



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section under Section 33 of the Housing (Scotland) Act 1988 (“the 1988 Act”)

Chamber Ref: FTS/HPC/EV/22/2480

Re: Property at 5 (1F2) Maxwell Street, Edinburgh, EH10 5HT (“the Property”)

Parties:

Mr Chris Hampton, Dr Margaret Douglas, 30 West Mill Road, Edinburgh; 30 West Mill Road, Edinburgh, EH13 0NX (“the Applicant”)

Mr Kjartan Behm of D.J. Alexander, John Cotton Centre, 10 Sunnyside, Edinburgh, EH11 2QH (the Applicants’ Representative”)

Mr Pedrum Aval, 5 (1F2) Maxwell Street, Edinburgh, EH10 5HT (“the Respondent”)

Mr Andrew Wilson of Edinburgh Housing Advice Partnership, 28 Westfield Avenue, Edinburgh, EH11 2QH (“the Respondent’s Representative”)

Tribunal Members:

Martin McAllister (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for possession should be refused.

Background

- 1. This was a hearing held by teleconferencing on 28th March 2023 to consider the application made by the Applicants dated 20th July 2022 for**

an order of possession of the Property in terms of Rule 66 of the Tribunal Rules.

Case Management Discussion

- 2. A case management discussion was held on 6th December 2022.**
- 3. Both parties made written submissions prior to the case management discussion.**
- 4. The Respondent's Representative stated that it was accepted that the Notice to Quit and notice required under section 33 of the 1988 Act ("Section 33 Notice") both dated 1st December 2021 had been served on the Respondent on 3rd December 2021 and that these demonstrated that the Applicants had required the Respondent to remove himself by 8th June 2021. He said that he intended to take no issue with the Notice to Quit and Section 33 Notice and he accepted that the necessary ground of eviction under Section 33 of the 1988 Act had been met.**
- 5. The Applicant's Representative stated that the tribunal should find it reasonable for the order for possession to be granted. The Respondent's Representative took the opposite view and stated that the tribunal should find that it is not reasonable to grant the order for possession.**
- 6. It was determined that a Hearing would be required before the tribunal could make a finding on the application.**
- 7. A notice of Direction was issued requiring any written submissions to be lodged with the Tribunal no later than twenty one days prior to the Hearing and that a list of any witnesses should also be submitted.**

Hearing

- 8. The Applicants were represented by Mr Kjartan Behm of D J Alexander, letting agents and the Respondent by Mr Andrew Wilson of Edinburgh Housing Advice Partnership. The Respondent was present and gave evidence.**

Preliminary Matters

- 9. No additional written submissions had been lodged by the Respondent or his representative.**
- 10. On 7th March 2023, the Applicant's Representative had sent additional written submissions to the Tribunal. These sought to have the Tribunal to "accept retroactive amendment of the original notice served against the tenancy" to include additional grounds. The written representations state**

that these additional grounds are Grounds 11,12 and 13 of Schedule 5 of the 1988 Act. The submissions were accompanied by a rent statement and various documents which the Applicant's Representative said was supportive of his position.

11. The Respondent's Representative said that he considered that it was the matter of reasonableness which required to be addressed at the Hearing and that he saw no need for other grounds to be put before the tribunal. Mr Wilson said that, if the Applicant was seeking to introduce new grounds, he would require an opportunity to respond. It became clear that Mr Wilson did not have a copy of the latest submissions of the Applicant's Representative and an adjournment was allowed for him to find them in his emails. He said that he had been having IT problems.
12. After the adjournment, Mr Wilson said that he had the submissions which had been sent to him by the Applicant's Representative and that he had looked at them. He said that the submissions raise new issues and he reiterated that he considered that the issue before the tribunal was whether it is reasonable to grant the order of possession.
13. Mr Behm said that he had lodged the various productions to support the additional grounds and that, if the tribunal was not minded to allow the amendment of the original notice to quit, these "bolstered" his position in relation to reasonableness. He said that Grounds 11 and 12 related to arrears of rent which were evidenced by the rent statement which had been lodged. He said that Ground 13 related to breaches of the tenancy agreement and that he would elaborate on these in due course.
14. It was noted that the rent statement showed the sum of £3,914 to be due by the Respondent. The submissions stated that the Respondent's rental account is currently in arrears of £1,130 when late payment fees are removed from the statement.
15. Mr Wilson said that the Respondent had made an additional payment of £300 on 20th March 2023 and had altered his standing order to the Applicants' letting agent and that a monthly sum of £140 would be paid towards arrears which would commence in April 2023. Mr Behm confirmed that the sum of £300 had been paid by the Respondent and that the arrears stood at £830. He said that, prior to the Hearing, he had no knowledge of the alteration of the standing order.

Findings in Fact

16. The Applicants and Respondent are respectively landlord and tenant in respect of a short assured tenancy of the Property which was entered into on 9th July 2013.
17. The lease commenced on 9th July 2013 for a period of six months and has continued by tacit relocation.

18. The agreed monthly rental at the commencement of the lease was £650 and the rent currently passing is £760.
19. On 3rd December 2021, the Applicant served upon the Respondent a notice to quit and a notice under Section 33 of the 1988 Act requiring the Respondent to leave the Property by 8th June 2022.
20. The Respondent resides in the Property with his mother.

Findings in Fact and Law

21. The notice to quit and notice under Section 33 of the 1988 Act were in correct form as required by law and had been properly served.
22. Section 33 (1) (e) of the 1988 Act requires the Tribunal to make an order of possession if it is reasonable to do so. It is not considered reasonable to make such an order of possession.

Discussion and Reasons

23. The Respondent's position was that the ground for eviction was met. Mr Wilson helpfully stated that he had no issue with the notice to quit or the notice under Section 33 of the Act. His position was that it was the question of reasonableness which required to be determined.
24. The tribunal considered the Applicant's submission to allow amendment of the notice to quit to include Grounds 11, 12 and 13. It did not consider it appropriate to allow such amendment. The matters referred to in the submission were known to the Applicant at the time of submission of the application and he had the opportunity then to seek amendment. More fundamentally was the fact that the application before the tribunal was one under Section 33 of the 1988 Act and not under Section 18 of the 1988 Act. Furthermore, even if amendment were allowed, Grounds 11, 12 and 13 are discretionary and the matter of reasonableness would require to be addressed by the tribunal.
25. The tribunal did consider it appropriate to take into account the information submitted by the Applicant's Representative on 7th March 2023 when carrying out the balancing exercise to determine whether the order for possession should be granted.
26. The Applicant's Representative said that his clients wanted to put financial uncertainty behind them. He said that the Respondent had been in arrears of rent since 2019. He said that a notice to quit had been served

on the Respondent who had responded by making some payments between March and June 2019 totalling £1,220 in reduction of the arrears and undertaking to address the remaining outstanding sums. Mr Behm said that, as a consequence of the payments and undertaking, the Applicants had rescinded the notice to quit. He said that the last payment towards the arrears had been in June 2019 until the most recent payment in March 2023. Mr Behm said that, since June 2019, the Respondent had made monthly payments of rent although one had been missed in May 2021.

27. The rent statement submitted by the Applicants' Representative showed a balance due of £3,914 and when the recent payment of £300 was taken into account, the sum showing due was £3,614. Mr Behm said that the previous letting agent, Bowmore Lettings (which was acquired by D.J. Alexander) had a practice of applying late rental payment charges. He said that it was not his company's policy to do so and none were applied after the accounting systems of the letting agents were merged in July/August 2022. Mr Behm confirmed that the level of rent arrears was £830 on the date of the Hearing and that the balance showing on the rent statement was a combination of arrears and late rental payment charges. When asked to comment on the fact that there appeared to be two charges shown as debits on the statement most months of £24 and £48 respectively, Mr Behm described them as penalties designed to prompt a tenant. He said that such charges are always open to negotiation and could be waived. Mr Behm was unable to refer the tribunal to the part of the tenancy agreement where such charges were referred to.
28. Mr Behm said that neither the Respondent or his agent had intimated that the standing order would be changed from April 2023. He confirmed that, if the payments in the amended standing order continue to be made, the rent arrears would be cleared in six months.
29. Mr Wilson said that rent statements produced by the letting agents were confusing because it was not clear what constituted arrears and what was in respect of charges.
30. The Respondent said that he became unemployed in the summer of 2019 and that he fell into arrears until he found other employment. He said that he works as a chef at the Sheraton Grand hotel and has a part time job as a shift manager for Pizza Hut. He described himself as working "all the time" to make ends meet.
31. The Respondent said that he had not approached his landlord or the letting agent when he fell into arrears because "he had nothing he could say to them" and he conceded that he has had difficulty in communicating with the letting agent because of health issues. He said that he is now able to deal with matters because of the assistance which Mr Wilson was giving him. He said that Mr Wilson had helped him arrange for the latest payment which he had made towards arrears. When asked why he had

not previously made payment towards the arrears, the Respondent said that he didn't know the level of arrears and he said that the rent statements were confusing.

32. Mr Behm disputed that the Respondent did not know the level of arrears and said that the letting agent sends frequent messages or emails regarding arrears. He confirmed that the rent statements sent to the Respondent would be in the form of that which had been submitted to the Tribunal.

33. Mr Behm had lodged inspection reports of the Property and he said that the Respondent had breached the tenancy agreement by not reporting defects that required repair. He referred to cracks in plaster work possibly caused by subsidence and corrosion on a ceiling. He could not say if, after the Applicants had been aware of issues from the inspections, works had been carried out by them but he thought that no works had been done.

34. The Respondent said that his mother was staying with him and that this had developed gradually over lockdown. He said that it would be of considerable benefit to him if his landlords allowed his mother to become a co-tenant because this would allow her to claim housing benefit.

35. Mr Behm said that there was evidence from the inspections of the Property that a person other than the Respondent was living in it. He said that the Applicants' permission had not been sought for this occupation and he referred the tribunal to clauses 2.18 and 2.19:

"2.18 to use the premises only as a single private residence for the occupation of the tenant and not to carry on any formal or registered trade, business or profession there.

2.19 Not to sublet, take in lodgers or paying guests without the landlord or his agent's prior consent....."

36. Mr Behm said that the fact that the Respondent's mother was residing in the Property constituted a breach of the tenancy agreement.

37. Mr Wilson said that, in response to the notice to quit, the Respondent had sent a proposal to the Applicants' letting agents in May 2022 and had not received a response.

38. Mr Behm disputed this and referred the tribunal to the productions which he had lodged which he said evidenced that there had been communications by his company which had not been responded to. He said that non communication by the Respondent had been a constant issue over the years of the tenancy.

39. The Applicants' Representative lodged an email from Mr Hampton, one of

the Applicants which had been sent to him on 3rd February 2023 and which set out his position:

- 1. I am not a buy to let landlord with multiple properties.*
- 2. I have met my obligation to keep the property in good order and respond quickly to arising issues.*
- 3. Years of late/irregular payments by the tenant coupled to his persistent refusal to communicate with the property managers have caused me stress and uncertainty.*
- 4. This flat forms a substantial part of my pension. I am retiring this year and need to bring the current situation to a close to secure my own finances.*

40. Mr Behm said that he was unaware of what plans the Applicants had for the Property but that they were entitled to have financial certainty with any tenants residing in it and that this had not been the case with the Respondent.

41. The Respondent said that he had lived in the Property since 2013. He said that he was single and aged 37. He said that his mother was aged 71.

42. Mr Behm said that, because of the arrears of rent, irregular payment of rent, failure of the Respondent to engage with the Applicants or their agents and breaches of the tenancy agreement by not reporting repairs and having another person reside in the Property, it was reasonable for the order for possession to be granted. He said that the Applicants have no confidence that the Respondent's current plans to pay the arrears of rent will come to fruition given his past failure to do so.

43. Mr Wilson said that the Tribunal should have regard to the regular payment of rent since 2019, the efforts being made by the Respondent to deal with the arrears of rent and the Respondent's personal circumstances, in weighing whether or not it would be reasonable to evict him.

44. In determining whether it is reasonable to grant the order for possession, the tribunal is required to balance all the evidence before it and to weigh the various factors which apply to the parties.

45. In arriving at its decision, the tribunal has to consider the whole circumstances. Prior to the amendment introduced by the Coronavirus (Recovery and Reform) (Scotland) Act 2022, an application such as was before it would have been granted, assuming the necessary procedures had been followed. A landlord seeking recovery of a property where the tenancy had reached its term could be confident that the necessary order would be granted. By virtue of the said 2022 Act, the Tribunal had to be satisfied that it was reasonable to grant the order.

46. In *Edinburgh City Council v Forbes* 2002 Hous.L.R. 61 Sheriff Principal Nicholson QC at para 7-16 explained: *“A decision on such a matter (i.e. the question of whether it is reasonable to pronounce an order) will of course be influenced by reference to established or admitted facts, but reasonableness is not itself a fact but instead a concept or conclusion determined by an exercise of judgement.”*
47. In the Upper Tribunal decision of *Boyle v. Ford* (2023UT04), Sheriff Jamieson stated that the responsibility of the Tribunal in terms of Section 33 (1) (e) of the 1988 Act was to satisfy itself that it was reasonable to make an order for possession. He stated that the onus should not be on a tenant to show reasonable grounds for the Tribunal to refuse the granting of an order for possession.
48. A leading English case, *Cumming v Danson*, [1942] 2 All ER 653 at 655 is useful. Lord Greene MR said,
- “In considering reasonableness....it is, in my opinion, perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.”*
49. The tribunal considered the alleged breaches of the tenancy agreement in relation to occupancy of the Property and alleged failure of the Respondent to report repairs.
50. It was significant that the tribunal had no evidence of work being done to the Property by the Applicants following upon their agent’s inspections of the Property. The matters disclosed in the inspection reports were relatively minor and it was not clear that any failure by the Respondent constituted a breach of his obligations as a tenant.
51. There was no evidence that the Respondent’s mother was a sub-tenant, lodger or paying guest. She is his mother and residing with him in a two bedroom flat. Whilst it may have been appropriate for the Respondent to advise the Applicants that his mother intended to or was residing with him, the tribunal did not find this to be particularly serious and did not find that such occupation was in breach of the tenancy agreement.
52. If the Applicants’ position on reasonableness was based solely on any failure of the Respondent in reporting repairs or the occupation of the

Property by his mother, the tribunal would not consider that the necessary threshold would have been crossed but nevertheless did take these into account as part of the totality of matters to be considered.

53. There are rent arrears and this is something that the tribunal has to properly take into account. The arrears are now being addressed by the Respondent. This would appear to have been something which he could have dealt with sooner and there is no certainty that the arrears will be repaid in six months. Notwithstanding that, the arrears have not risen for more than three and a half years and rent is being paid on a monthly basis and has been for that period. The current level of rent arrears is equivalent to little more than one month's rent.
54. The tribunal accepts that there is evidence of the Respondent's non engagement with the Applicants' letting agent and that this appears to have been a pattern. It would have been frustrating for the Applicants and the letting agent. The Respondent's position was that health issues made it difficult for him to address matters but that he is now better able to do so.
55. The tribunal weighed the various matters. The Applicants are receiving rent from the Respondent and this has been paid on a monthly basis since the summer of 2019 with only one missed payment in May 2021. The tribunal accepted that there are rent arrears which are being addressed. The matter of the Respondent's mother and alleged failure to report repairs were considered by the tribunal to be de minimis. The tribunal accepted that communication and engagement by the Respondent has not been good. The tribunal considered the position of the Respondent who had lived in the Property for almost ten years.
56. Taking all matters into account, the tribunal did not consider that it was reasonable to grant the order of possession.

Observation

Whilst not part of its deliberations in arriving at its determination, the tribunal considered it appropriate to comment on the rent statement produced by the Applicants' Representative. It showed the balance due to be £3,914 but only £1,130 was in respect of rent arrears which meant that £2,784 was in respect of late rent payment charges for which there seemed to be no contractual basis. It is respectfully suggested that D. J. Alexander, a registered letting agent, might consider it prudent to consider whether or not it is appropriate for it to issue such rent statements in the future.

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.

**Martin J. McAllister
Legal Member
29th March 2023**