton said he remembered talking about cars as he was a car enthusiast, but that had been part of a wider discussion about the house and the bathroom in the house. He said it made no sense to let the yard and shed when someone else was in the house.

23. When asked about the Respondent paying Mrs Jean Paton £400.00 for March rent on 29 February 2012 Mr Paton said this was his mother and suggested there was nothing underhand about this and thought it might have been an initial deposit. He referred to bank statements having been provided to his representative but on further consideration it was stated these only went back to 2017 so could not cast light on this payment. When told that the diary entry showed that first 4 cars had moved into the shed the same day Mr Tierney asked if Mr Paton agreed that the Respondent had been given the full use of the yard and shed from that time. Mr Paton neither agreed nor disagreed. When it was put to him that between January and June 2012 there was an unwritten agreement between the parties that the Respondent could use the shed for the storage of cars Mr Paton said he neither agreed or disagreed.

24. When asked if the written lease commenced on 1 June 2012 at a rent of £400.00 per month Mr Paton said he did not know. He said that he did not deal with the rents. These had previously been dealt with by his mother and now by a girl working for the company as his mother was 75. He agreed he had never been told that the Respondent was in arrears of rent but would have expected to have been told if he was more than a week or two overdue.

25. Mr Tierney referred Mr Paton to the bank pay in slips (Productions 12- 21) He confirmed that these showed that the Respondent paid £715 .00 per month into the Applicant's Bank of Scotland account each month. Mr Tierney queried what the additional £315.00 was for if the lease provided that the rent for the property was £400.00. Mr Paton said that he presumed it was for the shed. Mr Tierney then suggested that this proved there were two leases to which Mr Paton said there had never been a second lease. He said he had never seen a commercial lease. Mr Tierney again suggested there had been an unwritten agreement entered into between January and June 2012 and asked if Mr Paton agreed or disagreed. Mr Paton said neither as he was being asked to agree about something he did not know.

26. Mr Tierney referred to the photographs lodged on behalf of the Applicant and Mr Paton confirmed he had taken them. The aerial photographs had been taken by drone. Mr Tierney identified the Respondent's property from the photographs as well as the shed and yard and also established with Mr Paton that within the

larger area there were three other tenanted properties and one other commercial property all owned by the Applicant.

27. Mr Tierney asked if the principal problem was the condition of the yard and shed and not the house. Mr Paton said he totally disagreed. He disputed that the house was relatively clean and tidy. He said the windows were never being opened, that the grass had not been cut in a year and that it was a disgrace. He went on to say that his mother had been made aware of the gutters needing to be cleaned out and that dampness was becoming a problem because of debris up against the walls when she had been speaking to neighbours. He said that all houses needed to be aired and that there was a lot of value in the house. He said that he had taken a builder to the house who had said there needed to be less clutter and that it needed to be aired.

28. In response to a query from the Tribunal as to what communication there had been with the Respondent before instructing solicitors to proceed with a Notice to Quit Mr Paton said that he could not remember and that all communications were through his lawyer, although he was aware the Respondent had been communicating with his mother and she had been getting upset.

29. In response to a further query from the Tribunal, Mr Paton said he thought he had only been in the property once but had sent in other people to inspect it and do things like electrical safety checks. He said that as a family business they had decided not to carry out any improvements to the property but to fulfil their obligations as landlords as regards maintenance. He confirmed the Respondent had requested a new bathroom in the early stages of the tenancy but this had not been agreed. There had been no repair requests except for Mr Scott raising an issue in respect of smoke detectors and he had seen to this.

30. In response to a further query from the Tribunal Mr Paton agreed it was the landlord’s responsibility to maintain and clear the gutters but the Respondent had an obligation to inform the landlord when action was required.

Douglas Scott

31. The Respondent confirmed to Mr Tierney he would be 75 the following week. He said he was waiting on a hip operation but did not have a date for it. He said he was up four times a night with the pain and taking nineteen pills a day. The Respondent explained he had undergone triple bypass heart surgery in July 2013 and as a result had given up his road haulage business and was now retired. He said he lived on his own and was less able to manage now than he had been at the commencement of the tenancy.

32. The Respondent explained that in 2012 he had decided to move to the Girvan area and was looking for somewhere to store his collection of vintage cars. He had been given Mr Paton’s father’s name and contacted him by telephone and then spoke to Alex Paton.

33. The Respondent confirmed he discussed looking for business premises and that he was also possibly looking for a house as his house in Newton Mearns was being marketed for sale.

34. Mr Tierney referred the Respondent to his diary entries for January 2012 and the Respondent confirmed that he met with Alex Paton and discussed renting the shed and yard for storing cars.

35. Mr Tierney referred the Respondent to his diary entry of 29 February 2012 and the Respondent confirmed he paid Mr Jean Paton £400.00 in cash that day and was given access to the shed and yard and the first cars were moved in. He said that more cars were moved in throughout March 2012.

36. The Respondent said that in about March or April 2012 Mrs Paton mentioned renting the house to him. He said most of his dealings had been with Mrs Paton. He said that he paid a further £400.00 rent on 2 April 2012 and again on 1 May 2012. He said these payments were all in respect of the shed. He went on to say that the previous tenant of the house had not paid his rent and he agreed to rent the house from 1 June 2012 although he was still living at Newton Mearns. He said that from then on, he paid rent of £715.00 per month in a single payment into the Applicant's business account so that he had a receipt.

37. The Respondent said that he had expected to have a written lease for the shed but this never came and there was just a verbal agreement between himself and Mrs Paton and Alex Paton. He confirmed he was up to date with his rent payments.

38. The Respondent said that he had been flooded out four times and that sewage and fresh water went into one drain. He said that the Applicant had stopped carrying out weedkilling treatment around the property five or six years ago. He explained that he had applied for a grant for a new boiler in 2015 and Mr Paton had not objected to this. A number of radiators and the storage tank had been replaced. The boiler was supposed to be serviced every year and that should be done by the landlord. He had put down new lino in the kitchen. He said that the gutters were still overflowing He had spoken to the Applicant's builder and employees about the issues He had told them about broken slates but nothing was being done.

39. The Respondent said that the state of the shed and the cars lying about the yard had never been mentioned to him. He disputed that there were cars in front of the property or at the back preventing access to the gutters. He said that he had made an effort to get rid of stuff from his house that was not needed and that the house was not dirty. He was dismantling furniture and packing up things in anticipation of leaving. He said he had given away a lot of ornaments and picture frames. He said that he kept his windows closed because there were gypsies living nearby and was worried about theft. There were also bats in the house and shed. He was concerned about the gutters overflowing and water entering the property. He said he did want to get the shed and yard tidied

up and was in the process of organising that. There was no longer an electricity supply in the shed.

40. In response to a question from Mr De Abreu the Respondent said he thought there was meant to be two leases. He said the previous tenant Colin Stewart had rented both the house and the shed but had left leaving a trail of debt but that was none of his business.

41. When Mr De Abreu asked if it was odd that there was no mention of the shed in the tenancy agreement the Respondent said that he had taken on the shed first and then when he took on the house he had been given the Applicant's bank details and the amount changed from £400.00 to £715.00.. He went on to say that there were now only fifteen cars left and that the scrap was being laid out to go in a van.

42. The Respondent went on to say that there was no way that he would have been charged £400.00 rent for the house and the yard and the shed.

43. Mr De Abreu asked the Respondent if he agreed that there were no exact boundaries marking the shed and the house but the Respondent did not directly answer.

44. Mr De Abreu referred the Respondent to Clauses 8 and 14 of the tenancy agreement and asked if the lease included the yard and shed was the property being kept in good order. At this point the Tribunal queried whether this was a reasonable question for the Respondent to answer given it was his position that the yard and shed formed part of a separate commercial lease but allowed the question under reservation. The Respondent replied that it was not in good order as previously the Applicant's employee Mr Robertson had used weedkiller to control the weeds and had cleaned out the gutters but all that had stopped. He said that he had kept the property as tidy as he could but that water was entering the property and he had five bowls out to collect it.

45. Mr De Abreu went on to refer the Respondent to the tenancy agreement and to Clause 14 where it was stated that the property was to be used solely as a private dwelling house and asked him if he was using it as a business. The Respondent replied by saying that he was retired and went on to say that the shed could not be compared to a dwelling house. He said the yard to the west of the house came with the house as did the garage with no electricity to the east. The shed did not. The Respondent went on to say there should have been a lease in 2012 for the shed and yard. The Applicant took the money but never set up the contract. He said if the farmhouse extended to include the yard and shed then he wondered what he was paying the extra money for.

Conclusions

46. For the Applicant Mr De Abreu referred the Tribunal to his opening statement and submitted that there was only one lease that included the farmhouse and the yard and shed. The Respondent had failed to maintain the property in

accordance with Clauses 8 and17 of the tenancy agreement and a valid Notice to Quit having been served the grounds for possession had been established and it was reasonable to grant the order. Whilst Mr De Abreu had sympathy for the Respondent's condition the failures of the Respondent was having a detrimental impact on the value of the Applicant's property. The Applicant had a vested interest in preserving its financial value and therefore it was reasonable to grant the order.

47. For the Respondent Mr Tierney submitted that there was evidence to support the existence of an unwritten commercial lease of the yard and shed. The lease of the dwelling house was entirely separate. The photographs submitted on behalf of the Applicant did not support a breach of the tenancy agreement. The majority of the photos related to the yard and shed over which the Tribunal did not have jurisdiction. With regards to reasonableness Mr Tierney referred to the Respondent's poor health and the fact that he had undergone a triple heart bypass and was awaiting a hip replacement. He also made mention of the Scottish Government's recent announcement of its intention to pass legislation to enforce a moratorium on evictions until the end of March 2023 although he accepted he did not know what effect this might have on existing applications.

Findings in Fact and Law

48. The parties entered into a verbal agreement for the Respondent to rent the yard and shed adjoining the property on a commercial basis at a rent of £400.00 per calendar month commencing on 29 February 2012.

49. The parties entered into a Short Assured Tenancy agreement that subsequently was converted to an Assured Tenancy, that commenced on 1 June 2012 at a rent of £400.00 per calendar month.

50. With effect from 1 June 2012 the combined rent for the property and the adjoining yard and shed was £715.00 per calendar month.

51. The Respondent is not in arrears with his rent.

52. The Respondent has used the yard and shed to store cars and other machinery.

53. The Respondent was served with a Notice to Quit by the Applicant's representatives by recorded delivery post and delivered on 16 February 2021.

54. The Notice to Quit was procedurally valid.

55. Prior to the Notice to Quit being served on the Respondent the Applicant had not communicated its intention to terminate the tenancy with the Respondent or raised concerns formally about the Respondent's ongoing maintenance of the property.

56. The Applicant's representatives gave intimation of the Application to South Ayrshire Council on 6 September 2021 and again on 23 March 2022.

57. The Respondent is not in breach of Clauses 8 or 17(d) of the tenancy agreement.

58. The Respondent is elderly and in poor health and awaiting a hip replacement operation. He has undergone triple heart bypass surgery in the past.

Reasons for Decision

59. The Tribunal found the Respondent to be a believable and convincing witness. The Tribunal found no reason to doubt the veracity of the Respondent's diary entries from 2012 (Respondent's Productions 1-6) which coupled with the Respondents own evidence clearly indicated that by 29 February 2012 an agreement had been reached with the Applicant to rent the yard and shed adjoining the farmhouse at a rent of £400.00 per calendar month. It was apparent that from that time on the Respondent had access to the shed and had moved his cars there. The Tribunal did not find the evidence of Mr Alex Paton and his recollection of events around this time to be helpful. His evidence was evasive and unconvincing. The Tribunal is unable to say why the combined rent for the tenancy of the property and the yard and shed from 1 Jun 2012 was reduced from what might have been expected to be £800.00 per month to £715.00 per month but can only surmise that was the agreement reached between the parties given it has continued for more than 11 years. However, the Tribunal is in no doubt that the tenancy agreement can only relate to the farmhouse itself and not the shed and yard given that the rent is stated to be £400.00 per calendar month and the rent paid is £715.00 per calendar month. The Tribunal is therefore in no doubt that there are two separate leases in existence. One being an Assured Tenancy of the farmhouse and the other a verbal lease of the yard and shed. The Tribunal only has jurisdiction to consider issues concerning the Assured Tenancy

60. Mr De Abreu was concerned that the title plan submitted on behalf of the Applicant did not differentiate the boundary between the yard and shed and the farmhouse. However, there are other properties within that title rented out by the Applicant therefore the title plan is not of much assistance. The aerial photographs submitted on behalf of the Applicant do show some features that may assist in delineating the boundaries and the Tribunal was not persuaded that the two properties could not be separated and they clearly had for the purposes of preparing the tenancy agreement.

61. The majority of the photographs submitted on behalf of the Applicant and the allegations of a failure to maintain the property appeared to centre on the condition of the yard and shed. Given that the Tribunal has held that the yard and shed does not form part of the Respondent's residential tenancy these do not form any part of the Tribunal's considerations in this matter. However, it should perhaps be noted in passing that the Respondent has confirmed that he

is in the process of removing scrap and the remaining vehicles from the yard and shed.

62. The Tribunal noted that the Respondent had thought at the time the internal farmhouse photographs were taken that he might shortly have to vacate the property and he had therefore been preparing for a move. The Tribunal has also noted that the Respondent has been trying to declutter the property and give away some of his possessions. Considering the evidence before it the Tribunal was not persuaded that internally the Respondent was failing to maintain the property in accordance with the terms of the tenancy agreement.

63. It did seem to the Tribunal that there may well be underlying tensions between the parties stemming from the Respondent feeling that the Applicant is not doing enough to improve the fabric of the property such as installing a new bathroom or fixing the roof or sorting the issues with the drainage. At the same time, it is possible that the Applicant has a genuine concern that the property could suffer from damp or mould if it is not properly ventilated. Nevertheless, the Tribunal was concerned to note that it appeared the Applicant had not attempted to address any concerns it might have with the Respondent before instructing solicitors to serve a Notice to Quit.

64. It appeared that there was a longstanding problem with the cleaning of the gutters. This was an obligation that fell squarely on the part of the Applicant to deal with. From the latest photograph submitted on behalf of the Applicant it was not immediately apparent to the Tribunal as to why certainly at the front of the property the gutters could not be cleared out. This was confirmed by the Respondent in his evidence. Furthermore, again looking at the photograph it did not appear to the Tribunal that the front of the property was being poorly maintained by the Respondent. Taking everything into consideration the Tribunal did not find that the Respondent was in breach of Clauses 8 and 17(c) and (d) of the tenancy agreement.

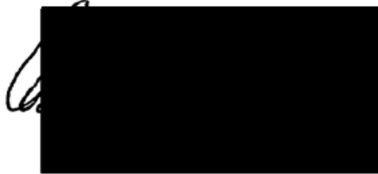
65. Had the Tribunal found that the Respondent had been in breach of Clauses 8 and 17 (c) and (d) and found Grounds13 and 14 of Schedule 5 of the 1988 Act to have been established it would have had to consider whether in all the circumstances it would be reasonable to grant an order for possession. Given the Respondent's age and poor state of health and the efforts he has been making to try and improve and declutter the house the Tribunal would have been slow to grant such an order particularly when there had been little or no effort made on the part of the Applicant to enter into discussions with the Respondent in advance of instructing a Notice to Quit to be served.

Decision

66. The Tribunal having carefully considered the oral evidence of the parties together with the written submissions and documents and photographs refuses the application.

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.



Graham Harding	**7 September 2022**
Legal Member/Chair	**Date**