

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 92 of the Anti-Social Behaviour etc. (Scotland) Act 2004

Chamber Ref: FTS/HPC/GL/19/1023

Parties:

Mrs Anu Sharma, 17 High Calside, Paisley, PA2 6BY ("the Applicant")

Renfrewshire Council, Renfrewshire House, Cotton Street, Paisley, PA1 1TT ("the Respondent")

Tribunal Members:

Shirley Evans (Legal Member) and Leslie Forrest (Ordinary Member)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") refuses the application made by Mrs Anu Sharma dated 1 April 2019 in terms of Section 92 of the Anti-social Behaviour etc. (Scotland) Act 2004 and Rule 99 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

Background

1. This is an application in terms of Rule 99 of the First-tier for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Regulations") and Section 92 of the Anti-Social Behaviour etc. (Scotland) Act 2004 ("the 2004 Act"). The Applicant is appealing a decision of the Respondent's Regulatory Functions Board ("the Board") on 13 March 2019 to remove her from the Register of Private Landlords ("the register").
2. The Applicant had been entered on the register as being a fit and proper person to be a landlord in terms of Section 84 (3) of the 2004 Act. The Applicant had come to the Board's attention following upon concerns about two of the Applicant's properties at 87 and 95 Causeyside Street, Paisley as reported in a Memorandum with appendices dated 12 December 2018 ("the memo") from the Respondent's Director of Communities, Housing and Planning Services. At the Board's hearing on 13 March 2019, after representations on behalf of the Applicant, from the complainer at 95 Causeyside Street, Paisley and from Ms Gray on behalf of the Department of Communities, Housing and Planning, the Board were of the opinion that the Applicant was not fit and proper to act as a landlord. The Board

accordingly removed the Applicant from the register in terms of Section 89 of the 2004 Act. It is against that decision the current appeal before the Tribunal proceeds.

First Case Management Discussion

3. A Case Management Discussion ("CMD") proceeded on 12 June 2019. For the Applicant the Tribunal had before it the Application and an Inventory of Productions comprising -
 - i. letter from the Respondents to the Applicant dated 22 February 2019 with a 69 page Memorandum with appendices from the Respondent's Department of Communities, Housing and Planning Services dated 12 December 2019 ("the memo");
 - ii. copy of the Applicant's Inventory of Productions which was before the Board on 13 March 2019 –
 - a. letter from existing tenants from the Applicant's other properties;
 - b. sample of invoices from Miller Services to the Applicant between 3 July 2017 and 10 June 2018 in respect of the properties at 2/1 95 Causeyside Street, Paisley and 1/2 87 Causeyside Street, Paisley;
 - c. sample invoices between Glens Management Ltd and the Applicant between 27 February 2017 and 1 November 2018;
 - d. email from Erskine Roofcare Services to the Applicant dated 19 June 2018 with invoice and reports of works between 15 December 2017 and 28 January 2019;
 - e. email from Pink Plumbing Services to the Applicant dated 9 June 2018 with invoice;
 - f. copy report from Walker Love, Sheriff Officers dated 29 November 2018 in respect of the eviction of the tenant at 2/1 95 Causeyside Street, Paisley;
 - g. email from M L Electrical to the Applicant dated 29 January 2019 with copy note to Wright and Crawford solicitors;
 - h. email from Erroch Roofing Services to Harper MacLeod dated 8 February 2019;
 - i. letter from Miller Services to Harper Macleod dated 13 February 2019;
 - j. note from the occupier of 1/2 87 Causeyside Street, Paisley provided in February 2019 and;
 - k. email from Eric Burns to Harper Macleod dated 7 March 2019,
 - iii. copy letter from M Malik, Stop N Shop, 95 Causeyside Street, Paisley dated 9 March 2019,
 - iv. copy correspondence between the Respondent's Jennifer Gray and the Applicant dated 8 and 12 March 2019
 - v. copy decision note from the Respondent to the Applicant dated 19 March 2019,

- vi. copy Joint Apprentice Council Certificate for John McCafferty dated 27 December 1974,
 - vii. copy letter from Wright and Crawford Solicitors to the Applicant enclosing confirmation of service of notice to quit and section 33 notice for 95 Causeyside Street, Paisley dated 20 March 2018 and;
 - viii. copy notice to quit and section 33 notice for 87 Causeyside Street, Paisley dated 30 May 2018.
4. The Respondent had drafted a Reasons of Decision ("the Reasons") dated 28 May 2019 which was lodged with their written representations. The Respondent also lodged submissions on what they considered the correct procedure to be followed by the Tribunal in considering the appeal together with a bundle of authorities.
 5. During the course of that CMD, parties were invited to make submissions on the correct procedure for the appeal and whether the matter should proceed as a hearing *de novo* or as a review as to whether the Respondent was entitled to reach the decision it had based on the material before the Board. After some debate, parties agreed the appeal should proceed on the basis of whether the decision of the Board was one which no reasonable authority could have reached following upon the dicta of Lord President Emslie at page 347 - 348 in *Wordie Property Company Limited v Secretary of State for Scotland 1984 SLT 345* and Sheriff Deutsch in *TH v Glasgow City Council, 21 September 2017(unreported)*.
 6. The Applicant's solicitor requested to amend the Application which had been drafted prior to the Reasons being issued. In the circumstances, the Tribunal adjourned the CMD to a further date to allow amendment. The Tribunal requested parties lodge clean copies of their amended positions with the Tribunal. The Tribunal's Note on that CMD is referred to.

Continued Case Management Discussion

7. The Tribunal proceeded to a continued Case Management Discussion on 14 August 2019. Both parties had provided the Tribunal with additional written representations. At that CMD, both parties took the Tribunal through their respective written representations.
8. Mr Hunter who appeared for the Applicant, referred the Tribunal to various paragraphs of the Reasons and highlighted the Board's failure to explain the weight given to the mitigating factors he had addressed the Board on as against the public interest which the Board favoured. He submitted there was no analysis that the Board had exercised any balancing exercise with regard to the factors before them before deciding the Applicant was not a fit and proper person. He was critical that the Board had a backward looking approach in reaching their decision and of their failure to provide advice and assistance to the Applicant. In his submission, the decision of the

Respondent to revoke the Applicant's registration was an error in law, an unreasonable exercise of discretion and disproportionate.

9. Mr McLaughlin, who appeared for the Respondent, submitted the decision taken by the Board was reasonable and lawful. He disputed the approach of the Board should have been forward looking as this was not the correct test under Section 89 of the 2004 Act. In his submission, it was the totality of the Applicant's conduct as set out in the Reasons which entitled the Board to conclude the Applicant was no longer a fit and proper person to be included in the register.
10. After the lengthy submissions made by both parties, the CMD was continued to allow both parties to lodge legal submissions with the Tribunal. The Tribunal's Note on that CMD is referred to.

Legal Submissions

11. The Tribunal proceeded to a continued Case Management Discussion on 26 September 2019 for legal submissions. The Applicant was represented by Mr Andrew Hunter from Messrs Harper Macleod and the Respondent by Mr Andrew McLaughlin from Renfrewshire Council.
12. Both parties had provided the Tribunal with written legal submissions together with Lists of Authorities. The Applicant also made additional representations following on the CMD of 14 August 2019 with his legal submissions.
13. The Respondent's List of Authorities, there being no objection from Mr Hunter, was accepted by the Tribunal although lodged late.
14. The Applicant had also lodged a second Inventory of Productions comprising tenancy references from the Applicant to the Respondent for the Applicant's previous tenants at 87 and 95 Causeyside Street, Paisley. After hearing submissions on whether the second Inventory of Productions for the Applicant should be before the Tribunal, the Tribunal determined that as these items had not been before the Board when they made their decision on 13 March 2019, they were not relevant and could not be considered by the Tribunal. The second Inventory of Productions for the Applicant was therefore not allowed.

Additional Representations for the Applicant

15. The Tribunal considered the additional representations for the Applicant following from the CMD on 14 August 2019. These related to –

- i. the qualification of the electrician;
- ii. "successive issues with water penetration" and;
- iii. the removal of radiators.

With regard to the qualifications of the electrician, the Tribunal noted as requested, that with regard to paragraph 10 of the Tribunal's Note of 19 August 2019, the Applicant's then solicitor Wright and Crawford on 30 August 2018 advised the Respondent's Environmental Health Officer that her electrician would contact the Respondent directly to resolve the matter of his certification. The Applicant's written submission referred the Tribunal to page 64 of the memo. The Tribunal also noted as requested that it was regrettable the Applicant did not know until after she received the citation in January 2019 from the Respondent that her electrician had failed to provide the Respondent with evidence that he was qualified despite his repeated assurances to her that he would do so. The Tribunal also noted that despite the electrician providing some information in January 2019, this was not sufficient and the matter of his certification was still outstanding at the Board's hearing on 13 March 2019.

16. The submissions relating to "successive issues with water penetration" with reference to paragraphs 13 and 18 of the Tribunal's Note of 19 August 2019 and pages 2 and 4 of the memo were also noted by the Tribunal. These were later supported by Mr Hunter's subsequent oral submissions as set out in paragraph 39 below in relation to water penetration.

17. With regard to the removal of radiators, the Tribunal accepted Mr Hunter's written submission that there was an error in paragraph 15 of the Tribunal's Note of 19 August 2019. The Tribunal accepted that two radiators had been removed from 87 Causeyside Street, Paisley and not from both properties.

18. The Tribunal advised parties that they had been through their written legal submissions together with the authorities lodged. The Applicant's legal submissions were broken down into 4 sections –

- i. decision making process;
- ii. the written reasons;
- iii. the "forward looking" test and;
- iv. the Tribunal substituting its own decision.

19. The Respondent's legal submissions comprised sections on -

- i. the legal test to determine whether a decision was unlawful with reference to *Wordie v the Secretary of State*;
- ii. the adequacy or otherwise of a statement of reasons;
- iii. the reasoning in paragraph 61 of the Reasons;
- iv. the information relied upon in paragraph 56 of the Reasons;
- v. the failure to put material considerations to the Applicant;
- vi. dishonesty not disregarded;

- vii. the Reasons failed to have regard to the material consideration that the properties had been removed from the Register;
- viii. the Reasons failed to have adequate regard to the *status quo* and insufficient reason as to why this and other mitigating factors presented by the Applicant were outweighed by the public interest;
- ix. the Reason's failure to explain why no advice was offered by the Applicant;
- x. the forward looking approach and;
- xi. conclusions

The Applicant's Submissions

20. The Tribunal invited both parties to highlight what they wanted the Tribunal to take from each authority they presented. Mr Hunter's first submission related to the Respondent's decision making process. He referred to his list of authorities and to *Ritchie v Aberdeen City Council 2011 SC 570* as proposition that when considering whether a person is fit and proper, the standards set out in the *Wordie* case apply. He referred to paragraphs 15 and 16 in the *Ritchie* case as being authority as to how the Board should have conducted a balancing exercise. In his submission, if the Board had not balanced the issues before them before they found his client was not a fit and proper person, the Board could not be said to have acted reasonably.
21. In this regard, Mr Hunter was critical of paragraph 66 of the Reasons. In his submission, the decision that the Applicant was not a fit and proper person was made before the Board considered the mitigating factors set out in paragraph 67 of the Reasons. He referred the Tribunal to the whole of paragraph 66 of the Reasons and in particular the last sentence which read "*Consequently, the Board, having regard to the totality of Mrs Sharma's conduct, were of the view that her conduct was of a sufficiently serious nature to render her not a fit and proper person to act as a landlord*".
22. Paragraph 67 was where the Board had then attempted to set out their reasons for their finding in paragraph 66. In paragraph 67, Mr Hunter submitted the Board had only considered the fact that the two properties of concern to the Board were vacant and had been removed from the register by the Applicant. In his submission, he was left in doubt as to how the Board considered his submissions with regard to the Applicant's remaining six properties. The Board should have considered the mitigating factors relating to those properties. In accordance with the *Ritchie* case, what the Board should have done was consider the good things against the bad things and then made a decision. The Board however had made their decision that the Applicant was not fit and proper before they considered the mitigating factors. By not doing so, the Board had erred in law in his submission.
23. Mr Hunter also referred to *Hart v Aberdeen City Council 2006 Hous LR 93* in support of his submission that if there were material considerations before them, a Board must show what weight is applied to each. With reference to paragraph 67 of the Reasons he still did not know what weighting had been

applied or why the Board considered the public interest outweighed the mitigating factors.

24. Further, Mr Hunter was critical that the Board had simply concluded that no advice could be offered to the Applicant in all the circumstances without any explanation as to why that should be in paragraph 67 of the Reasons. In his written submissions, Mr Hunter submitted that if the sole consideration was the electrical certification, given that the Applicant's other properties were operating normally, save for the certification point, a reasonable Board would have found the Applicant to be a fit and proper person and allowed a period of time for proof of that certification to be lodged with them. He submitted it was unclear on a fair reading of the Reasons as to why the Applicant could not continue to be registered as a landlord; these other properties were of no concern to the Board, there were letters of support from her tenants and the Applicant had removed the two properties from the register that were of concern to the Board. In his submission, the Reasons failed the balancing test and could not be said to be reasonable.
25. Mr Hunter's next submission was the Board should have been forward looking in their approach to the fit and proper test. He referred to the Inner House decision in *Lidl v City of Glasgow Licensing Board* 2013 SC 442 at page 458, paragraph 35 - *"While a licensing board necessarily has to consider the earlier factual allegations upon which the application or proposal for review is made, the process of review is essentially forward looking. It involves examining whether the continuance of the particular premises licence in issue, without taking any of the steps listed in section 39(2), would be inconsistent with endeavouring to achieve the licensing objective in question. The process of review is therefore not directed to imposing a penalty in respect of some past event which is not likely to recur to an extent liable to jeopardise the licensing objective."*
26. In his submission, whilst the *Lidl* case concerned a different licensing regime, namely liquor licensing, what the Board had done in the current case was to invite the Applicant to the continued hearing to review her fitness as a landlord. At that point, she was still a fit and proper person to be a landlord. His written submissions referred to the letter from the Board to the Applicant which the Tribunal had noted was lodged as production 1 in the Applicant's Inventory of Productions. In his submission, that letter essentially recognised the status quo, namely she was a fit and proper person. He submitted she would remain so until such time as the Board found otherwise. The purpose of the hearing before the Board was to review her status. On the basis of *Lidl* therefore his submission was the Board should have been forward looking and not wholly focused on past concerns. They should have considered whether there would be a recurrence of the behaviour that had been brought to the Board's attention. Mr Hunter submitted the Board's position was that the public interest outweighed the mitigating factors. If the Board had offered the Applicant advice, e.g. to lodge

the electrical certificate and not appear before them again, that would have been forward looking and would have achieved the licensing objective. However, in his submission the Board had hung "the sword of Damocles" over the Applicant with regard to the electrical certification with no explanation. The Board had by their failure to give advice deprived the Applicant of an opportunity to address their concerns with her registration intact. Accordingly, the Board had failed the forward looking approach to the statutory test and had accordingly erred. His submission was that in all the circumstances the Tribunal should uphold the appeal and find that the Applicant was a fit and proper person to be reinstated onto the register.

27. Finally the Tribunal noted Mr Hunter's written submission that the Tribunal could not substitute its own decision in the place of the Respondent's decision. The Tribunal made it clear to parties it would not take account of any factors which had not been before the Board and that the appeal was proceeding as a review of the Respondent's decision.

The Respondent's Submissions

28. The Tribunal asked Mr McLaughlin for the Respondents to highlight what he wanted the Tribunal to take from his authorities. He referred to the case of *TH v Glasgow City Council*, 21 September 2017(unreported) following *Wordie Property Company Limited v Secretary of State for Scotland* 1984 SLT 345. The approach the Tribunal could take was laid out at pages 347-348 in the *Wordie* case namely that the Board's decision would be unlawful if it was based on a material error in law, if the Board had taken into account some irrelevant consideration or had failed to take account of relevant and material considerations, where the decision required a factual basis, there was no proper basis in fact to support the decision or the decision was one which no reasonable authority could have reached the decision would fail.
29. He further submitted with reference to Sheriff Deutsch at paragraph 19 in *TH v Glasgow City Council* that a Landlord could not be a fit and proper person for one property and at the same time not be a fit and proper person for another property. His submission therefore was that it was appropriate to assess the conduct of the Applicant and that that outweighed that there had been no complaints in relation to the remaining properties that were still on the register.
30. Further, with regard to the Reasons, he submitted that an informed reader would be left in no doubt as to the reasons and material considerations as to why the Board made the decision. He relied on the *Wordie* case and to Lord President Emslie at p348 in support of that submission.
31. With reference to *Freeland v Glasgow District Licensing Board* 1979 SC 226 he submitted that all the Respondent was required to do was give the Applicant fair notice of the material the Board would have before them. The

Respondent was not obliged to hold a hearing to consider the Applicant's suitability. In his submission, the Respondent gave the Applicant sufficient notice of the matters before the Board. The meeting on 13 March 2019 was a continued hearing. The Respondent had sent all documents to the Applicant. The Tribunal noted that the first Board meeting the Applicant was required to appear was in January 2019 and that the matter was continued to 13 March 2019. The Respondent sent the memo with the letter of 22 February 2019 notifying the Applicant of the continued Hearing on 13 March 2019. Mr McLaughlin submitted therefore that the Applicant had had sufficient notice to consider the matters that were being put to the Board and by having a hearing, she had had an opportunity to comment on those matters.

32. With regard to carrying out the balancing exercise, he submitted the cases of *Simson v Aberdeenshire Council* 2007 SC 366 and *Hughes v Hamilton District Council* 1991 SC 251 were authorities that the weighing up of factors was a matter for a local authority and that the judiciary could not interfere with that exercise or substitute their own view.
33. In his submission the case of *Lidl* was not relevant. With reference to paragraphs 18, 20 and 21 at page 455 of *Lidl*, he submitted *Lidl* related solely to the Licensing (Scotland) Act 2005. It was a distinct test. In his submission, *Lidl* was not authority for the forward-looking test to be applied over different licensing regimes. The Respondent had to be satisfied that the Applicant was a fit and proper person and that could only be determined with reference to her behaviour as a landlord. He referred to the 2004 Act's wording at Section 84(3) (c) that the Board "shall" remove a person if they are no longer deemed to be fit and proper. In his submission, the 2004 Act did not give the Board any discretion on the matter. They had to remove the Applicant from the register if they found her not to be fit and proper.
34. Mr McLaughlin then went onto distinguish the *Ritchie* case with reference to paragraphs 66 and 67 of the Reasons. In the *Ritchie* case, the statement of reasons did not refer to any mitigating factors. The same could not be said for the Reasons. The Board's decision was in paragraph 69. He submitted the Reasons was not a document to be dissected, but had to be taken as a whole. Mr McLaughlin accepted that that the last sentence in paragraph 66 could have been drafted better and that the use of the word "render" was unfortunate.
35. However, he submitted paragraph 66 was clear that the concern to the Board was the Applicant's conduct relating to the two properties complained about. They were aware the Applicant had removed the two properties from the register from Mr Hunter's submissions as set out in paragraph 5 of the Reasons, but the Board had no control over what properties were included in the register and only had power to control persons on the register.

36. Paragraph 67 looked at the mitigations overall. The weighing up exercise was shown and in his submission, the Board had considered the Applicant's conduct in relation to the two properties against mitigating factors unrelated to the public interest. In his submission, the lack of the electrical certificate could affect the Applicant's other properties which remained on the register, the concern being that they may not comply with the Repairing Standard and therefore there was an impact on other tenants. He referred to paragraph 17 of his written submissions that paragraph 67 when taken in context of the Reasons as a whole, showed the Board had weighed up the mitigations against the Applicant's failings and had given more weight to the failings. Paragraph 68 discounts the forward looking test and ultimately paragraph 69 set out the final decision that the Applicant was not a fit and proper person to be included as a landlord on the register. Accordingly, his submission was that the decision was reasonable and the finding that the Applicant was not fit and proper and her subsequent removal from the register was proportionate.
37. Mr McLaughlin concluded that the decision of the Board satisfied the test laid out in *Wordie* and that the Reasons when read as a whole were adequate and intelligible. He submitted the Tribunal should not uphold the appeal.

The Applicant's Response

38. The Tribunal invited Mr Hunter to respond to the Respondent's submissions. He re-iterated they could have given the Applicant advice, but had not done so, with no explanation as to why they had not done so.
39. With regard to paragraph 61 of the Reasons, he referred the Tribunal to his written submissions with regard to successive issues of water penetration at 95 Causeyside Street, Paisley. In his submission when one drilled into the Environmental Health Officer's submissions in the memo, there was no stated conclusion as to what had caused the water penetration. He questioned whether the Board was right to conclude that water ingress had been caused by internal issues and not the roof. He submitted that there was a question over who had responsibility for roof repairs. In his submission, there had to be an adequate basis of fact to conclude that internal issues from the property were the cause of water penetration. In his submission, it was not fair of the Board to say that water ingress was coming from the Applicant's property.
40. With reference to paragraph 56 of the Reasons and 87 Causeyside, Paisley he submitted that there were no conclusions set out following upon visits to that property from 2015. He referred the Tribunal to page 5 of the memo and submitted that not all visits to the property had outcomes or required actions.

41. He made further submissions relating to paragraphs 12 and 13 of the Reasons which set out his mitigating submissions to the Board including the Applicant's good long standing relationship with six her remaining tenants who would be impacted if she were removed from the register in contrast to the tenants at the two properties who had damaged the properties and been uncooperative. The Reasons set out that the Applicant had tried to carry out repairs but had been prevented from doing so by the tenants in the two properties who were "playing the system" in the hope that if they were evicted they would be rehoused by the Respondent.
42. The Board's reasons were set out from paragraph 45 onwards. He reiterated his reliance on the forward looking test as set out in the *Lidl* decision. Advice would have been forward looking, but he could not accept an explanation that advice was not appropriate.
43. He reiterated his criticism of the words "*to render*" in the final sentence of paragraph 66 and that the decision the Applicant was not fit and proper was therefore made before the final paragraph in paragraph 69. He accepted that if that final sentence in paragraph 66 was not there he would have trouble making some of the points he had made.

Further questions

44. The Tribunal adjourned for a short while to consider whether they had any questions for the parties. After the adjournment, the Tribunal asked Mr Hunter whether there were any mitigating factors which were before the Board that the Board had not taken into account. Mr Hunter's response was that the Reasons were a fair reflection of what happened at the Board and that he did not believe there was anything else that was before the Board.
45. The Tribunal asked Mr Hunter to sum up what matters were before the Board that would indicate Mrs Sharma was a fit and proper person. In response, he relied on the fact that she had evicted the two tenants who had been problematic from the properties that were of concern to the Board. He further submitted it was not fair to say his client had been non-communicative with the Respondent. She had responded to the Respondent and the over criticism of her was unfair. The Applicant in his submission had attempted to address matters highlighted to her by the Respondent, but this had been difficult due to the ulterior motives of the two tenants. In his submission in other circumstances where the landlord/tenant relationship was operating normally in the other six remaining properties, the Board had no concerns, caveated by the electrical certificate issue. His client had been a registered landlord since the requirement for registration was mandatory.
46. Finally, the Tribunal questioned whether removal of the two properties from the register by the Applicant which had been brought to the Board's attention

was an indication that the Applicant was a fit and proper person. In brief, Mr Hunter explained the decision to remove the properties was “fitness neutral” and was not motivated by the process, but by a desire to concentrate on her other six properties.

47. The Tribunal then questioned Mr McLaughlin and asked him where in the Reasons did it show that other factors beyond the electrical certificate were of material consideration to the Board. Mr McLaughlin referred the Tribunal to paragraphs 57 – 65 of the Reasons which dealt with the quality of repairs, recurring water ingress to neighbouring properties from both properties and the overall concern about the management of both properties by the Applicant. There were therefore other material factors that were of concern to the Board other than the electrical certificate.
48. The Tribunal asked where the evidence was before the Board that would allow them to conclude that water ingress was caused by internal issues and not the roof at 95 Causeyside Street. Mr McLaughlin referred the Tribunal to paragraph 61 of the Reasons and to the various issues of water penetration at 95 Causeyside Street where there were multiple sources of water penetration. The Board had taken into account the state of the roof and had stated that had that been the only source of water penetration the Board would not have found the Applicant not to be fit and proper. However, the quality of internal repairs was of concern to the Board which had in some instances led to continued water ingress. The fact that no repairs had been carried out to the roof and that there had been no major instances of water penetration since October 2018 would suggest that the major incidents of water ingress to then had at least been partially due to the state of disrepair of the Applicant's property as set out in page 4 of the memo and Appendices 6 and 10.
49. The Tribunal also asked Mr McLaughlin where in the Reasons there was any explanation as to why the public interest should outweigh the supporting letters from the Applicant's six remaining tenants. In short, Mr McLaughlin submitted that this was embedded throughout the Reasons as a whole with reference to the impact on neighbours and remaining tenants in the Applicant's other properties.

Reasons for Decision

50. Following upon the agreement of parties at the CMD on 12 June 2019, this appeal proceeds on the basis of whether the decision of the Board on 13 March 2019 was one which no reasonable authority could have reached following upon the dicta of Lord President Emslie at page 347 - 348 in *Wordie Property Company Limited v Secretary of State for Scotland 1984 SLT 345* and Sheriff Deutsch in *TH v Glasgow City Council, 21 September 2017(unreported)*. Having considered both parties detailed written and oral

submissions, the Inventory of Productions for the Applicant and in particular the memo of 12 December 2018 and the Reasons, the Tribunal is of the opinion that the decision taken by the Respondent to remove the Applicant from the register in terms of Section 89 of the 2004 Act was reasonable and lawful.

51. Much was made of the inadequacies of the Reasons by Mr Hunter. The Tribunal accepted his criticism of the final sentence of paragraph 66 of the Reasons that "*Consequently, the Board, having regard to the totality of Mrs Sharma's conduct, were of the view that her conduct was of a sufficiently serious nature to render her not fit and proper person to act as a landlord*". The use of the words "*to render*" in particular was unfortunate. The Tribunal also accepted his submission that had that final sentence not been there he would have trouble making some of the points. However the Tribunal was not persuaded that this was fatal to the Respondent's decision.
52. The Tribunal preferred the Respondent's submissions that the Reasons set out the material considerations considered by the Board from paragraph 45 onwards. When read as a whole to paragraph 69, this would allow the reader to be left in no doubt as to why the Board had reached their decision. The Tribunal was persuaded by the submission of the Respondent that the Reasons was not a document that should be dissected in order to derive meaning from it, but it should be read as a whole. The Tribunal was of the opinion that an informed reader would be left in no doubt as to the reasons and material considerations as to why the Board made the decision following upon the decision of Lord President Emslie at p348 in *Wordie*. The Tribunal was therefore satisfied that when read as a whole the Reasons were adequate and intelligible.
53. The Tribunal was not persuaded by the Applicant's submission that the Reasons did not show how the Board had carried out the balancing exercise, there being no reason why they had concluded that the public interest should outweigh the Applicant's mitigating factors. The Tribunal preferred the Respondent's submission that the Reasons disclosed the Board had carried out a balancing exercise of the mitigating factors for the Applicant against the public interest in paragraph 67. The Tribunal accepted the Respondent's submission that the decision in the *Ritchie* case could be distinguished from the present case. In *Ritchie* Lord Drummond Young had noted there was no reference to the mitigating factors in the statement of reasons and therefore it was impossible to discover how the balancing exercise had been carried out. That was not the position in this case. The Tribunal preferred the Respondent's submissions that on a reading as a whole the Reasons showed the Respondent had carried out a balancing exercise.
54. The Tribunal noted the Applicant's written submissions that *if* the sole consideration was the electrical certification, given that the Applicant's other

properties were operating normally, ***save for the certification point***, a reasonable Board would have found the Applicant to be a fit and proper person and allowed a period of time for proof of that certification to be lodged with them. However, this submission in the Tribunal's opinion was misdirected. It is predicated on the basis that there were no other material considerations before the Board. From the papers before the Board and from the submissions of the Respondent it was clear to the Tribunal that the issue before the Board was more than the Applicant's failure to produce an electrical certificate. Her failure to do so was not only at the Board meeting on 13 March 2019 but also at the previous Board meeting in January 2019. The sole consideration was not the electrical certification. The Board had other considerations before them including the quality of repairs, recurring water ingress to neighbouring properties from both properties and the overall concern about the management of both properties by the Applicant.

55. There was no evidence before the Board that the Applicant's other properties were "operating normally". The Applicant had not produced an electrical certificate to show that these other properties should not be of concern to the Board. No reasonable Board could ignore the Applicant had been asked to produce the electrical certificate and had failed to produce it at not only at the hearing in January but at the hearing on 13 March. Without this evidence the Board could not be said to have acted unreasonably.
56. The Tribunal took into account the Applicant's additional representations that on 30 August 2018 the Applicant's previous solicitor had advised the Respondent's Environmental Health Officer that her electrician would contact the Respondent directly to resolve the matter of his certification. The Tribunal noted as requested in the Applicant's submission that it was regrettable she did not know until after she received the citation in January 2019 from the Respondent that her electrician had failed to provide the Respondent with evidence that he was qualified despite his repeated assurances to her that he would do so.
57. The Tribunal was not persuaded that this failure should not be fatal to the Applicant particularly when the Board had other material considerations before it. The Tribunal preferred the Respondent's submissions that it was the totality of the Applicant's actions that was of concern to the Board. No reasonable Board would accept the failure to produce the electrical certification as immaterial particularly when they had other material considerations before them. There is no doubt from the Reasons that the Board considered all these factors and cannot be said to have erred in law by doing so. The failure to produce this certificate could not be ignored by the Board particularly when this was one of a number of concerns before the Board.
58. Further the Tribunal did not accept the Applicant's submissions that the Board could have allowed the Applicant to continue to be registered as a

landlord of her other properties which were of no concern to the Board, with letters of support from her tenants. The Board had no evidence the other properties were operating “normally” as they had no electrical certification carried out by a properly qualified person capable of producing and signing an EICR as required by regulations. The Tribunal accepted the Board were aware the Applicant had removed the two properties from the register. The Board however preferred the Respondent’s submission that the Respondent had no control over what properties were included in the register if she were found to be fit and proper and only had power to control persons on the register. The Tribunal noted the decision of Sheriff Deutsch in *TH v Glasgow City Council* at paragraph 19 that it was doubtful that it was open to a local authority to determine that an applicant is unfit to be a landlord of some properties and not of others. The Tribunal accepted the Respondent’s submission therefore that it was appropriate to assess the conduct of the Applicant as a whole and to find that this outweighed that there had been no complaints relating to the other properties.

59. Mr Hunter had relied heavily on the *Lidl* decision in support of his submission that the Board should be forward looking and that had the Board chosen to give the Applicant advice that would have satisfied the forward looking test. The Tribunal did not accept the forward looking test was the correct test to be applied in the context of the 2004 Act. The Board preferred the submission of the Respondent in this regard. Section 84(3) (c) of the 2004 Act refers to the requirement that a person has to be a fit and proper person to be included in the register as a landlord. Section 89 of the 2004 Act states “Where—

(a) a person is registered by a local authority; and

(b) subsection (2) or (3) applies,

the authority **shall** remove the person from its register.

(2) This subsection applies where—

(a) the person was registered by virtue of section 84(3); and

(b) paragraph (c) of that section no longer applies.”

The Tribunal was persuaded that the wording of Section 89 with reference to Section 84(3) (c) of 2004 Act did not allow the Board any discretion in removing a person who they found not to be fit and proper from the register. They had to remove the Applicant from the register if they found her not to be fit and proper.

60. In terms of Section 92 (2) of the 2004 Act The Tribunal may make an order to require a local authority to enter a person in the register and specifying whether the entry is made by virtue of Section 84 (3) (landlord) or Section 84 (4) (letting agent). In all the circumstances, the Tribunal was not persuaded that the decision taken by the Board was one which no reasonable Board would have taken. The Board took into account all the material considerations and mitigating factors before it. The Board cannot be said to have erred in law by finding the Applicant was not a fit and proper

person to be included in the register. Accordingly the Tribunal refuses the appeal. The decision of the Tribunal is a unanimous decision.

Right of Appeal

In terms of Section 92 (5) of the Anti-Social Behaviour etc (Scotland) Act 2004 a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland. An appeal shall be made within 21 days of the date on which this decision appealed against was made. The decision of the Upper Tribunal shall be final.

Shirley Evans

Legal Chair



10 October 2019.
Date