



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.

Chamber Ref: FTS/HPC/EV/23/0538

Re: Property at 43/8 West Bryson Road, Edinburgh, EH11 1BQ (“the Property”)

Parties:

Mr Andrew Ferguson, 21/1 Moo 3, Soi Haddsurin 2, Cherngt, Phuket, Thailand (“the Applicant”)

Ms Miwako Ferguson, 43/8 West Bryson Road, Edinburgh, EH11 1BQ (“the Respondent”)

Tribunal Members:

Shirley Evans (Legal Member) and Elaine Munroe (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order against the Respondent for possession of the Property at 43/8 West Bryson Road, Edinburgh, EH11 1BQ under Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”) be granted. The order will be issued to the Applicants after the expiry of 30 days mentioned below in the right of appeal section unless an application for recall, review or permission to appeal is lodged with the Tribunal by the Respondent. The order will include a power to Officers of Court to eject the Respondent and family, servants, dependants, employees and others together with their goods, gear and whole belongings furth and from the Property and to make the same void and redd that the Applicant or others in his name may enter thereon and peaceably possess and enjoy the same.

Background

1. This is an application for an order for repossession under Rule 109 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”).

2. The action is unusual as it is founded on two contracts between the parties headed "Schooling Agreements" dated 27 June 2019 and 17 November 2019 which the Applicant argues create a Private Residential Tenancy ("PRT") agreement between the parties. The Notice to Leave is based on the Respondent's alleged failure to pay various bills, allowing another party to live in the Property (Ground 11) and anti-social behaviour (Ground 15). The Schooling Agreements, the Notice to Leave with an Execution of Service by Stirling Park Sheriff Officers dated 23 November 2022, emails between Applicant and Respondent dated 17 November 2019, emails from the Factor dated 28 March 2022, 5 and 19 April 2022, 28 June 2022, 27 July 2022, 12 August 2022 and 17 October 2022, an email from a neighbour dated 21 October 2022 and a Section 11 Notice to Edinburgh City Council dated 20th February 2023 were attached to the application. Extensive written submissions were also made by the Applicant's solicitor in response to queries from the Tribunal which also formed part of the application.
3. The Tribunal proceeded to a Case Management Discussion on 16 June 2023 by way of teleconference. Mr Chisholm from Complete Clarity Solicitors & Simplicity Legal appeared for the Applicant. Mr Ferguson, the Applicant was also in attendance. There was no appearance by or on behalf of the Respondent.
4. Mr Chisholm, with reference to the written submissions lodged, submitted that the Respondent, who is the Applicant's ex-wife, is a tenant at the Property under a PRT in terms of the Private Housing (Tenancies) (Scotland) Act 2016. He submitted the Schooling Agreement dated 27 June 2019 placed an obligation on the Applicant to pay the Respondent £320 per month for child maintenance when she moved to Scotland and that the variation of the Schooling Agreement dated 17 November 2019 created the tenant/landlord relationship. He submitted Clause 2(b) created an obligation to pay a sum equivalent to rent on the Respondent to the Applicant. The Tribunal noted that Clause 2(b) stated "*This arrangement will be instead of AF (the Applicant-sic) paying 320 GBP per month to MF (the Respondent-sic) for child support.*" Mr Chisholm submitted that rent can be set off against another obligation to pay by the landlord to the tenant as a consideration in kind. The Tribunal noted Mr Chisholm's written submissions which referred to Rankine, The Law of Leases in Scotland (1916) at page 114 which states "*parties are entitled to agree...to rent set against payment of interest on debt due by the landlord to the tenant...or for any purpose not rendered illegal by the general law of contract*". Mr Chisholm also submitted the other cardinal elements of a Lease were also contained within the second Agreement namely the parties, the property and the duration. The Respondent lived in the Property as her only or principal home as a separate dwelling.
5. The Tribunal queried whether this arrangement was a PRT or a licence to occupy and accordingly whether it had jurisdiction. The Tribunal also queried whether the Notice to Leave had given the Respondent sufficient notice under the 2016 Act. The Tribunal noted the Notice to Leave was served on the Respondent on 23 November 2022 by Sheriff Officers and accepted the Applicant's written submission that following the Upper Tribunal case of *Smith*

v MacDonald [2021] UT 20 and under Section 26(5) of The Interpretation and Legislative Reform (Scotland) Act 2010 the Respondent received the Notice to Leave on 23 November 2022 by that delivery. The Notice to Leave provided the Applicant could not apply to the Tribunal for an eviction order before 21 December 2022. Mr Chisholm submitted that Section 62(4) of the 2016 Act requires the day to be specified in the Notice to Leave on which the landlord expects to become entitled to make an application for an eviction order to the Tribunal, that day being the day falling after the day on which the notice period defined in section 54(2) will expire. He submitted that although that date fell short by one day this was a minor error that should not invalidate the Notice in terms of section 73 of the 2016 Act. Mr Chisholm further submitted that under section 52(2) of the 2016 Act although the Tribunal could not entertain an application for an eviction order if it is made in breach of section 52(3) or any of sections 54 to 56 of the 2016 Act, the Tribunal can entertain an application made in breach of section 54 (restriction of applying to the Tribunal during the Notice period) if the Tribunal considers that it is reasonable. His submission was that the Respondent had been denied one day's notice at the most, but that as the application was not made until 20 February 2023 the Respondent has not been prejudiced as she was aware the application could be made.

6. In relation to the breaches of the agreement referred to in the Notice to Leave Mr Chisholm submitted that under Clause 2 (c) of the variation dated 17 November 2019, the Respondent was to pay for utilities etc which she had not done. Under Clause 2(d) she was not to sub let; it was believed her partner had lived with her at some time, although it was unclear as to whether he still did or whether he was possibly in prison. He submitted the Respondent's partner was at the centre of anti -social behaviour and made reference to the emails lodged.
7. The Tribunal decided to continue the matter to a full Hearing to determine-
 - i. Whether the Tribunal had jurisdiction and whether the "Schooling Agreements" created a PRT or a Licence to Occupy;
 - ii. If a PRT is in existence between parties, whether the Notice to Leave was valid with reference to Sections 52, 54 and 62 of the 2016 Act;
 - iii. Whether there is a ground or grounds of eviction under the 2016 Act with reference to the up to date position on the Respondent's partner residing in the Property, full details of the alleged anti-social behaviour, the steps the Applicant took to stop the behaviour complained of, the nature and content of any discussions between the parties particularly now their son has finished school and details of the bills, including amounts, the Respondent had not paid;
 - iv. If there is a ground to evict, whether in all the circumstances, it is reasonable to evict.

8. The Tribunal issued a Notice of Direction requesting a full affidavit from Mr Ferguson covering these factual aspects of the case and requesting documentary evidence relating to the Respondent's alleged non-payment of utility bills and anti-social behaviour. The Applicant's solicitor submitted an affidavit from the Applicant and documentary evidence comprising bank statements, statements from Talk Talk and Scottish Power, emails from 1 September 2020 -2 May 2023 from the Applicant to the Respondent and further copies of emails from 28 March – 17 October 2022 from James Gibb, Property Factors, an email from a neighbour dated 21 October 2022 and a copy email dated 17 November 2019 with a copy of the second Agreement.

Hearing

9. The case proceeded to a Hearing on 24 July 2023. by way of teleconference. Mr Stevenson from Complete Clarity Solicitors & Simplicity Legal appeared for the Applicant. Mr Ferguson, the Applicant was also in attendance. There was no appearance by or on behalf of the Respondent despite the teleconference starting 5 minutes late to allow her plenty of time to join. The Tribunal noted the Respondent had been notified by a Recorded Delivery letter dated 10 July 2023 that the Hearing would proceed on 24 July 2023 and accordingly proceeded in absence of the Respondence.

Mr Ferguson's evidence

10. On behalf of the Applicant Mr Stevenson referred the Tribunal to Mr Ferguson's affidavit. The Tribunal was happy to take his affidavit as read as forming his evidence in chief. Mr Stevenson did not wish to lead any further evidence from Mr Ferguson at this stage.
11. Mr Ferguson's affidavit was dated 4 July 2023. Mr Ferguson gave evidence in his affidavit that he had been married to the Respondent for 13 years and had one son. They married in Japan. They divorced in August 2014. Under Japanese law divorce can be settled between parties by agreement. Mr Ferguson was living in Thailand and the Respondent in Japan. By 2018 parties agreed that their son should be educated at school in Edinburgh. In 2019, the Respondent wanted to move to Edinburgh to be nearer their son. The Applicant purchased the Property in October 2019. To assist the Respondent who was coming to a foreign country and for the benefit of their son, parties agreed that the Respondent would live in the Property. The parties then entered into a variation of their original agreement which related to the arrangements for their son on 17 November 2019. It was agreed that in lieu of rent the Applicant would not pay the Respondent the monthly child maintenance payment under their divorce agreement. The Tribunal noted that Clause 2(b) of the variation dated 17 November 2019 stated "*This arrangement will be instead of AF (the Applicant-sic) paying 320 GBP per month to MF (the Respondent-sic) for child support.*"
12. Mr Ferguson's evidence in his affidavit was there had been some initial issues with payment of the utility bills. By June 2023 there was £1383.77

outstanding. The Tribunal noted that under Clause 2 (c) of the second Agreement, the Respondent was to pay for utilities etc at the Property.

13. His affidavit then referred to anti -social behaviour at the Property from January/February – October 2022. This behaviour was initially caused by the Respondent's partner who lived at the Property. The Tribunal noted that under Clause 2 (d) of the second Agreement, the Respondent was to not to have anyone else living in the Property with her. The behaviour comprised of aggressive and intimidating behaviour towards neighbours, vandalism and damage to neighbours' vehicles, damage to neighbours' property, most of which was attributed initially to the Respondent's partner. The factors of the Property had contacted the Applicant to advise him of the position. The affidavit went onto explain that the Respondent's partner had been arrested at the Property on 25 March 2022 despite the Respondent advising the Applicant on 23 March 2022 that she would not allow her partner to continue to live in the Property. The Applicant was concerned for his son's safety if he visited the Property. On 23 March 2023 the Respondent advised the Applicant she would move from the Property by June 2022.
14. The Applicant's affidavit explained he agreed to give the Respondent until June 2022 and offered to help her find alternative accommodation.
15. Finally in Mr Ferguson's affidavit he gave evidence that the Respondent had the financial means to find alternative accommodation, that she had a property in Japan and various investments and would therefore not be homeless.
16. The Tribunal proceeded to question Mr Ferguson firstly in relation to the utility bills and then anti-social behaviour.
17. On being questioned by the Tribunal Mr Ferguson was referred to the bank statements lodged noting the first one was dated April 2021. Mr Ferguson clarified that there had been a few issues between 2019 and 2021, mainly due to banking problems. On 4 April 2022 the Respondent had brought all payments due to him for the utility bills up to date when the Applicant visited the UK. The Tribunal noted a payment of £1180 was made by the Respondent on 4 April 2022. Mr Ferguson explained that no further payments had been made by the Respondent towards the utility bills since then despite him sending monthly emails to the Respondent advising her of the increasing sum due. These emails were ignored by the Respondent. He cancelled the Scottish Power direct debit in April 2023 and explained that he had not done so previously as he was hopeful that the Respondent would pay, bearing in mind that there had been long gaps in payment previously. He had kept the Talk Talk direct debit as he needed the Respondent to have internet access as he relied on email as a means of communication with her. With reference to the email of 2 May 2023 to the Respondent Mr Ferguson confirmed the amount outstanding for utility bills was £1277.13 and that he had made other payments since then for broadband. He advised that no reason had been

given by the Respondent for non-payment of the utility bills despite her obligation to pay these.

18. The Tribunal then questioned Mr Ferguson about anti-social behaviour at the Property. The Tribunal referred the Applicant to the emails lodged dated from 28 March -17 October 2022 from James Gibb, Property Factors. With reference to the Applicant's affidavit the Tribunal noted his evidence was to the effect that the behaviour started in January/February 2022 but the first email from James Gibb was dated 28 March 2022. Mr Ferguson explained he received the first complaints of anti-social behaviour in March 2022, but that the behaviour had been going on since January 2022 as referred to in the email dated 21 October 2022 from a neighbour. It had taken James Gibb some time to establish who was responsible for the Property. When he became aware of the problems at the Property Mr Ferguson advised he tried to contact the Respondent. He spoke with her on 23 March 2022. He told her that her partner was wanted by the Police and that he had been responsible for anti-social behaviour at the block. His concern was for their son. He advised the Respondent accepted this and assured the Applicant she would not allow her partner to continue to live in the Property. However, her partner was arrested two days later on 25 March 2022 at the Property. As far as the Applicant was aware the Respondent's partner has not been back at the Property since then. The Police would not give him any information.
19. The Tribunal noted the email of 28 March 2022 complained of intimidation and assaults by the Respondent's partner, damage to neighbours' vehicles including slashed tyres, smashed windscreens, eggs being thrown at neighbouring properties' windows and that the Respondent's partner had spat at neighbours. The Tribunal further noted some neighbours had given up their tenancies in the block where the Property was situated because of the behaviour.
20. With reference to the email from James Gibb on 19 April 2022, the Tribunal noted the Respondent was aggressively banging on neighbours' doors which was scaring the neighbours. Mr Ferguson pointed out that it was in this email the Respondent had advised the Police that her partner was residing with her at the Property when he was arrested.
21. The Tribunal pointed out that concerns had been raised about the Respondent's mental health in the emails of 19 April and 28 June 2022 and queried whether the Applicant was aware of whether she had any mental health issues. Mr Ferguson explained that in the past the Respondent had had periods of poor mental health. When the complaints came to light, he called an NHS helpline but was told that unless the Respondent was a danger to herself or others there was nothing that could be done to assist the Respondent unless she wanted help. However, he had no reason to believe she was a danger to herself or others.
22. The Tribunal noted the further emails of 27 July 2022 concerning the Respondent knocking on doors and ringing door bells, of 12 August 2022 concerning screaming and of 17 October 2022 regarding a leak to the

property below, screaming and banging. Mr Ferguson explained that when the factor had emailed him on 17 October 2022 he was in Edinburgh. He attended at the Property and was given access by the Respondent. He discovered the sealant round the bath/ shower had been removed which resulted in water running down the wall into the flat below. The Applicant explained that he again spoke to the Respondent about her behaviour but that there was no meaningful discussion from the Respondent. With reference to the email dated 21 October 2022 from a neighbour the Applicant explained that although it referred to the Respondent's partners behaviour he understood that this was the neighbour summarising what had happened over the previous 10 months which included the time up to when the Respondent's partner was arrested and since then with the complaints about the Respondent screaming, shouting and banging on doors and ceilings and floors causing the neighbour to feel fearful. On being questioned further from the Tribunal he confirmed the last date any complaints had been received was the email of 21 October 2022 from the neighbour. He also advised that he last spoke with the Respondent in April 2023 when he was in Edinburgh as he was trying to gain entry to the Property to carry out various safety checks, but was unable to gain access. He explained that since the allegations of anti-social behaviour his son had visited his mother at the Property for a few hours at a time.

23. Mr Stevenson was given an opportunity to raise any issues following upon the questioning from the Tribunal. He referred the Applicant to paragraph 20 of his affidavit and the reference to assisting the Respondent to find alternative accommodation. Mr Ferguson explained that he had sent the Respondent emails with detail of properties in a certain price range which he thought may be suitable for the Respondent. However, she was still in the Property which was over a year on from when she said she would move out by June 2022. He explained that the Respondent had also breached the second Agreement which allowed the Respondent to live in the Property until their son had finished high school. His son had now finished high school but the Respondent continued to live in the Property.

Submissions

24. After a short adjournment Mr Stevenson made his submissions. He referred to the submissions previously lodged and re-iterated in his email to the Tribunal of 17 July 2022. He took the Tribunal through the key points of his submission.
25. As had been argued at the Case Management Discussion, Mr Stevenson submitted that the Schooling Agreement as varied by the second Agreement on 17 November 2019 created a Private Residential Tenancy in terms of the 2016 Act. That second Agreement contained the cardinal elements of a lease; the parties were identified, the Property was identified, the rent being £320 per month in lieu of Mr Ferguson not paying the equivalent in monthly child maintenance and the duration was identified as being when the parties' son finished high school, although he submitted that duration was not an essential element of a PRT. The initial contract between the parties created an

obligation on the Applicant to pay the Respondent £320 per month child maintenance. However, the variation of the contract by the second Agreement on 17 November 2019 allowed the Respondent to reside in the Property in lieu of the continuing obligation on Mr Ferguson to pay child benefit. Mr Stevenson submitted that that arrangement amounted to set off. On that basis, he submitted a lease has been created conferring tenancy rights to the Respondent. On being questioned by the Tribunal on the purpose of the second Agreement he submitted the purpose was to provide the Respondent with accommodation she could live in.

26. In relation to the validity of the Notice to Leave the Tribunal reminded Mr Stevenson that the Tribunal had accepted the Applicant's submission at the Case Management Discussion that following the Upper Tribunal case of *Smith v MacDonald [2021] UT 20* and under Section 26(5) of The Interpretation and Legislative Reform (Scotland) Act 2010 the Respondent had received the Notice to Leave on 23 November 2022 by delivery by Sheriff Officers. Mr Stevenson went on to re-iterate the submission made at the Case Management Discussion that Section 62(4) of the 2016 Act requires the day to be specified in the Notice to Leave on which the landlord expects to become entitled to make an application for an eviction order to the Tribunal, to be the day falling after the day on which the notice period defined in section 54(2) will expire. The Notice to Leave specified that date as being 21 December 2022. He accepted that that date fell short by one day and did not therefore comply with section 54, but that that did not invalidate the Notice to Leave. In support of that submission, he referred the Tribunal to section 73 of the 2016 Act which provides that a minor error in the Notice does not invalidate the Notice. The insertion of the date he submitted was a minor error. He further submitted that under section 52(4) of the 2016 Act the Tribunal has a discretionary power to entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable. He submitted the Respondent had been denied one day's notice at the most and that as the application was not made until 20 February 2023 it was reasonable for the Tribunal to use its discretion and allow the application to proceed on the Notice to Leave.
27. Mr Stevenson then addressed the Tribunal on the two Grounds of eviction under the Notice to Leave, namely Ground 15 (anti-social behaviour) and Ground 11 (breach of the tenancy agreement). He submitted that Ground 15 had been established namely that the Respondent had engaged in anti-social behaviour. He referred to the emails lodged from the property factors documenting the anti-social behaviour and referred to the affidavit and oral evidence from the Applicant. He further submitted that Ground 11 had also been met and submitted there was clear evidence of non-payment of utility bills and of the Respondent's partner having resided at the Property as evidenced in the email of 19 April 2022 when the Respondent admitted to the Police when he was arrested at the Property on 25 March 2022 that he resided at the Property.
28. Mr Stevenson submitted it was reasonable to evict. He submitted that his client had been very patient. He had followed the legal process and had tried

to help the Respondent find alternative accommodation. The Respondent had refused to engage in the process. Mr Ferguson had been put to the expense of bringing this action. The Tribunal queried the Respondent's state of mental health with reference to the emails that raised concern about her well being. Mr Stevenson submitted that there was no evidence before the Tribunal that the Respondent was suffering from any mental health condition currently or at the time of the behaviour. He submitted his client had been candid and open in stating that the Respondent had suffered periods of ill mental health in the past. The state of the Respondent's current mental health could easily have been proved by medical evidence, but there was no such evidence before the Tribunal.

29. The Tribunal queried whether it was reasonable to evict on Ground 15 when there had on the evidence been no further complaints of anti-social behaviour since October 2022. Mr Stevenson accepted that but submitted that although there was no known reports since October 2022 it was possible that had not been reported, although he did accept that in all likelihood this would have been reported by the property factors had complaints been received by them. In his submission there was no guarantee that anti-social behaviour would not happen again. The Tribunal queried whether on another view it could be concluded that the Respondent had stopped her behaviour after she had received the Notice to Leave. In response Mr Stevenson submitted that regardless, the Tribunal should take into account incidents which were less than a year old. The last incident was in October 2022. He further submitted that it would be reasonable to evict as the Respondent had shown no remorse or accepted that her behaviour was unacceptable. Further the Tribunal noted the terms of the Applicant's affidavit that the Respondent had the financial means to secure alternative accommodation, a property in Japan and various investments.

30. Finally, Mr Stevenson made submissions on the Cost of Living (Tenant Protection) (Scotland) Act 2022. He submitted and accepted that in the event that the Tribunal decided to make an Order of repossession this could not be enforced for 6 months unless the Tribunal granted the Order under Ground 15.

31. The Tribunal noted that a notice in terms of section 11 of the Homelessness etc (Scotland) Act 2003 had been served on Edinburgh City Council on 20 February 2023.

Findings In Fact

32. The Applicant and the Respondent entered into a contract headed "Schooling Agreement" on 27 June 2019. In terms of Clause 2 of that Agreement the Applicant agreed to pay £320 per month to the Respondent for child support starting from when the Respondent moved to Scotland. There is no mention of the Property in that Agreement.

33. On 17 November 2019 the agreement dated 27 June 2019 was varied by the parties. In terms of Clause 2 of this variation parties agreed that the Applicant would allow the Respondent to reside in the Property subject to certain conditions. The Respondent had exclusive possession of the Property. Under Clause 2 (b) parties agreed "*This arrangement will be instead of AF (the Applicant-sic) paying 320 GBP per month to MF (the Respondent-sic) for child support*". Under Clause 2 (c) parties agreed the Respondent was responsible for Council Tax, utility bills and the TV License fee and that these costs would be paid either directly or via the Applicant's UK bank account. Further to Clause 2 (d) the parties agreed that the Respondent would not sublet any part of the property or allow any third party to stay at the property on a long-term basis.
34. The Respondent has failed to comply with her obligation to meet the utility bills in terms of Clause 2 (c) of the variation dated 17 November 2019. The Applicant sent monthly emails reminding the Respondent of her obligation and seeking payment of the bills. As of 2 May 2023, to the Respondent was due to pay the Applicant £1277.13 for utility bills. She has ignored all attempts by the Applicant to engage with him and has given no reason to the Applicant for her failure to pay for the utilities.
35. The Respondent has breached the terms of Clause 2 (d) of the variation dated 17 November 2019 by allowing her partner to live in the Property. The Respondent advised the Police that he was resident at the Property. The Respondent's partner has not lived in the Property since 25 March 2022,
36. The Respondent and her partner have engaged in anti-social behaviour at the Property. During March 2022 the Respondent's partner assaulted and intimidated neighbours, damaged neighbours' vehicles including slashing tyres and smashing windscreens. He threw eggs at neighbouring properties' windows, He spat at neighbours. His behaviour placed neighbours in a state of fear. He was arrested on 25 March 2022 and has not returned to the Property.
37. During April 2022 the Respondent aggressively banged on neighbours' doors Her behaviour placed neighbours in a state of fear. The Respondent advised the Applicant she would leave the Property by June 2022. The Applicant has made efforts to assist the Respondent in finding alternative accommodation. The Respondent has the financial means to secure alternative accommodation.
38. The Respondent remained in the Property after June 2022. During July 2022 the Respondent was knocking on doors and ringing door bells. On or about 2 August 2022 the Respondent was screaming at the Property causing neighbours to be alarmed. On 17 October 2022 the Respondent was screaming and shouting at the Property. Further on 17 October 2022 water leaked from the Property to the property below. The sealant round the bath/shower had been removed which resulted in water running down the wall into the flat below. By email dated 21 October 2022 a neighbour complained to the Applicant about the Respondent's behaviour causing the neighbour to feel

fearful. No further complaints of anti-social behaviour have been received by the Applicant since 21 October 2022.

39. On 23 November 2022 Sheriff Officers delivered a Notice to Leave on the Respondent. The said Notice requested that the Respondent remove from the Property by 21 December 2022. The Notice to Leave proceeded on Grounds 11 and 15 of Schedule 3 of the 2016 Act.
40. A Notice under Section 11 of the Homelessness, etc. (Scotland) Act 2003 was served on Edinburgh City Council on 20 February 2023.
41. The Respondent continues to reside in the Property alone and has the financial means to secure alternative accommodation.

Findings in Fact and Law

42. The variation of the agreement dated 17 November 2019 between the parties provided that the Respondent was entitled to reside in the Property in exchange for her foregoing monthly child support by the Applicant of £320 as provided for in the agreement of 27 June 2019. The Respondent had exclusive occupation of the Property as her only or principal home. The variation contained the essential elements of a lease. The variation of the agreement created a landlord and tenant relationship between the parties.
43. The variation agreement dated 17 November 2019 created a private residential tenancy between the parties in terms of section 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

Reasons for Decision

44. The initial matter for consideration was whether the agreement between the parties headed a "Schooling Agreement" dated 27 June 2019 and varied by agreement dated 17 November 2019 was a lease or licence. That would then determine whether the Tribunal had jurisdiction to consider the application to evict. In the event that the Tribunal found the agreement to be a licence it would not have jurisdiction to consider the application.
45. The Tribunal had the benefit of extensive written submissions lodged on behalf of the Applicant. In essence it was argued on behalf of the Applicant that the agreement dated 27 June 2019 and varied by the agreement of 17 November 2019 created a Private Residential Tenancy agreement under the Private Housing (Tenancies) (Scotland) Act 2016. It was submitted that the four elements required for the creation of a lease were present in the agreement as varied. The Tribunal accept that submission. The terms of the variation shows there was agreement as to parties, premises and duration. Further in relation to rent the Tribunal accept that the agreement dated 27 June 2019 created an obligation on the Applicant to pay child support of £320 per month. The variation then sets out a mechanism for the equivalent of rent to be paid by allowing the Respondent to live in the Property instead of

receiving child support of £320 per month. The Respondent had exclusive occupation of the Property. The Tribunal accepted the Applicant's submission that rent can be a return to the landlord from the tenant in exchange for possession and that rent can constitute a set off of debts owed by the landlord to the tenant with reference to Rankine, *The Law of Leases in Scotland* (1916) at page 114. which states "*parties are entitled to agree...to rent set against payment of interest on debt due by the landlord to the tenant...or for any purpose not rendered illegal by the general law of contract*".

46. As the contract and variation were entered into in June and November 2019 setting out the parties, premises, rent and duration being the essential elements of a Lease, the contract can only be a private residential tenancy agreement as defined in section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 which provides-

"1 Meaning of private residential tenancy

(1) A tenancy is a private residential tenancy where—
(a) the tenancy is one under which a property is let to an individual ("the tenant") as a separate dwelling,
(b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and
(c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy".

There are no exclusions under Schedule 1 that apply in this case.

47. The decision of Sheriff Collins in *St Andrews Forest Lodges Ltd. v Grieve* [2017] SC DUN 25. although not binding on the Tribunal is persuasive. Sheriff Collins discusses that the four elements of the lease being the parties, the property, rent and duration, can be supplemented by the grant of exclusive possession. This additional element assists in determining whether a contract is to be regarded as a lease or licence. The Respondent had exclusive possession of the Property.
48. In all the circumstances the Tribunal is persuaded that the agreement between the parties is a lease and falls within the definition of a private residential tenancy. It follows therefore that the Tribunal does have jurisdiction to determine the application.
49. The Notice to Leave served by Sheriff Officers on 23 November 2022 provided that proceedings could be commenced in the Tribunal on 21 December 2022. This did not give the Respondent the required notice with reference to Sections 54 (2) and 62(4) of the 2016 Act. The notice given fell short by one day. However, the application to the Tribunal was not made until 20 February 2023. The Tribunal accept the Applicant's submission that the Respondent had more than sufficient notice that proceedings would be raised before the application was lodged with the Tribunal. The Tribunal considers that it is reasonable in those circumstances to entertain the application in

terms of Section 52 (4) of the 2016 Act despite the Notice to Leave not complying with Section 54.

50. Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 gives the power to the Tribunal to evict if it finds that any of the grounds in Schedule 3 apply. This application proceeds on Ground 11 (breach of tenancy and Ground 15 (anti-social behaviour). After consideration of the documents lodged on behalf of the Applicant, the Applicant's affidavit and the oral evidence from the Applicant the Tribunal was satisfied that the Respondent had breached the terms of the tenancy agreement by her refusal to pay the utilities bills and by having her partner live with her at the Property and had also engaged in anti-social behaviour. The Tribunal noted that notice under Section 11 of the Homelessness etc. (Scotland) Act 2003 addressed to Edinburgh City Council had been served.
51. Both Grounds 11 and 15 of Schedule 3 of the 2016 Act are discretionary. As well as being satisfied the facts have been established to support the Ground of eviction, the Tribunal has to be satisfied that it is reasonable to evict. In determining whether it is reasonable to grant an order to evict, the Tribunal is required to weigh the various factors which apply and to consider the whole of the relevant circumstances of the case.
52. Having considered the evidence, the Tribunal was not persuaded that it was reasonable to evict under Ground 15. The initial behaviour complained of between January – March 2022 concerned the Respondent's partner. He had been arrested on 25 March 2022 at the Property and had not returned to the Property. Complaints between April – October 2022 were less frequent, but wholly attributable to the Respondent. However, there was no evidence before the Tribunal that this behaviour was continuing. The last complaint was on 21 October 2022. In the circumstances the Tribunal did not find that it would be reasonable to evict under Ground 15.
53. The Tribunal having considered the evidence found that it was reasonable to evict the Respondent under Ground 11. The Applicant had very clear documentary evidence which he spoke to. He had updated the Respondent on a monthly basis as to the amount owed for electricity and broadband. The Tribunal accepted his evidence that the Respondent ignored his requests for payment. She continued to do so and had made no attempt to come to an arrangement with the Applicant to pay the sums due. She had given no explanation as to why she was not paying for the utilities. The Respondent had allowed her partner, who had engaged in anti-social behaviour, to live with her at the Property. The Respondent had not engaged with the Tribunal process and had not disputed the application to evict her from the Property. The Respondent lived alone. Whilst the parties had a son, he did not live with the Respondent. The Tribunal was satisfied the Applicant had attempted to assist the Respondent in finding alternative accommodation. The Tribunal was satisfied the Respondent had the financial means to secure alternative accommodation. The balance of reasonableness in this case weighted

towards the Applicant. The Tribunal find it would be reasonable to grant the order.

54. In the circumstances the Tribunal considered that in terms of Ground 11 of Schedule 3 the Respondent had breached the terms of the tenancy agreement and that it is reasonable to grant an eviction order in terms of Section 51 of the 2016 Act.

Decision

55. The Tribunal granted an order for repossession. The decision of the Tribunal was unanimous.

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.

Shirley Evans

29 July 2023

Legal Chair

Date