



**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/EV/21/1722**

**Re: Property at 11 Heathlands Park, Kinellar, AB21 0SG (“the Property”)**

**Parties:**

**Mr Kenneth Marshall c/o Craigmar Properties, 9 Heathlands Park, Kinellar, AB21 0SG (“the Applicant”)**

**Mr Darren Bell, Ms Kim Downie, 11 Heathlands Park, Kinellar, AB21 0SG; 11 Heathlands Park, Kinellar, AB21 0SG (“the Respondent”)**

**Tribunal Members:**

**Valerie Bremner (Legal Member) and Elizabeth Williams (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 of the Property be made in terms of section 51(1) of the Private Housing (Tenancies)(Scotland) Act 2016 under Ground 12 of part 3 of schedule 3 to the Act.**

**The Decision of the Tribunal was unanimous.**

1. This is an application for an Eviction order in terms of Rule 109 of the Tribunal Rules of Procedure. The application was first lodged with the Tribunal on 16th July 2021. It was accepted by the Tribunal on 17 August 2021 and a case management discussion was fixed in respect of the application for 1 October 2021. A related payment order application (FTT/HPC/CV/21/2045) also called for a case management discussion on 1 October 2021.

**The Case Management Discussion**

2. At the case management discussion on 1 October 2021 the Applicant was represented by Mrs Moira Marshall and Ms Christine Marshall, mother and

daughter. They are involved in the family business Craigmar Properties, which is a partnership between Mr Kenneth Marshall and Mr Charles Marshall which exists to manage the family's rental property portfolio of around a hundred properties.

3. There was no appearance at the case management discussion by or on behalf of the Respondents. Ms Christine Marshall requested that the Tribunal proceed in their absence. The Tribunal noted that papers for both Respondents had been served by Sheriff Officers who had deposited both sets of papers in the letterbox at the property. The Tribunal was satisfied that both Respondents had received the application and supporting papers with reasonable notice of the case management discussion. In the circumstances the Tribunal was prepared to proceed in the absence of the Respondents.
4. The Tribunal had sight of the application, a tenancy agreement, a sheet outlining rent payments made and outstanding payments, e mail correspondence with the Tribunal, a simplified sheet setting out outstanding rental payments together with three letters from the owners of the property giving consent for the landlord to lease properties on their behalf. The Applicant had also lodged a Notice in terms of Section 11 of the Homelessness etc (Scotland) Act 2003, an email intimating this notice to Aberdeenshire Council, a Notice to Leave and recorded delivery postal slip in relation to this notice.
5. Ms Marshall advised the Tribunal that the Respondents had entered into a private tenancy agreement at the property, with Mr Kenneth Marshall, her father, a partner in Craigmar Properties, with effect from 1 June 2019 with a monthly rent payable of £1095. Ms Marshall could not advise the Tribunal if the Respondents were employed or self-employed at the start of the tenancy but was able to say that for the first few months of the tenancy the rent was paid. Arrears started to develop in November 2019 and between December 2019 and the start of August 2021 rent had been paid only for the months of January 2020 and July 2021. Ms Marshall indicated that it was understood that the Respondents lived at the property with three school-age children. She was aware that since early in 2020 when the arrears started to build up emails were sent, phone calls were made and letters sent to the Respondents. She indicated that Respondents had spoken to Mr Kenneth Marshall the landlord promising to pay the arrears saying that they would be seeking help to pay the rent. A cheaper rental property had been offered to them in an effort to assist them but despite all attempts to secure rental payments from the Respondents nothing was forthcoming. The outstanding rent as of 1 August 2021 when the application was made to the Tribunal was £21,495. At no time during the tenancy had the Respondents ever suggested that the rent arrears were accruing due to a failure or delay in payment of a relevant benefit although at one stage it had been suggested by them that they would be seeking help to pay the rent.
6. Ms Marshall and her mother Mrs Marshall also advised the Tribunal that they understood that the Respondents might be leaving the property, as they had been observed packing up as if to leave and on the morning of the case management discussion a text been received to the effect that the keys would be returned by early in the next week. No attempt had been made by the Respondents to communicate with either Mr Kenneth Marshall the landlord or any member of the Marshall family involved in the business regarding payment of the rent arrears.

7. The Tribunal noted that the application ran in the name of Craigmar Properties and not the name of the landlord Kenneth Marshall. Ms Marshall indicated that she had understood this had been “sorted out” and that the application was to run in the name of Kenneth Marshall as landlord in terms of correspondence with the Tribunal. It appeared that the related payment order application had been amended to run in the name of Mr Marshall but the eviction application had not been so amended. Ms Marshall moved to amend to insert Mr Marshall’s name as Applicant. In support of her request she indicated that the Respondents were well aware of Mr Marshall’s position within the partnership Craigmar Properties and pointed to the fact that in the tenancy agreement itself, rent was payable direct to Craigmar Properties. The Tribunal considered the request to amend the name of the Applicant and whether there would be prejudice to the Respondents if such an amendment were made. The Tribunal took the view that in the circumstances where the Respondents were well aware of the name of their landlord and the connection between the landlord and Craigmar Properties that it would be appropriate to allow an amendment to the name of the Applicant to be made without any additional conditions being imposed as regards the amendment in terms of Rule 14A(2) of the Tribunal Rules of procedure.
8. There was discussion at the case management discussion as to whether the eviction action was necessary given that Ms Marshall and her mother Mrs Marshall indicated that a text had been received to suggest that the Respondents were leaving the property. The Tribunal adjourned briefly to allow an update regarding that matter to be obtained but no further information was available on the day of the case management discussion and there was no suggestion that keys had been returned to the Applicant or any member of the family involved in Craigmar Properties. In the circumstances Ms Marshall requested that the Tribunal consider the eviction application as the suggested departure of the Respondents was uncertain.
9. The Tribunal noted that the Notice to Leave produced by the Applicant did not on the face of it appear to comply with section 62(4) and (5) of the 2016 Act in that the date noted in part four of the notice appear to be exactly 6 months after the Notice to Leave had been posted by recorded delivery. The Notice to Leave was dated 8th December 2020 and a six month notice period applied, but given the assumptions made in the Act as regards receipt of the document by a tenant under section 62(5), the date in part four of the notice ought to have been 11<sup>th</sup> June 2021 and not 8th June 2021. Ms Marshall asked the Tribunal take account of paragraph 10 of Schedule one of the Coronavirus (Scotland) Act 2020 and hold that the failure to take proper account of the notice periods relevant to the application as set out in the 2020 Act would not render the Notice to Leave invalid. The Tribunal noted that the application had been lodged after the expiry of the proper notice period but had simply failed to take proper account of section 62(4) and (5) of the 2016 Act. The Tribunal considered matters and was prepared to hold that the error in the notice period set out in part four of the Notice did not render the notice to leave invalid.
10. The Tribunal also raised the issue of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 which required certain steps to be taken by landlords before making an application to the Tribunal for eviction on rent arrears grounds after 6<sup>th</sup> October 2020 in respect of certain applications such as this one. Ms Marshall was not aware of the pre-

action protocol but pointed to the attempts made by the landlord Kenneth Marshall and various family members to engage the Respondents in an effort to address the rent arrears, all of which attempts had been unsuccessful. The Respondents had been offered the opportunity to rent cheaper rental property in an effort to assist them but the offer had not been accepted.

11. Whilst there was little information before the Tribunal regarding the Respondents' circumstances, given the history of non-payment and the substantial rent arrears, the Tribunal felt it was reasonable to make an eviction order in terms of Ground 12, Part 3 of schedule 3 of the 2016 Act.

### **Findings in Fact**

12. The Applicant Kenneth Marshall entered into a private residential tenancy at the property with the Respondents with effect from 1 June 2019.
13. The monthly rent payable in terms of the tenancy agreement was £1095 payable on the first of each month.
14. Rent arrears started to accrue from November 2019 and from that date until August 2021 only two months' rent were paid by the Respondents.
15. Rent arrears as at the start of August 2021 had reached £21,495.
16. Rent arrears as at the date of the case management discussion stood at a sum in excess of £22,000.
17. These rent arrears were not caused by a delay or failure in the payment of a relevant benefit to or on behalf of the Respondents.
18. The Applicant and a number of family members in the family business Craigmar Properties had over a number of months during the tenancy attempted to contact the Respondents regarding the rent arrears by email, telephone, letter, and face-to-face conversation.
19. The Applicant Mr Kenneth Marshall offered the Respondents the opportunity to move to a cheaper rental property to assist their situation but this offer was not accepted.
20. Despite efforts made by the Applicant and other family members to deal with the rent arrears at no time did the Respondents make any proposals for payment of the arrears by any form of instalment plan.
21. A valid Notice to Leave was sent to the Respondents setting out the intention to apply to the Tribunal for an eviction order in terms of Ground 12 of schedule 3 of the 2016 Act.
22. A notice in terms of section 11 of the Homelessness etc (Scotland) Act 2003 was sent to Aberdeenshire Council prior to the application for an eviction order being submitted to the Tribunal.
23. Rent at the property in terms of the tenancy agreement between the parties is in arrears over a period of more than three consecutive months.

### **Reasons For Decision**

24. The Tribunal dealt with a number of procedural matters prior to coming to a decision in relation to the application. The application had been lodged in the name of the partnership which dealt with the management of the rental properties and not the landlord himself. There was a request by the Applicant's representative to amend the application to run in the name of the landlord, the

Applicant's representative believing that this request had been made of the Tribunal in advance of the case management discussion and there was correspondence to that effect in relation to the related payment order application. Having considered the matter and given that the Respondents although absent, were said to be fully aware of the relationship between the named landlord Mr Kenneth Marshall and the partnership to which the rent was paid, there seemed to be no prejudice of any kind to the Respondents in allowing the name of the Applicant in the application to be amended.

25. The Tribunal also had to consider the Notice to Leave lodged with the application. Although this had not been used to support a request for an eviction order prior to the expiry of the notice period, the date entered in part four of the Notice to Leave was clearly incorrect having regard to the terms of section 62(4) and(5) of the 2016 Act, in that no account had been taken of the statutory assumption that the tenant would receive the Notice to Leave 48 hours after it was sent and that the date to be put in part four of the notice would be the day after the expiry of that notice period. It was clear from the Applicant's representative's responses when asked about this matter that this was simply a failure to take proper account of the notice period as amended by the 2020 Act and the Tribunal took the view that it could apply the provisions of paragraph 10 of Schedule 1 of the 2020 Act in this application and find that this did not render the notice to leave invalid.
26. The Tribunal also had to consider the fact that the Applicant in this application had not complied with the terms of the Pre-Action Protocol requirements as set out in the (Coronavirus) (Scotland) Regulations 2020 in that the regulations had not been complied with in terms of the letters which require to be sent to a tenant in advance of the application. The Tribunal noted that the failure to comply with the pre-action protocol is not of itself fatal to an application but is something to which the Tribunal must have regard in deciding the application. The Tribunal did accept however that in this case the Applicant had made a number of efforts to engage the Respondents in relation to the significant rent arrears to no avail. They had also offered the Respondents the opportunity to rent another property within their extensive property portfolio at a cheaper rent but this offer appeared not to have been accepted.
27. In considering whether it was reasonable to grant the order, having been satisfied regarding the validity of the Notice to Leave and other statutory requirements in respect of an eviction order application, the Tribunal came to the view that the statutory eviction ground had been established and a prima facie case as to reasonableness had been made out. It would be a matter for the tenants to put matters before the Tribunal to show why the order should not be granted and the tenants had not appeared in relation to this application. The Tribunal took the view that in a situation such as this, where there is a significant sum of arrears and a history of non-payment, there is an effective onus on the tenant to put forward reasons why it would not be reasonable to grant the order, in order that the strength of each party's position could be weighed. In this application the Respondents chose not to appear at the Case Management Discussion and put their position although they had been given notice of it. The Tribunal was therefore satisfied having regard to the significant history of non-payment and the amount of the arrears that it would be reasonable to grant the order for eviction as requested.

## **Decision**

The Tribunal determined that it was reasonable to make an order for possession of the Property in terms of section 51(1) of the Private Housing (Tenancies)(Scotland) Act 2016 under Ground 12 of part 3 of schedule 3 to the 2016 Act.

## **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.

Since an appeal is only able to be made on a point of law, a party who intends to appeal the tribunal's decision may wish to request a Statement of Reasons for the decision to enable them to identify the point of law on which they wish to appeal. A party may make a request of the First-tier Tribunal for Scotland (Housing and Property Chamber) to provide written reasons for their decision within 14 days of the date of issue of this decision.

Where a Statement of Reasons is provided by the tribunal after such a request, the 30 day period for receipt of an application for permission to appeal begins on the date the Statement of Reasons is sent to them.

Valerie Bremner

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Legal Member/Chair

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Date

1.10.21