

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 58 and 59 of the Private Housing Tenancies (Scotland) Act 2016 (“the 2016 Act”)

Chamber Ref: FTS/HPC/PR/21/3115

Property at 11 Hamilton Wynd, Edinburgh, EH6 4EH (“the Property”)

Parties:

Mr Mamadou Diop, Flat 35A, Allerton House, Provost Estate, London, N1 7QX (“the Applicant”)

Ms Ashley Liu, 87 Moredun Park Gardebs, Edinburgh, EH17 7LQ (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member) and Ahsan Khan (Ordinary Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £1440 should be made in favour of the Applicant.

Background

1. The Applicant seeks a wrongful termination order in terms of Section 58 and 59 of the 2016 Act. Two related applications were also submitted to the Tribunal under Chamber references PR/21/3116 and CV/21/3117. Various documents were lodged in support of the applications including a copy private residential tenancy agreement, Notice to Leave, emails from the three Tenancy Deposit Schemes and copies of emails between the parties.
2. The parties were notified that a case management discussion (“CMD”) would take place by telephone conference call on 29 March 2022 at 10am. They were provided with the telephone number, passcode, and information about how to join the call. Prior to the CMD the Respondent lodged written submissions and documents. The CMD took place by telephone conference call on 29 March 2022 at 10am. The Respondent participated. The Applicant did not participate. The Legal Member advised the Respondent that the Tribunal Clerk had

contacted the Applicant. He was travelling and was unable to dial into the conference call. He thought that the Tribunal would call him. He requested a postponement of the CMD. Having regard to the overriding objectives of the Tribunal, the Legal Member determined that it would be in the interests of justice to postpone the CMD to another date so that the Applicant could arrange to participate.

3. The parties were advised that a CMD would take place on 24 May 2022. At the request of the Respondent, it was postponed to 1 September 2022 and then again to 15 September 2022. The CMD took place on 15 September 2022 at 2pm. The Applicant participated. The Respondent was represented by her mother, Ms Lui, as the Respondent was unavailable
4. At the CMD, the Legal Member asked Ms Lui whether the Notice to Leave lodged with the application had been given to the Applicant by the Respondent. Ms Lui confirmed that it had. She stated that Mr Diop had been unsure about the tenancy and the parties had therefore agreed that it would be for a three-month period, with both parties able to terminate it by giving 28 days' notice. The Legal Member noted that the tenancy is a PRT and therefore did not have a fixed term. In relation to the grounds specified in the Notice (grounds 1, 3 and 4), Ms Lui said that the Respondent had a "buy to let" mortgage. When she served the Notice, she had planned to sell the property and to carry out some re-decoration to the kitchen and bathroom before she did so. She had some financial problems because of losing her job during the pandemic, having a baby, and becoming ill. She wanted to sell the property to pay off the mortgage. However, her solicitor had asked for a substantial sum of money to cover costs such as the home report. She did not have the funds available and could not proceed with the sale. She still owns the property and does not reside there. She lives with her mother because of her health problems.
5. The Legal Member determined that the application should proceed to a hearing and issued a direction to the parties for the production of information and documents. The parties were notified that the hearing would take place by telephone conference call on 29 November 2022 at 10am.
6. Prior to the hearing both parties lodged written representations and documents. The Applicant provided some email correspondence between himself and the Respondent and a letter from the Local Authority in relation to a complaint/enquiry he had submitted. On 26 November 2022 he lodged a submission which stated that he had paid the rent for November. He also stated that he had experienced emotional distress, that there was no lock on his bedroom door or the bathroom door at the property, that the Respondent was not fit to be a landlord and was targeting foreign tenants to extort money from them. He added that he was requesting a copy of the BULB bill, that he had corresponded with the Local Authority and that the Landlord had failed to arrange a cleaner for the property. He also stated that there were often strangers in the house, that there were two tenants there when he moved out, that the heating did not work, that he had been evicted during the pandemic

and had to move back to London as he could not obtain accommodation in Edinburgh at short notice. The Respondent stated that she had made enquiries and investigated market prices. She referred to an email between herself and her solicitor regarding the proposed sale. She added that she had intended to move into the property with her daughter for a short time to give the house a “basic renovation (paint everywhere, do the seals in the bathroom & Kitchen, take down the shed, do the gardening which needed much attention)” before putting it on the market. However, because of a difficult pregnancy and birth, she had moved in with her “mother temporarily instead”.

7. On 28 November 2022, the Applicant notified the Tribunal that he was having problems with his phone. He did not request a postponement of the hearing. Prior to the hearing the Applicant was notified that he could dial in early to the call to check that he was able to join the call. He was also notified that the hearing would proceed in his absence if he did not request a postponement. No further communication was received.
8. The Hearing took place by telephone conference call in relation to the application and the two related applications. The Respondent participated. The Applicant did not participate.

The Hearing

9. Ms Lui told the Tribunal that she purchased the property in 2019 and lived there for a while. She then decided to convert the mortgage to a buy to let mortgage. Mr Diop was the first tenant at the property, with another (the second tenant) moving in on 26 September. After she moved out on 31 October 2021, a friend of a friend (the third tenant) moved in for an agreed short term let until 9 December 2021.
10. Ms Lui said that she only owns one property, the subject of the application. There are no tenants in the property at the present time. It is a three-bedroom house, although one of the bedrooms is really a box room. Mr Diop occupied a full-size double bedroom upstairs. The house has been unoccupied since the tenants moved out.
11. In response to questions from the Tribunal about whether she has carried out any work at the property, Ms Lui said that some gardening work has been done. She stated that, when all the tenants had moved out, she moved into the property as she had nowhere else to go. She then realised that she had a “buy to let” mortgage so her occupation of the property was not legal. She then moved in with her mum and has been there ever since. The property has remained unoccupied since that date and has not been re-let.
12. In relation to ground 4, Ms Lui said that she had moved into the property but only for two weeks. Prior to this she stayed with her father in Kirkcaldy. She moved into her mother’s home on 22 December 2021. She had intended to live in the property as this would have been the cheapest option.

13. In relation to ground 1 and 3, Ms Lui said that she had planned to renovate the property while she was living there. There was painting required throughout and some skirtings needed replaced. However, she wanted to sell. She did not have the money which had to be paid to the solicitor in advance, so could not instruct the sale. She still has not done so although she has kept in touch with the solicitor and still plans to sell.
14. In response to questions from the Tribunal, Ms Lui confirmed that the mortgage was converted in May 2021, as shown on the title sheet. However, the property was empty until Mr Diop moved in. It has also been empty since December 2021. She stated that, although she is unemployed, she continues to pay the "interest only" mortgage of £180 per month and the Council tax of about £100 per month, with the help of her mum and ex-partner. She said that she could not remember the price paid for the property or how much she owes to the lender. The Tribunal noted that, although the Respondent had submitted a copy of an email exchange with the solicitor, the list of fees and outlays which is referred to in the email was not submitted. The Tribunal also noted that the email indicated that only outlays marked with an asterisk were required in advance. Ms Lui said these amounted to £2388.
15. In a final submission, Ms Lui said that she is desperate to sell the property but has had health problems due to pregnancy and a difficult birth.

Findings in Fact

16. The Respondent is the owner and former landlord of the property
17. The tenancy started on 21 August 2021 and terminated on 29 November 2021, following service of a Notice to Leave on the Applicant.
18. The Notice to leave stated that the Respondent was seeking possession of the property on grounds 1, 3 and 4 of Schedule 3 of the 2016 Act.
19. The Respondent still owns the property. She did not market it for sale within 3 months of the Applicant moving out.
20. The Respondent does not reside at the property and did not move into the property for a period of at least three months when the Applicant moved out.
21. The Respondent has not carried out "significantly disruptive works" to the property and did not intend to do so when the Notice to leave was served.
22. The Respondent did not intend to live in the property for at least three months or put the property on the market within three months of the Applicant moving out of the property.

Reasons for Decision

23. Section 58 of the 2016 Act states “(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.” Section 50 states that a private residential tenancy “comes to an end if - (a) the tenant has received a notice to leave from the landlord, and (b) the tenant has ceased to occupy the property. In terms of Section 58(3) 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.” In terms of section 59, a wrongful termination order is “an order requiring the person who was the landlordto pay the person who made the application ...an amount not exceeding six months rent.”.
24. The Applicant did not participate in the hearing. Although he sent in written submissions and some documents, many of these appeared to be irrelevant. He did not address all issues identified at the CMD or provide a full response to the direction issued by the Tribunal. However, the Applicant lodged a notice to leave with the application which refers to three grounds. The date specified in Part 4 of the Notice was 30 November 2021. The Applicant moved out of the property on 29 November 2021. The Tribunal is therefore satisfied that Section 50 of the 2016 Act applies.
25. The Respondent does not dispute that she issued a Notice to leave to the Applicant. She also admitted that she has not sold the property or marketed it for sale, refurbished the property or lived in it for at least three months. She claims that she intended to do all these things but has been unable to do so.
26. The Tribunal did not find the Respondent to be credible or reliable. In her written submissions, and during an early part of the hearing, she stated that the property had been unoccupied since the tenants moved out. Later in the hearing, she stated that she had moved into the property for a period of two weeks, before realising that she could not reside there because she had a “buy to let” mortgage. As the Respondent had made a conscious decision to convert the mortgage a few months before, the suggestion that she was unaware or had forgotten that this was the case was not credible. The Respondent stated that she then moved in with her mother. However, in her submissions and earlier in the hearing, she claimed that the decision to move in with her mother was due to health issues. The Respondent also stated that the property has not been marketed for sale because she was/is not able to pay the sum of £2300 to the solicitor for outlays associated with the sale. This appears to be at odds with her claim that the mortgage is still being paid each month, although there is no rental income, and she is unemployed. She also stated that the full Council tax is being paid and said that she thought this was £100 per month for a Band B property, although she wasn’t sure. The Tribunal notes that Edinburgh Band B properties currently incur an annual charge of £1444. The Tribunal is therefore not persuaded, when account is taken of ongoing monthly outgoings, that Respondent has been unable to sell the property for financial reasons.

27. All three eviction grounds referred to in the Notice are based on the Respondent's intention. The meaning of "intention" was considered by the Supreme Court in the case of *S Franses Ltd v Cavendish Hotel (London) Ltd* (2019 AC 249). The Court applied the test outlined in the speech of Lord Justice Asquith in *Cunliffe v Goodman* (1950 2 KB) which states that the question is "if the plaintiff did no more than entertain the idea ...if she got no further than to contemplate it as a (perhaps attractive) possibility then one would have to say...either that there was no evidence of a positive "intention" or that the word intention was incapable as a matter of construction of applying to anything so tentative and so indefinite." The party must "do more than contemplate" but must have decided to proceed on that basis and must have a "reasonable prospect" of so doing. In subsequent cases, it has also been established that a landlord must show that the intention is not only "genuine" but also "firm and settled".

Ground 3

28. Ground 3 of Schedule 3 applies when the Landlord "intends to carry out "significantly disruptive works to" the let property (Section 3(1). To qualify, the Landlord must intend to "refurbish" the property and it must be "impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord" (Section 3(2). Evidence tending to show that the landlord has the intention "includes (for example)" a grant of planning permission or contract with an architect or builder.

29. By her own admission, the works which the Respondent stated that she had intended to carry out were largely cosmetic. They included painting, replacing skirting boards and gardening. None of the stated works could be described as "significantly disruptive". They could have been carried out while the property was occupied by a tenant and did not require planning permission or involvement of an architect or builder.

30. The Tribunal notes that most of the proposed work has not been carried out. It is not clear why this is the case if, as is claimed, the property is unoccupied. In any event, the Tribunal is satisfied that, even if the Respondent intended to do the specified work at the date of service of the Notice, this work did not meet the requirements of ground 3. The Respondent therefore misled the Applicant when she stated in the notice to leave that she intended to refurbish the let property.

Ground 1

31. Ground 1 of schedule 3 applies when the landlord intends to sell the let property. To qualify the landlord must be entitled to sell it and must intend "to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it. (Schedule 3 Paragraph 1(2))

32. As previously stated, the Tribunal did not find the Respondent's evidence to be wholly credible or reliable. Aside from the oral evidence, the only evidence provided in support of ground 1 was the email correspondence between the

Respondent and a solicitor regarding the costs associated with a sale. This is dated 24 November 2021, more than three weeks after the Notice was issued to the Applicant. The Respondent stated that, although she still intends to sell, the discovery that some costs had to be paid in advance meant that she was unable to proceed at the time the Applicant vacated the property, or subsequently. However, she did not alert the Applicant to the change of circumstances and has apparently continued to meet mortgage and Council tax payments for an unoccupied property for almost a year. Furthermore, the fact that she did not make enquiries about selling until the 24 November 2021, the reference in the Notice to grounds 3 and 4 as well as ground 1, and the fact that the Respondent does not appear to have given any thought to potential selling costs before sending the Notice, all suggest that Respondent may have been thinking about selling the property but that she did not have a firm or settled intention of doing so.

33. The Tribunal is therefore satisfied that the Respondent misled the Applicant when she stated in the notice that she intended to sell the property.

Ground 4

34. This ground applies when the landlord intends to live in the let property for at least three months. (Schedule 3 Paragraph 4(2)). This has clearly not been established. The Respondent stated that she intended to move into the property for a short (unspecified) period while she carried out some painting and gardening work before putting the house on the market. However, her evidence was highly unsatisfactory. She initially said (in written submissions and oral evidence) that the property has been unoccupied since the tenants moved out in December 2021. Later, she said that she had moved in for about 2 weeks before realising that she could not do so, because of her buy to let mortgage. The Respondent had converted her mortgage in May 2021, when she decided to move out and let the property. She was fully aware of the restrictions which applied. The Tribunal is not persuaded that she did move into the property. Even if she did, there is no evidence that she intended to do so for at least three months. She did not convert the mortgage back to an owner occupier mortgage. The Respondent also gave two different explanations for not living in the property – mental health issues and the buy to let mortgage.

35. The Tribunal is therefore satisfied that the Respondent misled the Applicant when she stated in the Notice that she intended to live in the let property.

36. In the application form the Applicant states that he was issued with the Notice to leave due to racism and alleges a connection with organised crime. Neither of these were established. However, it is clear from the documents lodged, that the Applicant made numerous complaints about the property, the heating system and people entering without his knowledge or permission. These complaints may have been the motivating factors. The Tribunal notes that the tenancy only lasted 3 months. Although the Applicant stated that he went back to London because he could not find alternative accommodation at short notice, he has not returned to reside in Edinburgh. The Respondent claimed that the

Applicant only planned a short stay at the property. This was not denied by the Applicant either at the CMD or in his submissions. In the circumstances, the Tribunal is satisfied that the maximum penalty is not warranted, and the award should be three times the monthly rent.

Decision

37. The Tribunal determines that an order for the sum of £1440 should be made in favour of the Applicant.

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.

Josephine Bonnar

Josephine Bonnar, Legal Member

5 December 2022