



**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/21/1819

**Re: Property at FLAT 11, 1 WESTERLEA GARDENS, EDINBURGH, EH12 6HU
("the Property")**

Parties:

**MR RICHARD LEE-SMITH, 21 DALHOUSIE COURT, CARNOUSTIE, DD7 7JD ("the
Applicant")**

**MR IAN ROY and NICOLA BROWN, whose present whereabouts are unknown
("the Respondents")**

Tribunal Members:

George Clark (Legal Member)

Decision (in absence of the Respondent)

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the
Tribunal") determined that the application should be decided without a Hearing,
made a Wrongful-termination Order under Section 58 of the Private Housing
(Tenancies) (Scotland) Act 2016 and, in terms of Section 59 of that Act, made an
Order for Payment by the Respondents to the Applicant of the sum of Nine
Thousand Pounds.**

Background

By application, received by the Tribunal on 27 July 2021, the Applicant sought a Wrongful Termination Order under Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). He contended that he had been misled by the Respondents into ceasing to occupy the Property.

The application was accompanied by copies of a Private Residential Tenancy Agreement between the Parties, commencing on 1 May 2018 at a rent of £1,500 per month, and a Notice to Leave dated 2 March 2021. The Notice to Leave stated that the Ground being relied on by the Respondents was Ground 4 of Schedule 3 to the 2016 Act, namely that the Respondents intended to live in the Property.

The Applicant included a copy of an email giving him prior warning that the Notice to Leave was about to be sent. It was dated 10 February 2021 and was sent to the Applicant by Rettie & Co. Ltd, the Respondents' letting agents. In it, they said that "due to a change of circumstance unfortunately they [the Respondents] are going to need to serve 3 months' notice to take the property back for their own use."

The Applicant also sent the Tribunal a copy of an email sent by the First-named Respondent to a group of owners/occupiers of Block C Westerlea Gardens, dated 16 June 2021, in which he said in relation to the Property "My daughter will be there and will be using it for a couple of weeks... We also plan to use it in August, as do other family/friends".

As the whereabouts of the Respondents is unknown to the Applicant, service of case papers on them was by way of advertisement on the Tribunal's website from 4 November 2021 until 14 December 2021.

The Respondents did not make any written representations to the Tribunal, but on 18 September 2021, the Applicant provided the Tribunal with copies of a number of emails between the First-named Respondent and the owners/occupiers of other flats in the block of which the Property forms part. They indicated that, on 30 August 2021, the First-named Respondent had asked the other owners/occupiers in Block C how to access the gas meters, how the back door to the garden worked and which parking spaces were allocated for visitors. One resident responded and the terms of the response indicated that the First-named Respondent was present in the Property at that time. On 3 September 2021, the First-named Respondent emailed the same group, saying "Thanks to everyone for their help and advice – was also nice to meet so many of you on our trip...See you next time! Ian and Nicola."

Case Management Discussion

A Case Management Discussion was held by means of a telephone conference call on the morning of 14 December 2021. The Applicant was present. The Respondents were neither present nor represented. The Applicant stated that he had left the Property in good faith on 5 June 2021, relying on the Notice to Leave, but it had since become apparent to him that the Respondents' letting agents' email of 10 February had perhaps been very carefully worded to avoid actually saying that the Respondents intended to move in to the Property as their principal home, and it seemed clear to him from the various emails that he has provided to the Tribunal that the Respondents intended to use the Property as a second home, not their only or principal residence. He understood that they were now back in Dubai.

Reasons for Decision

Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 states that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to decide the application without a Hearing.

Ground 4 of Schedule 3 to the 2016 Act provides that it is an Eviction Ground that the landlord intends to live in the let property and that the Tribunal must find that Ground 4 applies if the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months.

Section 58 of the 2016 Act applies where a private residential tenancy has been brought to an end by Notice to Leave and the tenant leaving and states that 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 person who was the landlord under the tenancy immediately before it was brought to an end.

Section 59 of the 2016 Act provides that 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 Order an amount not exceeding six months' rent.

Having considered all the evidence before it, the Tribunal decided, on the balance of probabilities, that the Respondents had not, when the Notice to Leave was served, intended that the Property would be their only or principal home for at least 3 months. The Applicant had vacated the Property on the basis of the Notice to Leave which relied on Ground 4 of Schedule 3 to the 2016 Act, but the Tribunal noted that in their email of 10 February 2021, giving advance warning that the Notice was to be issued, the Respondents' letting agents did not specifically say that the Respondents intended to use the Property as their only or principal home. They said that it was necessary for the Respondents to "take the property back for their own use". They referred to a "change of circumstance" but were not more specific. In his email of 16 June 2021, the First-named Respondent said "My daughter will be there and will be using it for a couple of weeks... We also plan to use it in August, as do other family/friends" and, whilst there was evidence suggesting that at least the First-named Respondent had stayed in the Property at the end of August, his email of 3 September referred to "our trip" and "See you next time". The view of the Tribunal was that these matters taken together indicated that the Respondents regarded the Property as a second home for the occasional use of themselves, their family and friends, and did not intend that it become their only or principal home and that, accordingly, the Applicant had been misled into ceasing to occupy the Property.

The Tribunal noted that, in the portion of the Notice to Leave form which invites landlords to provide supporting evidence, the letting agents stated - "Evidence available upon request". The view of the Tribunal was that the Applicant was not then under any obligation to ask to see the evidence. He had trusted the Respondents as his landlords and had acted in good faith throughout and thus had not exercised his right to have remained in the Property until they applied for and, if granted, obtained an Eviction Order under Ground 4 of Schedule 3 to the 2016 Act. The Respondents had betrayed that trust.

The maximum sum that the Tribunal could order the Respondents to pay was six months' rent, namely £9,000. The view of the Tribunal was that the Applicant had been misled into ceasing to occupy a property in which he was, seemingly, very content. The Respondents' letting agents had issued the Notice to Leave on their behalf and there was no evidence to suggest that the Respondents could have obtained an Eviction Order but for their act of misleading the Applicant. Accordingly, the Tribunal decided that the Respondents should be ordered to pay to the Applicant the maximum sum permitted by Section 59 of the 2016 Act, namely £9,000.

In his application, the Applicant had asked the Tribunal to make an Order for payment in respect of cleaning charges charged by the letting agents at the end of the tenancy and in respect of his moving costs. These had not, however, been vouched, but, in any event, The Tribunal could not add these costs, as to do so would have taken the total amount of the Tribunal's Order over the six months' rent limit.

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.

Legal Member/Chair

14 December 2021
Date