



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016

Chamber Ref: FTS/HPC/PR/21/0549

Re: Property at 170 The Murrays, Edinburgh, EH17 8UP (“the Property”)

Parties:

Mr Matthew Donald Davis Simmermon-Gomes, Ms Karolina Emilia Kulsum-Binder, 32 East Pilton Farm Wynd, Edinburgh, EH5 2GJ (“the Applicant”)

Mr Gavin Rea, 243 Gilmerton Road, Edinburgh, EH16 5TH (“the Respondent”)

Tribunal Members:

Yvonne McKenna (Legal Member) Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that a wrongful termination order should be granted against the Respondent in terms of Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016 (“the 2016 Act”) and has decided to make an order for payment in the sum of ONE THOUSAND TWO HUNDRED POUNDS STERLING (£1,200). The order for payment will be issued to the Applicant 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.

Background

1. This is an application for an order for wrongful termination, contained within papers lodged with the Tribunal on 10th March 2021, in terms of Rule 110 of the First tier for Scotland Housing and Property Chamber Rules of Procedure (“the 2017 Rules”).

2. In the Application, the Applicant seeks payment of an award of 6 months' rent, for the months that the Applicants left earlier than needed under what is claimed to be false pretences. The Applicant states that financial stress was placed on the Applicants' family who had to loan funds to them due to having to move after redundancy. They also claim for emotional distress owing to constantly changing timelines, the Respondent's bad faith approach to the notice date, and the cancellation of a long-planned Christmas visit to family abroad, deemed impossible due to increased Covid restrictions.

3. Along with the application the following documentation was lodged; -

- A copy of the parties' Private Residential Tenancy Agreement ("PRT"),
- Notice to Leave dated 24 September 2020 giving notice to leave on 1 April 2021
- Notice to Leave dated 22 October 2020 giving notice to leave on 1 February 2021
- Email exchange between the Applicant and the Letting Agent dated 5 and 7 January 2021
- Documentation from the estate Agents regarding the Property being marketed for sale

4. The Respondent had been validly served by Notice by Advertisement.

5. On 29 June 2021 the Respondent lodged written representations with the Tribunal. These were crossed over to the Applicant.

6. Both parties were advised that a Case Management Discussion (CMD) would take place by teleconference on 15 July 2021 at 10am and that they were required to participate.

The Case Management Discussion (CMD) 15th July 2021

7. The application called for a CMD at 10am on 15 July 2021 by teleconference. Both the Applicant and the Respondent were present.

8. The Tribunal identified, following discussion with parties, that the following facts were agreed between the parties; -

- The PRT lodged by the Applicant is the PRT entered into between the parties.
- The start date of the tenancy was 26 June 2020.
- The Applicants were the tenants at the Property in terms of the PRT
- The Respondent was the Landlord
- Mr Byram Tavadia at Zone Lettings was the Letting Agent for the Property for the period of the tenancy.

- The first Notice to Leave was served on the Applicant dated 24 September 2020 giving a leave date of 1 April 2021
- The second Notice to Leave was served on the Applicant dated 22 October 2020 giving a date to leave the Property of 1 February 2021
- The rent payable was £1200 per calendar month.
- The date the tenancy ended was 21 February 2021.
- All rent due to the end date was paid by the Applicant.
- The Property was marketed for sale on 2 March 2021.

9. The Applicant accepted that the last date they were in the Property was the 20 February 2021 and they left a day earlier but agreed that the termination date was 21 February 2021.

10. The Tribunal did not consider in the circumstances given the dispute between parties that the matter could be resolved at the CMD and indicated that the case would need to be continued to a Hearing for evidence to be led.

11. The Tribunal accordingly continued the case to a Hearing on 17 August 2021 at 10am.

12. Separate Directions were issued by the Tribunal in the following terms.

The Applicant is required to lodge with the Tribunal at least 14 days in advance of the Hearing date; -

- (i) a list of witnesses the Applicant proposes to call to give evidence.
- (ii) any further documents such as additional emails exchanged between the Applicant and the Letting Agents proposed to be relied upon in evidence

The Respondent is required to lodge at least 14 days in advance of the Hearing date; -

- (i) a list of witnesses the Respondent proposes to call to give evidence
- (ii) any documents such as e-mails exchanged between the parties and /or with the Letting Agents proposed to be relied upon in evidence.

13. In advance of the Hearing date the Respondent produced an exchange of emails which he had received from the Letting Agent.

14. No further productions were received.

15. The Respondent indicated that the Letting Agent Mr Bryam Tavadia would be giving evidence as a witness.

Hearing 17 August 2021

16. The Applicant attended. Mr Gomes stated that he intended to lead evidence in support of the application and that his partner was present but did not intend to participate. The Respondent attended.

17. The Hearing took place by teleconference in view of the restrictions caused by the COVID-19 pandemic.

18. Mr Tavadia was contacted by telephone and invited to join the Hearing when it was his time to give evidence. Although there was an initial delay in Mr Tavadia giving evidence, he did eventually join the teleconference and gave evidence to the Tribunal as detailed below.

Preliminary Matters

19. The Legal Member explained at the outset that the ground used in the Notice to Leave issued latterly on 22nd October 2020 was ground 4 and that this ground applies if the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months. The Tribunal also set out that in terms of section 58 of the 2016 Act the Tribunal may make a wrongful termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the landlord. As a focus of the questions, it was explained that the evidence would centre around the Applicant and whether the Tribunal was satisfied that the Applicant was misled into leaving the Property, and the Respondent and whether the Tribunal was satisfied that at the point the Notice to Leave was sent, he intended to live in the Property.

20. The Legal Member discussed the further papers that had been lodged by the Respondent after the CMD. It transpired that the Applicant had not received the same and these were forwarded on to the Applicant by e-mail. A brief adjournment was allowed for this purpose. When the Hearing re-convened the Legal Member asked whether the Applicant had sufficient time to read over the same and it was agreed they were in a position to proceed.

The Applicant's Position

21. Mr Gomes gave oral evidence. He said that the Applicant's position was not long nor was it complicated. He said that he had received the first Notice to Leave as agreed on the 24 September 2020 ordering the Applicant to leave the property by 1 April 2021. The ground contained within that Notice was that the landlord required to sell the Property.

22. He said that the second Notice to Leave dated 22nd October 2020 detailed that the Applicant required to remove by 1 February 2021 as the landlord wanted to live in the Property.

23. He said that at the time the second Notice was served that this was not the landlord's true intention as within days of the Applicant moving out the Property was advertised for sale. He said that the Applicant was thus misled regarding the requirements of the Notice to Leave issued on the 22 October 2020.

24. He stated that when he moved into the Property, he had believed that this would be a long-term residence. He said that at the time that he viewed the Property he had made this clear as he had just required to remove from another tenancy with a prior landlord who for personal reasons needed to sell. He said that he wanted to have a stable home for himself, his partner and his young daughter.

25. His position was that the Respondent had changed the notice period in bad faith, always intending to sell the Property.

26. After the Notice of 22nd October 2020 was served on the Applicant, he began a search for other tenancies. He had been made redundant at that time. Although he had adequate money to pay for rent and food for the family, he required to be upfront with letting agents regarding any new tenancies that he was no longer employed. His wife did not work, and agencies were not keen to rent to him in the circumstances at that time. He did not take up his new position until 1 March 2021. He said that as soon as he obtained employment, he secured a new tenancy.

27. In relation to the end date of the notice period, the Applicant's position was that he had sought an extension of the Notice Period of one month on 25 January 2021 and that the Respondent had suggested an extension of 2 months to take the end date to 1 April 2021. He had specifically requested written confirmation that this extension was agreed and referred to 2 emails that he had sent to the letting agents on 5 and 7 January 2021. This had not been forthcoming and he required to proceed on the basis that the end date remained 1 February 2021. He stated that he had no other option at that time but to operate on the basis this was the enforceable date as he had no written confirmation of the extension. He said that he did not trust that the landlord was acting in good faith at that time. His position was that despite the emails that were exchanged between the Respondent and Mr Tavadia that the Applicant was not privy to the same and had never received confirmation of the end date being 1 April 2021 which he had specifically requested. His position was that his emails to Mr Tavadia made it clear that the Applicant was overstaying the end-date of 1 February 2021 which he acknowledged and apologised for. He required to remain in the Property until the 21 February 2021 to await a boiler repair at his new tenancy. He was therefore unable to leave until that date.

The Respondent's Position

28. Mr Rea's position was that he owned 2 properties along with his late wife Una from whom he was estranged at the time that both the Notices to Leave were served. They jointly owned the Property in question as well as 243/3 Gilmerton Road Edinburgh where he currently continues to reside.

29. The reason that the Property was initially let out was that it had been the home of the Respondent's wife and 2 daughters. His marriage had ended in April 2019. In April 2020 his wife discovered she had terminal cancer and decided that she wished to return to Northern Ireland where her family members resided and to receive treatment in Belfast.

30. When his late wife had received this news, she wanted to get her affairs in order and the Respondent had agreed that both their properties would be sold.

31. As he was living in the property at Gilmerton Road this was marketed first, very quickly, and was listed for sale on 22nd October 2020. He said that his estate agents said that it would sell quickly.

32. At that time, although the prognosis for his wife was terminal, the Respondent said that they had hoped his wife may have 1 or 2 years left to live. Certainly, when the Property was let out it was his intention it would be for at least a year.

33. In September 2020 his wife tragically discovered that her treatment was not working and that a much shorter lifespan was envisaged.

34. As the Applicant remained living in the Property, the Respondent instructed Byram Tavadia at Zone Lettings to serve notice on the Applicant to end the tenancy. He was informed that the notice period was 6 months. He discussed this with his late wife who told him that she had been carrying out some research and that if he intended to move back into the house that the notice period was 3 months, instead of 6 months. His position was that he was unaware that was the case until she told him.

35. He agreed that he would move back into the house to get the Property looking as best as it could so that it would be ready for when it came time to sell. He assumed at that point that the property in Gilmerton Road would sell quickly and therefore it would suit him to move back into the Property when Gilmerton Road did sell. He accordingly instructed the second Notice to Leave which was served on 22nd October 2020 on the basis that he intended to live in the Property. He stated that at the time this second Notice to Leave was issued that he, "100 per cent intended to move back into the Property and work towards selling it ". He agreed however that his intention at the time the second Notice to Leave was issued was that the Property would be sold, but that he would live there for a few months while it was being sold. He also agreed that the real purpose of the Notice to Leave of 22nd October 2020 was for the Property to be placed on the market for sale. He also

agreed that if the second Notice to Leave had not been issued that the Applicant would have had an additional 2 months to reside in the Property.

36. On being questioned further regarding his intentions at the time the Notice was served the Respondent agreed that he had been overoptimistic regarding how quickly the property on Gilmerton Road would sell. He had based this on advice given to him by his estate agents in September 2020 a month before the second Notice to Leave was sent on 22nd October 2020. He also said that he was told by his estate agents that the market would be slow over the Christmas and January period.

37. In relation to any works required at the Property after the Applicant had left the Respondent agreed that very little was required and that the Home Report was carried out on 23 February 2021 a mere 2 days after the Applicant had left. There were no major works required to be completed by the Respondent other than some cosmetic paint touching up in parts.

38. He denied there was any misleading behaviour on his behalf. He said that his estate agents said that once the Property was vacated that they would carry out the Home Report and with dealing with viewings and legal issues 3 months would be an optimistic period for that to be dealt with.

39. He stated that regarding the end date of the tenancy he had received communication from the Letting Agent by email which was produced to the Tribunal dated 5 January 2021 stating that the Applicant, Mr Gomes had lost his job, was suffering from Covid and was finding it difficult to secure a new property to rent. He asked for a short extension of a month.

40. As the flat in Gilmerton Road had not sold he agreed to this extension. He said that he spoke to his estate agents, who told him that the market was usually slow in January, and that even after accepting an offer it would usually take a few months to conclude the technicalities. The Respondent therefore suggested a 2-month extension to the end date taking this to 1 April 2021 which was the original end date specified in the original Notice to Leave dated 24 September 2020. This was agreed to, (between the Letting Agent and the Respondent) and he received confirmation in writing from the Letting Agent Mr Tavadia that this was agreed by all parties. He had no direct dealings with the Applicant and did not have any evidence of the Applicant's agreement to a 1 April 2021 leaving date.

41. After the Applicant left the Property on 21 February 2021 and because the Respondent's property at Gilmerton Road had not sold he did not move back into the Property and the Property was listed for sale on 2 March 2021.

42. Sadly the Respondent's wife passed away on 2 March 2021.

43. An offer for the property at Gilmerton Road was submitted at the end of March 2021 and has just been agreed last week. The missives have not yet been concluded. The sale has been complicated by the fact that there was a survivorship clause in the title deed and the fact his wife's estate is being dealt with in Northern Ireland. He said that was a period of 5 months so he would have been living at the Property, using the same timescales, for at least 3 months.

44. The Respondent described in his written response that this has been the most traumatic time of his life and that this issue has caused him an enormous amount of additional distress and anguish. He stated that ever since his wife was given the terminal diagnosis in April 2020 that he was under enormous pressure to deal with everything that happened. This was exacerbated by the fact that his wife and daughters were in a different country, as well as sorting out the sale of the 2 properties and facing up to his wife's impending death

Evidence of Mr Byram Tavadia

45. Mr Tavadia is a Director with Zone Lettings and was employed by the Respondent. He said that he was informed that the owner wanted to move back into the Property and re-issued the second Notice to Leave on that basis.

46. He said that the Applicant requested an extension of the lease which the Respondent was happy to agree to and it was extended to 1 April 2021. He said that he thought that he had correspondence confirming that was agreed to by the Applicant but did not have this in front of him. He was specifically asked by the Applicant when the Applicant was told in writing that the extension to 1 April 2021 was agreed by all parties. He said that he was unsure and would need to check his e-mails. He was not at his desk and did not know the dates. He then suggested that he had correspondence from the Applicant which stated that he acknowledged the extension but not explicitly to the 1 April 2021. He said that this could be both implied and inferred. He said that he was unsure how much he was entitled to share by way of his communications with the Applicant.

47. Mr Tavadia was not a reliable witness. Initially it took the Tribunal some time to get hold of him despite the fact that the Respondent said that he had spoken with him earlier that day to ensure that he would be in a position to give evidence. He said that he was "down the coast on his mobile". He did not have access to any of his records or e-mails. He came across in his evidence as evasive and ill-prepared.

Findings in Fact and Law

48. The Applicant lived at the Property from 26 June 2020 to 20 February 2021 along with their young daughter who is now 3 years old.

49. On 26 June 2020 the Applicant and the Respondent entered into a Private Residential Tenancy Agreement in relation to the Property. In terms of the tenancy the rent payable was £1200 per calendar month.

50. Mr Bryam Tavadia at Zone Lettings was the Letting Agent for the Property for the period of the tenancy

51. On 24 September 2020 the Respondent served a Notice to Leave on the Applicant via his instructed Letting Agent. The Notice to Leave gave a date to vacate of 1 April 2021 and was on the ground that the Respondent intended to sell the Property.

52. On 22 October 2020 the Respondent served a Notice to Leave on the Applicant via his instructed Letting Agent. The Notice to Leave gave a date to vacate of 1 February 2021 and was on the ground that the Respondent intended to live in the Property, relying on Ground 4 of Schedule 3 of the 2016 Act.

53. As a result the Applicant immediately started to search for alternative accommodation and secured alternative accommodation on 25 January 2021.

54. The Applicant had been made redundant at the time the second Notice to Leave was served which compounded his difficulty in searching for alternative accommodation.

55. The Applicant left the Property and the tenancy ended on 21 February 2021 by agreement between the parties and in accordance with section 50 of the 2016 Act.

56. The Applicant moved from the Property as he had been led to believe that the Respondent was moving into the Property.

57. On 23 February 2021 a Home Report was prepared for the Respondent.

58. The Respondent did not move into the Property after the Notice to Leave of 22 October 2020 was served.

59. The Property was marketed for sale on 2 March 2021.

60. The Applicant paid all rent due up to the date the tenancy ended

61. The Applicant incurred difficulty and stress in obtaining a new tenancy for the family unit in a shortened timescale.

62. The Applicant was misled by the Respondent into ceasing to occupy the Property in terms of Section 58(3) of the 2016 Act.

63. The Respondent had wrongfully terminated the tenancy.

Reasons for Decision

64. The Tribunal was satisfied on the evidence that the Applicant had been misled into ceasing to occupy the Property. The Tribunal did not accept on the balance of probabilities that the Respondent intended to occupy the Property for at least 3 months. His intention was at the time that both notices were served to sell the Property. There was clearly an attempt by the Respondent to circumvent the legislation in issuing the second Notice.

65. The Tribunal accepted the credible oral evidence of the Applicant that the Applicant had been misled into leaving the Property on the basis that the Respondent intended to reside at the Property for at least 3 months.

66. The Respondent by his own admissions stated clearly that at the time that the second Notice to Leave was issued that his sole intention was to put the Property on the market for sale albeit that it may take some time to sell.

67. The Home Report was carried out only two days after the Applicant left and there were minimal works carried out by the Respondent after the tenancy ended.

68. The Respondent still remains living in Gilmerton Road so at the very least was over optimistic regarding how long this property would take to sell.

69. It can be reasonably inferred from what happened after the Applicant left what the Respondent's intention was at the time the Notice to Leave was served.

The Tribunal is not satisfied that the Respondent intended to move into the Property once it was vacated by the Applicant. The Tribunal therefore granted the application. The decision was unanimous.

70. The Tribunal having granted a wrongful termination order directed itself to the terms of section 59 of the 2016 Act. This is set out below

59 Wrongful-termination order

(1) In this section and in sections 57, 58 and 60, “a wrongful-termination order” means an order requiring the person who was the landlord under the tenancy immediately before it ended to pay the person who made the application for the wrongful-termination order an amount not exceeding six months’ rent.

(2) Subsection (3) applies where—

(a) the First-tier Tribunal intends to make a wrongful-termination order under section 57 or 58, and

(b) two or more persons jointly were the landlord under the tenancy in question immediately before it was brought to an end.

(3)The Tribunal may make a wrongful-termination order—

(a) against all, some, or only one of the former joint landlords,(b)stating that each person against whom the order is made is liable to pay a specified amount, but the cumulative total of each of the specified amounts must not exceed six months' rent,(c)stating that each person against whom the order is made is jointly and severally liable for the whole amount to be paid.

(4)In subsections (1) and (3)(b), “rent” means—(a)the amount that was payable in rent under the tenancy immediately before it ended, or(b)in a case where two or more persons jointly were the tenant under the tenancy immediately before it ended, the amount mentioned in paragraph (a) divided by the number of persons who were at that time joint tenants under the tenancy.

71. It is clear that where a termination order is made that there is discretion vested in the Tribunal. In considering the amount to be paid by the Respondent to the Applicant the Tribunal took into account that the actions of the Respondent caused some significant inconvenience and worry to the Applicant who was forced to look for a new family tenancy at a time when he had been made redundant. The Tribunal has also taken into account the personal circumstances of the Respondent at this time and in particular the fact that his late wife was suffering from a terminal diagnosis at the time the Notices to Leave were issued the maximum penalty which can be imposed by the Tribunal is six times the monthly rental. The monthly rental for this property was £1200 immediately before the tenancy was terminated. In assessing the quantum of the wrongful termination order, the Tribunal have taken all the circumstances into account and decided that an order for one times the monthly rent was just and appropriate in the circumstances.

Decision

72. The Tribunal made a wrongful termination order for £1200.

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.

Y. M