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 51 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the Act")

Chamber Ref: FTS/HPC/EV/19/2296

Re: Property at Lochhead Croft, Raemoir Road, Banchory, AB31 4ET ("the Property")

Parties:

Mr John Derek Smith, 76 Ransome Road, Ipswich, Suffolk, IP3 9AP ("the Applicant")

Mr Adewale Laoye, Mrs Laura Laoye, 103 Brierfield Terrace, Aberdeen, AB16 5XT; Lochhead Croft, Raemoir Road, Banchory, AB31 4ET ("the Respondent")

Tribunal Members:

Ewan Miller (Legal Member) and Mike Scott (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Applicant should be granted an order for possession of the Property under Grounds 3 & 4 of Schedule 3 to the Act.

Background

The Applicant was the owner of the Property. He had let the Property to the Respondent by way of a private residential tenancy under the terms of the Act. The lease had commenced on 1 July 2018. The Applicant sought to terminate the tenancy on the basis that he wished to refurbish the Property and live in it himself as his main residence. The Property would require significant refurbishment in this regard. Accordingly, the Applicant applied to the Tribunal seeking an order for possession under Grounds 3 & 4 of Schedule 3 to the Act.

The Tribunal had before it a large amount of correspondence, including the following documentation and information:-

- The Applicant's application to the Tribunal dated 22 July 2019;

- Copy Notice to Leave dated 27 December 2018;
- Copy Sheriff Officers Certificates of Service of the Notice to Leave on the Respondent dated 28 December 2018;
- Copy s11 Homelessness Notice;
- Copy Lease of the Property dated 23 June 2018;
- Land Certificate KNC6850;
- 2 Affidavits regarding the intention of the Applicant to live in the Property dated 16 December 2019;
- 3 Inventories of Productions from the Respondent dated 6 November 2019.

This matter had initially called for a Case Management Discussion on 21 November 2019. The Legal Member at that CMD had identified that the Respondent was challenging the intention of the Applicant to both live in the Property and to refurbish it.

Accordingly, the Legal Member determined at the Case Management Discussion that the issue would be referred to a hearing of the Tribunal for determination. A date of 24 January 2020 was set for this. Unfortunately, on that date, it transpired that the Legal Member appointed had a conflict of interest as she knew the Respondent's representative and the matter was continued to allow the appointment of an alternate legal member.

A further hearing date of 13 March 2020 was set. This too ended up being postponed, this time at the request of the Respondent. The current Tribunal was not furnished with the reason for granting this postponement but from the case paperwork the Respondent had advised that she had been in touch with the local authority and was to be re-housed by the end of April. The previous Tribunal presumably determined that the matter was likely to resolve itself prior to a continued hearing and adjourned on that basis.

Due to the impact of the Covid-19 pandemic, a new hearing date was not set until 17 August 2020.

The Hearing & Preliminary Issues

The Tribunal held a hearing via teleconference on 17 August 2020 at 10am. The Applicant was present. The Respondent was neither present nor represented.

The Tribunal noted two preliminary issues that required to be addressed before dealing with the substantive matters, namely a further request from the Respondent's representative and the timings of the Notice to Leave.

Postponement Request

The Respondent was represented by a Mr Paul Patrick of RS Accountancy, Aboyne. Mr Patrick indicated to the Tribunal on 14 August 2020 that he was requesting a further postponement. Evidence from the NHS had been produced previously that his client was shielding at the present time and that prevented her from taking part. He also stated that his office logistics prevented him from doing a conference call.

He was of the view that the matter should be dealt with via email or postponed until further notice.

The Tribunal responded that same day, pointing out that his postponement request highlighted that his client had a mobile phone and that his letterhead disclosed a landline. He and his client did not need to be in the same room to dial in to the hearing, they could do so separately. Indeed a teleconference should best suit his client if she was shielding as that minimised the risk to her. The Tribunal stated that they would ensure there were regular breaks in the proceedings to allow him to confer with his client, if required.

Mr Patrick replied, again indicating that this was unacceptable and that the hearing needed to be postponed. He telephoned the administrative office in Glasgow to advise that his only landline was to an open shop where members of the public would be able to hear. He was not prepared to use his mobile to dial a local number as that may incur significant cost and, in any event, his mobile reception was often poor. He was asked to put his comments in writing but indicated he was not prepared to do so and if the hearing went ahead he would simply appeal.

Mr Patrick then did email the Tribunal. He advised he had arranged his premises so that it was all in one room that was open to members of the public and so he could be overheard in breach of the GDPR. He indicated he was not prepared to join the call as he had not taken instructions from his client. The Applicant had also emailed in that day with some information. Mr Patrick pointed out that this had not been submitted 7 days in advance and so he had not had time to take instructions or consider it.

The Tribunal noted these points. Hearings are open to the public and so the possibility of a member of the public overhearing a comment in his premises was not necessarily a material issue. In any event, the Tribunal could not envisage how he could conduct an accountancy business from an open shop if he were to maintain client confidentiality. It was a not unreasonable assumption to make that he had some method of being able to speak to clients on their individual affairs in private. An online check on the assessor's rates entry for his premises showed that it was divided in to parts and there was, for example, a managers office. Again, it was not unreasonable to assume there was some part of the office where a mobile call could be made or that he could take part in the hearing from his home or from some other location. The Tribunal advised him of their view and that the hearing should proceed. The Tribunal indicated that on the question of emails from the Applicant, the Respondent could submit at the hearing that they should not be received late and the Tribunal would consider the point at that stage.

The Tribunal heard nothing further from Mr Patrick on the 14th August and neither he nor the Respondent joined the call on the 17th. On the day of the hearing, the Tribunal again considered whether the matter should progress or should be postponed. On balance the Tribunal was of the view that the matter should progress.

The Respondent had already had the benefit of one postponement and the Tribunal had to consider the interests of both parties. It was unfair on the Applicant for the matter to keep being postponed.

The procedural rules of the Tribunal specifically allow for teleconferences to take place. Mr Patrick, in his correspondence had indicated he had a mobile phone and that his client did also. There appeared to be no reason for them not to at least try and participate in the hearing. If their mobile reception was sufficiently poor on the day that they could not take part then that would be a different matter. It was not, however, acceptable, to make an assumption that their mobile reception would be insufficient.

There seemed to be a general reticence and unwillingness from Mr Patrick to take part. He put forward numerous excuses as to why a teleconference could not take place without making any effort to at least try and participate on the day or to put in place arrangements that would facilitate matters. Covid-19 has brought many changes to the country and it is not unreasonable to now expect parties before a hearing to deal with hearings in a new way – such as a teleconference. His client was able to dial in separately and the Tribunal had given the assurance they would ensure he and the Respondent had breaks to confer. The nub of the dispute with the Applicant had been known to him for months and he had had ample opportunity to take instructions, albeit by phone rather than in person.

Mr Patrick had already submitted 3 sets of productions to the Tribunal and so the Tribunal had knowledge of the Respondent's position. Mr Patrick had also submitted via letter on 20 July 2020 that the Applicant was living in another of his properties and therefore the Tribunal was able to question the Applicant on this during the hearing.

The Tribunal was satisfied that the Respondent and her representative had failed to take reasonable steps to participate and that their refusal amounted to a failure to co-operate with the Tribunal. The Tribunal was satisfied that it was appropriate to continue. The prejudice to the Applicant in further delaying outweighed any potential prejudice to the Respondent in not allowing a further postponement.

Notice to Leave

The Tribunal noted that the Notice to Leave was served by Sheriff Officer on 28 December 2018 and stated that the expiry date was 24 January 2019.

The relevant provisions regarding the required period of notice are contained in s.54 of the Act and are:-

"54 Restriction on applying during the notice period

(1)A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2)The relevant period in relation to a notice to leave—

(a)begins on the day the tenant receives the notice to leave from the landlord, and

(b)expires on the day falling—

(i)28 days after it begins if subsection (3) applies,

(ii)84 days after it begins if subsection (3) does not apply.

(3)This subsection applies if—

(a)on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months"

Accordingly, the first day was 28 December 2018 (the Respondnet having lived in the Property for less than 6 months). The day falling 28 days after that date was 25 January 2019 and not the 24 January 2019 as stated in the Notice to Leave and so the Notice to Leave was defective in that it did not comply with s54(2).

However, s52(4) of the Act gives a discretion to the Tribunal to still determine the matter if it deems it reasonable in the circumstances to do so:-

"52Applications for eviction orders and consideration of them

(1)In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(2)The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a)subsection (3), or

(b)any of sections 54 to 56 (but see subsection (4)).

(3)An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

(4)Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so."

The Tribunal considered that notwithstanding the error in the Notice to Leave it was reasonable to consider the application. The error was by a single day and was the minimum period by which the Notice could have been defective. The primary reason a notice period is required is to give fair notice to a tenant that they may be required to remove from a property and to give them sufficient time to find alternate accommodation or to defend the matter. The Tribunal would generally be reluctant to allow a shorter period than the minimum required to be cured by the use of the discretion in s52(4). However, normally a landlord applies to the Tribunal shortly after the period in the Notice to Leave expires and so ensuring the minimum period of notice has been given is more crucial. In this particular case, the Applicant had waited almost 6 months before applying to the Tribunal. The matter had then taken a considerable time to reach a hearing. The Respondent had had the benefit of a postponement previously and that had then pushed the matter in to the delay caused by Covid 19. If the Applicant's Notice to Leave were to be rejected by the Tribunal the new time periods introduced by the Coronavirus (Scotland) Act 2020 would apply. It could then mean that since the Applicant first sent a Notice to Leave he

would have had to wait in excess of two years to have the matter be properly heard before the Tribunal. Given the error was by one day and that the Respondent had previously indicated she was removing from the Property and that she had also had the benefit of input from Mr. Patrick it seemed disproportionate to the Tribunal not to exercise its discretion in the matter and proceed to hear the matter.

Findings in Fact and Law

The Tribunal found the following facts to be established:-

- The Applicant was the owner of the Property;
- The Applicant had let the Property to the Respondent by way of a private residential tenancy under the terms of the Act with effect from 1 July 2018;
- The Applicant had a genuine intention to both significantly refurbish the Property and to live in it as his main residence;
- The Applicant had satisfied the tests contained in Grounds 3 & 4 of Schedule 3 of the Act.

Reasons for the Decision

The relevant tests to be applied by the Tribunal were contained in Grounds 3 & 4 of Schedule 3 of the Act and are as follows:-

"3 Landlord intends to refurbish
3(1)It is an eviction ground that the landlord intends to carry out significantly disruptive works to, or in relation to, the let property.

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

(a)the landlord intends to refurbish the let property (or any premises of which the let property forms part),

(b)the landlord is entitled to do so, and

(c)it would be impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord.

(3)Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(a) includes (for example)—

(a)any planning permission which the intended refurbishment would require,

(b)a contract between the landlord and an architect or a builder which concerns the intended refurbishment.

Landlord intends to live in property
4(1)It is an eviction ground that the landlord intends to live in the let property.

(2)The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months.

(3)References to the landlord in this paragraph—

(a)in a case where two or more persons jointly are the landlord under a tenancy, are to be read as referring to any one of them,

(b)in a case where the landlord holds the landlord's interest as a trustee under a trust, are to be read as referring to a person who is a beneficiary under the trust.

(4)Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2) includes (for example) an affidavit stating that the landlord has that intention"

The Tribunal considered Ground 4 first. It is, to a certain degree, difficult for any landlord to produce hard evidence of an intention to live in a property, other than simply saying that it is their intention to do so. Subsection 4 of this ground highlights that evidence tending to show such an intent may be an affidavit. In this case the Applicant had produced such an affidavit from himself confirming he intended to live in the property as his principal home for 3 or more months. He also produced an affidavit from a friend in the area who confirmed that the Applicant had mentioned to him that intended to retire and live in the Property on numerous occasions.

The Tribunal questioned the Applicant in detail as to why he wished to reside in that Property. The Tribunal noted that the Applicant was now 67 and had recently finished working abroad. He had worked in the oil industry and had twice resided in the area for extended periods. Although he was originally from England, he now viewed the Aberdeenshire area as his home.

The Tribunal questioned the Applicant as to what other properties he had and whether he could live in one of them. The Applicant advised that he had 9 other properties. 3 were 2 bed apartments , 2 in Aberdeen and 1 in London. He had 2 properties in Essex. In the Aberdeenshire area, aside from the Property, he owned a larger property at Tarland with 5 acres. He also had a cluster of 3 properties located together between Banchory and Kincardine O'Neill.

The Applicant explained that the Property was the first property he had bought in the area. It had been purchased as his main residence on his first work period in Aberdeen. It had been purchased by him in 1999 and he had carried out certain upgrading works at that point. He preferred to live in the country and so the properties in Aberdeen and London were of no interest to him, other than as investments. He wished to settle in Aberdeenshire and so the properties in Essex were not part of his retirement plan. Although his elderly mother lived in the area, he and his sister had purchased a property next door to his sister's property for their mother to live in. As his sister was her primary carer there was no need for him to live in Essex. The property at Tarland was too large for him. Whilst he wished to have a good sized garden, such as the one at the Property, the property at Tarland

had 5 acres and would be too much for him to maintain in the longer term. The group of properties at Banchory were not of the quality that the Property was. He had lived in the Property before and viewed it as his main residence. In 2005 he had purchased an additional strip of ground from the owner of the field adjacent to the Property along the frontage to give the Property a better aspect. The Tribunal noted this and considered this would not have been a worthwhile investment for a rental property as opposed to a main residence.

The Tribunal noted that the Respondent's representative had made the point in a written submission that the Applicant was living in one of his other properties at the present time and had been so for a year. The Respondent's representative asked the Tribunal in the written submission to investigate. Whilst it is not for the Tribunal to investigate matters of its own accord, this did seem to be a pertinent point. The Applicant stated that he had retired in the latter half of 2019. He had then spent a few months refurbishing one of his properties in Essex. He had relocated back to Aberdeenshire at the start of 2020, in anticipation that the Property would become vacant. He had initially stayed with a friend but with the likelihood of lockdown becoming obvious he had moved in to one of his own properties that was vacant as an interim measure.

The Tribunal considered matters. The Tribunal considered that the Applicant gave his evidence in a credible and open fashion. The Tribunal put numerous questions to the Applicant as to why he wished to move back to this particular property and not to one of his other properties. He answered all questions fluently, at length and without hesitation. He gave a detailed reasoning why he wished to move back to the Property. He had lived in it previously as his main residence as opposed to the other properties he owned. His age was consistent with retirement. The fact that he had moved in to another of his properties at the present time did not carry any great weight. It was a logical thing to do whilst the tenancy at the Property had continued longer than he had anticipated. He had produced affidavits from both himself and a 3rd party. Taking all of the evidence before it, the Tribunal found that, on the balance of probabilities that the Applicant did intend to move in to the Property and live in it for at least 3 months. On that basis, the Tribunal was obliged to grant the order for possession.

The Tribunal then considered Ground 3 of Schedule 3 and whether the Applicant intended to carry out a significant refurbishment at the Property. The Tribunal determined that in this regard also the Applicant had the necessary intent. As noted above, the Applicant appeared credible and open to the Tribunal and this was the case in relation to this ground also.

The Tribunal noted that the examples given that may support intent were a building contract or planning permission. Whilst the Applicant had produced a couple of quotes in this regard, there was limited information available. The Applicant submitted that he intended to do the majority of the non-structural works and redecoration himself. For the bigger works he really needed to access the Property in the company of contractors/architects to explain what he required so they could price the works accordingly. However, the Respondent had not been allowing him access and so he had been unable to make significant progress in this regard. There

were with the papers numerous emails between the parties which did substantiate the Applicant's claim in this regard.

The Tribunal questioned the Applicant at length on the works that he intended to carry out. The Applicant spoke at length and in minute detail about his plans to improve drainage, build a garage, replace the kitchen and bathroom, rearrange the layout, install energy efficient heating systems and a myriad of other matters. It was readily apparent to the Tribunal that the Applicant was intimately acquainted with the Property and had detailed plans that he wished to put in place. Whilst there was limited other evidence available, nonetheless the Tribunal found the evidence given in response to the Tribunal's questions to be compelling. On the balance of probabilities the Tribunal was satisfied that the works planned were significant and that it would be impracticable for a tenant to continue to occupy. Accordingly the test had been met for this ground also.

The Respondent's representative had submitted 3 inventories of productions. The Tribunal ensured that they considered these but found them to be of little benefit. The tests to be applied related to the intent of the Applicant to live in and refurbish the Property. Little of the submissions related to that, although the information that the Applicant had lived in another of his properties was useful. Much of the correspondence related to repairs at the Property and the general breakdown in relations between the parties, to details around a previous tenancy and an allegation that the Applicant had visited the Property without the consent of the Respondent. These were not materially relevant to the legal test to be applied. There was also a fairly unusual situation in that Mr Patrick had, until recently, been the Applicant's letting agent. There appeared to be a dispute between them and Mr Patrick now represented the tenant.

In any event, the Tribunal could only consider such information as related to the question of the intent of the Applicant to carry out works and to occupy. For the reasons set out above the Tribunal was satisfied that on the balance of probabilities the Applicant did intend to occupy the Property and carry out significant refurbishment. On that basis, the Tribunal was content to grant the order for possession sought and resolved to do so.

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.

E Miller

17 August 2020

Legal Member/Chair **Date**