

**Housing and Property Chamber**  
First-tier Tribunal for Scotland

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**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 and Schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”) and Rule 109 of the First-tier Tribunal Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Rules”)**

**Chamber Ref: FTS/HPC/EV/19/3873**

**Re: Property at 4 Ardbeg Avenue, Kilmarnock, KA3 2AR  
 (“the Property”)**

**Parties:**

**Mr Derek Livingston, 29 Fereneze Avenue, Clarkston, Glasgow, G76 7RU  
 (“the Applicant”)**

**Mr Brian Roche, Her Majesty’s Prison Bowhouse, Mauchline Road, Kilmarnock,  
 KA1 5AA  
 (“the Respondent”)**

**Tribunal Members:**

**Ms. Susanne L. M. Tanner Q.C. (Legal Member)  
 Ms. Elizabeth Williams (Ordinary Member)**

**Decision**

- i. The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) was satisfied that Ground 13 in Schedule 3, Part 3 to the 2016 Act was established by the Applicant, in that the Respondent received a relevant conviction after the tenancy of the Property was granted and the application was made within 12 months of the Respondent’s conviction;**
- ii. The Tribunal was satisfied that Ground 14 in Schedule 3, part 3 to the 2016 Act was established by the Applicant, in that the Respondent has engaged in relevant anti social behaviour towards other persons; the application was made within 12 months of the anti social behaviour occurring; and the tribunal is satisfied that it is reasonable to issue an eviction order as a consequence of it, given the nature of the anti-social behaviour, who it was in relation to and where it occurred; and**

- iii. **The Tribunal made an order for eviction in terms of Section 51 of the 2016 Act.**
- iv. **The Tribunal was not satisfied that Grounds 11 and 15 in Schedule 3, Part 3 to the 2016 Act were established by the Applicant.**
- v. **The decision of the Tribunal was unanimous**

## **Reasons**

### **1. Procedural Background**

- 1.1. On 3 December 2019, the Applicant's Representative made an application to the tribunal in terms of Section 51 of the Private Housing (Tenancies)(Scotland) Act 2016 ("the 2016 Act") and Rule 109 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017 ("the 2017 Rules").
- 1.2. The Applicant sought the Respondent's eviction from the Property in terms of Section 51 of the 2016 Act under Grounds 11, 13, 14 and 15 of Schedule 3 to the 2016 Act.
- 1.3. The Applicants' Representative lodged written submissions and documents with the Application, including:
  - 1.3.1. A Notice to Leave from the Applicant to the Respondent dated 15 October 2019; and
  - 1.3.2. A Section 11 Notice from the Applicant to the Respondent with proof of service by email on 4 December 2019.
- 1.4. On 6 December 2019, the tribunal's administration obtained the title sheet for the Property which shows that the Applicant is the registered proprietor of the Property.
- 1.5. On 17 December 2019, the tribunal requested further information from the Applicant to allow the Application to be considered further.
- 1.6. On 17, 18, 19 and 20 December 2019, the Applicant provided additional information, including a copy of the tenancy agreement for the Property and information relative to the service of the Notice to Leave.
- 1.7. On 23 December 2019, the Application was accepted for determination by a tribunal. Both parties were notified by letters dated 13 January 2020 of the date, time and arrangements for a Case Management Discussion ("CMD") teleconference in relation to the Application on 17 February 2020 at 1000h. The Respondent was invited to make written representations in response to the

Application by 3 February 2020. The parties were advised that they were required to attend the CMD. The parties were advised that the tribunal may do anything at a CMD which it may do at a hearing, including making a decision on the application which may involve making or refusing an eviction order. The parties were also advised that if they do not attend the CMD this will not stop a decision or order being made if the tribunal considers that it has sufficient information before it to do so and the procedure has been fair.

- 1.8. The Application documents and notification of CMD were served on the Respondent by Sheriff Officers.
- 1.9. The Respondent did not submit any representations or make any contact with the tribunal prior to the CMD.
- 1.10. Staff at HMP Bowhouse Kilmarnock contacted the Tribunal in relation to arrangements for the CMD. On 22 January 2020, a Direction was issued directing the Respondent to attend the CMD in person at the Glasgow Tribunals Centre.
- 1.11. On 1 February 2020 the Applicant submitted an email containing an email from a proposed witness, Mr Imran Mohammed.
- 1.12. On 3 February 2020, the Applicant submitted details of a witness Mr Roi Forbes and attached a letter from Mr Forbes dated 2 February 2020.
- 1.13. Staff at HMP Bowhouse Kilmarnock made arrangements for the Respondent to attend the CMD by teleconference.
- 1.14. The CMD took place on 17 February 2020. Reference is made to the Notes of the CMD which were produced by Ms Kelly, the legal member dealing with the case, which were sent to parties after the CMD. The Respondent did not attend the CMD. The grounds upon which eviction was sought were discussed at the CMD and the Applicant was directed by the legal member that evidence would require to be produced in support of those grounds. The CMD was adjourned to a hearing on 18 March 2020 at 1000h at the Glasgow Tribunals Centre. Notification letters dated 19 February 2020 were issued to both parties.
- 1.15. On 18, 19 and 24 February and 6 March 2020, the Applicant submitted further written representations and attached documents.
- 1.16. On 9 March 2020 the tribunal issued Directions requiring the Applicant to do certain things by 13 March 2020.

- 1.17. The Tribunal obtained an extract criminal conviction of the Respondent from Kilmarnock Sheriff Court dated 11 October 2019.
- 1.18. On 11 March 2020, the tribunal issued Directions to the parties providing information relative to the Respondent's conviction and requiring both parties to comply with further orders.
- 1.19. On 13 March 2020, the Applicant submitted further written representations and copies of the email and letter previously submitted from Mr Mohammed and Mr Forbes.
- 1.20. On 17 March 2020, the Applicant confirmed that he wished to call a witness who was 12 years old. The tribunal's administration informed the Applicant that the Respondent was due to attend in person accompanied by two prison officers from GeoAmey.
- 1.21. On 17 March 2020, the President of the Chamber decided to postpone the hearing on 18 March 2020.
- 1.22. Further scheduling of the hearing was postponed due to the Covi-19 pandemic. The hearing was then re-scheduled by teleconference.

## **2. Hearing: 3 and 26 November 2020 at 1000h, teleconference**

- 2.1. A hearing was held over two days.
- 2.2. The Applicant attended the hearing on both occasions.
- 2.3. The Respondent did not attend the hearing, despite arrangements having been put in place by HMP Bowhouse for his attendance by teleconference.
- 2.4. The tribunal was satisfied in terms of Rule 29 of the 2017 Rules that the requirements in Rule 24(1) regarding giving notice of a hearing had been duly complied with and proceeded with the application upon the representations of the Applicant and all the material before it.
- 2.5. Two witnesses gave evidence on behalf of the Applicant on 3 November 2020: Mr Imran Mohammed and Mr Roi Forbes, as referred to further below.
- 2.6. The Applicant lodged further documents during the course of the hearing.

## **2.7. Applicant's evidence and submissions relative to Ground 13**

2.8. Ground 13 is a mandatory ground. The Applicant seeks the Respondent's eviction from the Property on the basis that he has a relevant conviction after the start of the tenancy and within 12 months of the date of the Application.

2.9. The tribunal had already obtained details of the Respondent's conviction from Kilmarlock Sheriff Court. The Respondent was convicted of assault by threats and robbery on 11 October 2019. The Respondent is currently serving a period of imprisonment within HMP Bowhouse in respect of the conviction.

2.10. The Applicant produced evidence in relation to the locus of the crime, Frankie and Benny's restaurant in Kilmarlock. The map which was produced showed the location at Ocean Cinema Site, Queens Drive, Kilmarlock KA1 3XB and a route to the Property with a distance of around 2 miles. The Applicant submitted that that was within the locality of the let Property.

## **2.11. Applicant's submissions and evidence relative to Ground 11**

2.12. The Applicant referred to Clause 22 of the tenancy agreement which provides: *"unless the Tenant has received prior written permission from the Landlord, the Tenant must not: 21.1 sublet the Let Property or any part of it, 21.2 take in a lodger, 21.3 assign the Tenant's interest in the Let Property (or any part of it), or 21.4 otherwise part with, or give up to another person, possession of the Let Property (or any part of it)."*

2.13. The Applicant's complaint related to the fact that the Respondent's partner, Ms Hayley O'Brien was residing in the Property and refused to leave. She is not named on the tenancy agreement. The Applicant stated that all four parts of paragraph 22 were engaged.

2.14. The tribunal heard evidence from Mr Imran Mohammed and Mr Roi Forbes, which was directed towards proving that Ms Hayley O'Brien remained in the Property as at the date that the Notice to Leave was hand delivered and that she remained there at the present time. The Applicant also referred to text messages which he had received from Ms Hayley O'Brien from which he submitted that it could be inferred that she knew that she had no right to reside there.

2.15. The tribunal asked the Applicant about paragraph 34 of the tenancy agreement which allowed the tenant to allow another person over 16 to occupy the let property with them but obliged the tenant to tell the landlord that person's name in writing. The Applicant had not previously considered the

terms of paragraph 34 but stated that in any event he had not received such notice from the Respondent.

**2.16. Applicant's evidence and submissions relative to Ground 14**

2.17. The Applicant alleged that the Respondent had been supplying controlled drugs from the Property over the period prior to his conviction and sentence for the assault by threats and robbery. The Applicant stated that he had no personal knowledge of the supply of drugs by the Respondent. No evidence was lodged that the Respondent has a criminal conviction relative to Misuse of Drugs Act offences in the relevant period but the Applicant referred to proceedings at Kilmarnock Sheriff Court, the status of which was not known.

2.18. However, the Applicant stated that he had personally received complaints from two neighbours of the Property about numerous people coming and going from the Property on multiple occasions.

2.19. The Applicant also referred to correspondence between him and Police Scotland relative to two police searches under warrant on 18 June 2019 and 8 September 2019, both within the twelve months prior to the Application.

2.20. On both occasions damage was done to the Property, principally the front door. The Applicant referred to photographs of the damage to the door.

2.21. The Applicant stated that he was caused alarm, distress, nuisance and annoyance by the Respondent's behaviour, which had led to the complaints being made to the Applicant and the police searches in the Property.

2.22. No independent evidence was leads from the neighbours who had made the complaints to the Applicant.

**2.23. Applicant's evidence and submissions relative to Ground 15**

2.24. The Applicant's evidence and submissions on this point were not clear, nor were they focussed on the test in Ground 15, despite the tribunal attempting to assist the Applicant in the presentation of his case, as provided for in the overriding objective.

2.25. Essentially, the Applicant sought to prove that the Respondent's partner, Ms Hayley O'Brien, was residing in the Property without the legal right to do so and that she was therefore committing a trespass which the Applicant submitted amounted to anti-social behaviour. The behaviour complained of

appeared to post-date the Respondent being sentenced to serve a period of imprisonment.

- 2.26. The Applicant did not lead any evidence or make any submissions as to how he offered to prove that the Respondent associated in the Property with Ms O'Brien who had engaged in relevant anti-social behaviour.

**3. The tribunal makes the following findings-in-fact:**

- 3.1. The Applicant is the registered Proprietor of the Property.
- 3.2. The Applicant entered into a private residential tenancy for the Property with the Respondent dated 20 August 2018.
- 3.3. The Respondent is the sole tenant named on the tenancy agreement.
- 3.4. The start date of the tenancy was 20 August 2018.
- 3.5. The tenancy agreement allows for service of notices by email to the email addresses specified for the parties in the agreement and/or in hard copy by personal delivery or recorded delivery.
- 3.6. A Notice to Leave dated 15 October 2019 was served by the Applicant on the Respondent to his specified email address on 16 October 2019.
- 3.7. A Notice to Leave dated 15 October 2019 was personally served on the Respondent's partner Ms Hayley O'Brien, at the Property on 15 October 2019.
- 3.8. The Notice to Leave which was served on the Respondent includes notice that the grounds upon which eviction is sought are Grounds 11, 13, 14 and 15 of Schedule 3 of the 2016 Act.
- 3.9. The Respondent was convicted of assault by threats and robbery on 11 October 2019 at Kilmaronock Sheriff court and sentenced to a period of imprisonment.
- 3.10. The locus of the crime giving rise to the conviction was Frankie and Benny's restaurant, Ocean Cinema Site, Queens Drive, Kilmaronock KA1 3XB Kilmaronock.
- 3.11. The locus of the crime is around two miles away from the Property

- 3.12. The Application was made within twelve months of the Respondent's said conviction.
- 3.13. On a number of occasions in the twelve months prior to the Application, two neighbours of the Property complained to the Applicant about numerous people visiting the Property on multiple occasions.
- 3.14. On two occasions in the twelve months prior to the Application, namely 18 June 2019 and 8 September 2019, police officers from Police Scotland attended at the Property to execute search warrants at the Property.
- 3.15. The Property was damaged by the police during the said searches.
- 3.16. Items of real evidence were recovered from the Property in the said searches relative to the Respondent for alleged offences under the Misuse of Drugs Act 1972.
- 3.17. Criminal proceedings were commenced at Kilmarnock Sheriff Court against the Respondent for alleged offences under the Misuse of Drugs Act 1972 and it is not known if they have concluded or if the Respondent was convicted or acquitted.
- 3.18. The complaints to the Applicant by neighbours about people visiting the Property on multiple occasions and the consequent police searches in terms of the Misuse of Drugs Act 1972, which caused damage to the Property, arising from the behaviour of the Respondent, caused alarm, distress, nuisance and annoyance to the Applicant.
- 3.19. The tenancy agreement paragraph 22 provides that "unless the Tenant has received prior written permission from the Landlord, the Tenant must not: 21.1 sublet the Let Property or any part of it, 21.2 take in a lodger, 21.3 assign the Tenant's interest in the Let Property (or any part of it), or 21.4 otherwise part with, or give up to another person, possession of the Let Property (or any part of it)."
- 3.20. There was no breach by the Respondent of Section 22 of the tenancy agreement in respect of his partner, Ms Halyley O'Brien residing with him in the Property.



**3.21. The tribunal made the following findings in fact and law**

- 3.22. Frankie and Benny's, Kilmarnock is in the locality of the Property for the purposes of Ground 13 of Schedule 3 to the 2016 Act.
- 3.23. The Respondent's conviction is a relevant conviction for the purposes of Ground 13 of Schedule 3 to the 2016 Act.
- 3.24. The Respondent's behaviour is relevant anti social behaviour for the purposes of Ground 14 of Schedule 3 to the 2016 Act.
- 3.25. It is reasonable to issue an eviction order from the Property in respect of the Respondent's anti social behaviour.
- 3.26. The Respondent did not breach a term of the tenancy agreement, namely paragraph 22, for the purposes of Ground 11 of Schedule 3 of the 2016 Act.
- 3.27. Ms Hayley O'Brien does not have a relevant conviction and has not engaged in anti-social behaviour for the purposes of Ground 15 of Schedule 3 at any time in the 12 months prior to the Application.

**4. Reasons**

- 4.1. The tribunal considered the submissions and evidence of the Applicant and noted that no defence to the Application had been made by the Respondent at any time.
- 4.2. The Applicant's case was extensive. He had produced a large amount of written submissions and documentary evidence from the point at which the Application was made until the second day of the hearing. Not all of the material was directly relevant to the legal tests provided for in the grounds relied upon, but the tribunal assisted him in the presentation of his case to the extent that it is permitted to do, in terms of the overriding objective of the tribunal.
- 4.3. Having heard the evidence and the Applicant's submissions, the tribunal was satisfied that Ground 13 of the Schedule 3 to the 2016 had been met, in that the Respondent had a "relevant conviction", within the meaning of that Ground. Ground 13 is a mandatory ground.

- 4.4. The Applicant wished to continue to rely on the three discretionary grounds in addition to the mandatory ground.
- 4.5. Having heard the evidence and submissions relative to Ground 14, the tribunal was satisfied that the Applicant had proved that the Respondent's behaviour at the Property, in allowing numerous people to attend the Property on multiple occasions, leading to complaints by the neighbours and two searches of the Property by Police Scotland under the MDA 1972, causing damage to the Property, amounted to anti-social behaviour within the meaning of Ground 14.
- 4.6. The tribunal was satisfied that it was reasonable to issue an eviction order as a consequence of the Respondent's behaviour, given the nature of the anti-social behaviour and who it was in relation to, namely the Applicant and where it occurred, namely at the Property.
- 4.7. The tribunal therefore issued an eviction order in terms of Section 51 of the 2016 Act and Grounds 13 (mandatory) and 14 (discretionary).
- 4.8. In relation to Grounds 11 and 15, the tribunal was not satisfied on the balance of probabilities that either ground had been met.
- 4.9. The Applicant's submissions in relation to Ground 11 were unfocussed in that he was attempting to prove all of the distinct elements of paragraph 22, namely that the Respondent had sub-let to Ms O'Brien, that Ms O'Brien was a lodger, that the Respondent had assigned his interest in the Property to her and that the Respondent had given up possession of the Property to her. The evidence was not such as to satisfy the tribunal that any of those tests had been met. Therefore the tribunal did not accept that there had been a breach of paragraph 22 of the tenancy agreement.
- 4.10. The tribunal also noted that in terms of 34, Ms O'Brien would have been entitled to occupy the Property as her only or principal home with the Respondent, had the Respondent notified the Applicant in writing (which he did not do) and that the Respondent would then have been responsible for her actions in terms of paragraph 34. However, there were no other alleged tenancy breaches included in the Notice to Leave or in the Application.
- 4.11. Therefore, Ground 11 was not established on the balance of probabilities.
- 4.12. In relation to Ground 15, the Applicant did not advance a case with reference to the test to be met. The tribunal was not satisfied that the actions of the respondent's partner, Ms Hayley O'Brien, in continuing to reside in the

Property after the Respondent's incarceration, amounted on its own to "anti social behaviour" within the meaning of Ground 15. In addition, the behaviour complained of appeared to post-date the Respondent being sentenced and beginning to serve a period of imprisonment and the section requires the tenant to associate in the let property with a person who has a relevant conviction or who has engaged in relevant anti social behaviour. Therefore Ground 15 was not established on the balance of probabilities.

### **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.**

**26 November 2020**

**Ms. Susanne L. M. Tanner Q.C.**  
**Legal Member/Chair**