



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/21/3242

Re: Property at 1/10 Ocean Way, Edinburgh, EH6 7DG (“the Property”)

Parties:

Mrs Sahela Syed, Mr Mohammed Hamaad Khalid, 4/7 Western Harbour Terrace, Edinburgh, EH6 6JQ (“the Applicants”)

Ms Hazel Ross, Mr Malcolm Nixon, 48 Bankton Drive, Livingston, West Lothian, EH54 9EH (“the Respondents”)

Tribunal Members:

Nicola Irvine (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) refused the application for a wrongful termination order.

Background

- [1]** The application before the Tribunal was made in terms of Rule 110 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Regulations”). The Applicants sought a wrongful termination order in terms of section 58(2) of the Private Housing (Tenancies) (Scotland) Act 2016 and compensation of £6,000, representing 6 months’ rent. A case management discussion took place on 12 April 2022 and reference is made to the note from that discussion.
- [2]** In support of their application, the Applicants produced copies of the tenancy agreement, notice to leave, a timeline of events and various emails the Applicants exchanged with the Respondents’ letting agent.

- [3] In response to receiving intimation of the application, the Respondents lodged written representations along with copies of specialist survey reports and email exchanges between the Respondents and their letting agent, estate agent and solicitor.
- [4] The Tribunal obtained a copy of the title deed in respect of the property at 1/10 Ocean Way, Edinburgh, which shows that the Respondents are the heritable proprietors.

The hearing

- [5] The Hearing took place by conference call and all parties participated. There were no preliminary matters to be dealt with and the Tribunal invited parties to give evidence. The Tribunal reminded the parties of the area on which the Hearing was to focus, namely whether the Respondents intended to sell at the time of giving notice to the Applicants.

The Evidence

Mr Mohammed Hamaad Khalid

- [6] The Second Applicant is Mohammed Hamaad Khalid, who resides at 4/7 Western Harbour Terrace, Edinburgh EH6 6JQ. He and his wife moved into the property on 7 April 2020, having negotiated a monthly rental of £1,000. He and his wife paid rent on time, did not breach the terms of the tenancy and were good tenants. The tenancy was managed by letting agents, Home Lettings.
- [7] A notice to leave was served on Mr Khalid and his wife on 18 March 2021, giving them 6 months' notice to vacate the property by 21 September 2021. Initially, the Respondents were shocked as they had no prior warning of this and thereafter they endured difficulty in securing alternative accommodation.
- [8] Home Lettings contacted Mr Khalid in July 2021 requesting access to the property so that an estate agent could attend. At that time, Mr Khalid had already reported in early June a repair issue relating to the kitchen cupboards. He had been chasing the letting agent since then to have a repair effected. He considered the repairs required to be urgent and a matter of safety, but felt the letting agent did not deal with the matter with any urgency.
- [9] The Applicants managed to secure an off-market property through friends. Mr Khalid and his wife moved out of the property on 31 August 2021.
- [10] Mr Khalid referred to documents lodged by the Respondent. In particular, he referred to a report by MAF Associates dated 14 May 2021 ("the MAF report"). This report was a fire risk assessment of the external walls. Mr Khalid's view was that having had that report, the Respondents should have been aware of an issue with the cladding on the property before the Applicants vacated the

property. He considered that there was an onus on the Respondents to conduct investigations regarding the cladding.

- [11] After the Applicants moved out of the property, Mr Khalid and his wife regularly checked the market to find out if the property was for sale. He contacted Home Lettings, who told him that the property could not be sold because of a cladding issue. Home Lettings made Mr Khalid and his wife feel that they were somehow to blame because access to the property had not been arranged prior to their moving out.

Mrs Sahela Syed

- [12] The First Applicant is Mrs Sahela Syed and she lives at 4/7 Western Harbour Terrace, Edinburgh EH6 6JQ with her husband, the Second Applicant. She agreed with everything her husband said in his evidence. She also referred the Tribunal to a document lodged by the Respondents headed "ESW1", which is an external wall fire review dated 14 May 2021. She considered that it was the Respondents' obligation to look into the issue about cladding in more detail at the time.

Ms Hazel Ross

- [13] The First Respondent, Hazel Ross, lives with the Second Respondent at 48 Bankton Drive, Livingston, West Lothian EH54 9EH. She is a joint proprietor of the property at 1/10 Ocean Way, Edinburgh. There is a mortgage over the property. She explained that it was always the intention of her and the Second Respondent to sell the property. It is still their intention to sell the property, but they are prevented from doing so by a situation which is beyond their control.

- [14] In January 2021, in the midst of the pandemic, she and the Second Respondent had both been furloughed by their employers. They decided that they would market the property for sale. The tenancy was being managed by Home Lettings and the Respondents took advice from them about selling the property in February 2021. On behalf of the Respondents, Home Lettings instructed a solicitor to serve a Notice to Leave on the Applicants. Ms Ross was aware that the period of notice was 6 months and considered that was ample time for the Applicants to secure alternative accommodation. She accepts there was no prior notice to the tenants.

- [15] In May 2021, the Respondents returned £575 of the £1,000 deposit paid by the Applicants to assist them in securing another property. That carried a risk to the Respondents. In July 2021, the Respondents wanted to take the first steps towards selling the property and they engaged Warners to deal with the marketing and conveyancing associated with a sale. Warners asked the Respondents for an EWS1 report. The Respondents did not know anything about that type of report but contacted their property factor, James Gibb

Residential Factors, who provided a copy of an EWS1 report they had commissioned. A copy of that report has been produced by the Respondents. The Respondents gave a copy of that report to Warners, who told the Respondents that the report appeared to be satisfactory and that they would be able to sell the property. Reference was made to an email sent to Ms Ross by Warners on 7 July 2021 in which it says “....It does look as though the building has been given a B1 classification which in my opinion appears to be satisfactory.”

- [16] The Respondents tried to arrange access to the property through Home Lettings. The purpose of securing access to the property was not to arrange viewings of the property but take the first steps so that the Respondents could sell the property quicker. Access was requested 3 times but not secured, and Home Lettings advised the Respondents to wait until the Applicants had vacated the property before having any work carried out. Having accepted that advice, Ms Ross instructed Warners to pause progress of marketing the property.
- [17] Ms Ross made reference to an email from the Second Applicant to Home Lettings on 16 July 2021, which states “We are more than happy to accommodate an agent to attend the property but we will do so on the proviso that (1) the issues in relation to the kitchen are fixed timeously prior to us leaving the property and (2) in the event they are not fixed we need a guarantee that the landlord will still return our full deposit upon expiry of the lease.” Ms Ross was unaware of any issue with the kitchen cupboards until she received the Tribunal papers. Ms Ross had not seen the email of 16 July 2021 before she received the Tribunal papers and had not had discussions with Home Lettings about the issues surrounding their attempts to arrange access.
- [18] The Applicants vacated the property on 30 August 2021. The Respondents re-engaged Warners to make progress with the marketing of the property. On 5 September 2021, Warners gave the Respondents the shocking news that the property could not be sold. Reference was made to an email from Warners on 5 September 2021 at 17:29 which states “Hi Hazel, I’ve been in communication with Phil Diamond today and I’m so sorry to have to tell you that cladding in the building and the balconies mean that the building won’t pass the ESW1 until the necessary remedial work has been carried out.” The email goes on “It does look as if you and every other flat in the building will be at a stale mate until the Government steps in and has the remedial work carried out to enable it to pass.” This was the first time that the Respondents knew that they had a problem selling the property. There were 2 properties in the development which had already been marketed for sale and the Respondents did not think that they would have a difficulty in selling their property.

- [19]** The MAF report was prepared in respect of the whole development, rather than the Respondents' individual property. The Respondents thought that they could have an individual survey carried out on their property. The Respondents were aware that a fire engineer had previously provided surveys for other properties in the development and had passed them as safe to sell. The Respondents engaged with fire engineers, surveyors and their property factor to try to find a way of selling their property. The Respondents made enquiries with the selling agent for the 2 properties in the development which had been marketed; the selling agent advised that the properties had been sold. They managed to have the properties sold before the MAF report had been obtained. However, Philip Diamond said that the block the Respondents' property is in would fail as a result of the MAF report.
- [20]** The whole development has submitted an application to be part of the Scottish Government pilot scheme. As well as the issue with cladding, the Respondents have been told that the insulation within the walls has to be surveyed as it may also be a problem.
- [21]** When the notice to leave was served, the MAF report had not yet been obtained. The Respondents did not see the MAF report until Warners asked them for it in July 2021. The Respondents intended to sell the property. If they could sell it right now, they would. The Respondents are devastated that they cannot currently sell the property. After discovering that they cannot sell the property, the Respondents decided to re-let the property because they needed the rental income.
- [22]** The Respondents do not have a portfolio of properties; this is the only rental property owned by them. They are a couple with two children. They regret what happened but it was because of matters completely outwith their control.
- [23]** In cross examination by Mr Khalid, Ms Ross agreed that it was around 19 January 2021 that the Respondents agreed that they intended to sell the property. She explained that that was when she emailed Home Lettings about selling the property. She agreed that the Respondents instructed Warners in July 2021. In response to questions from Mr Khalid, she explained that Warners asked them for a report about the property in July 2021 and the Respondents sent that. The agents looked at the report and told the Respondents that they saw no problem in relation to the sale of the property. The Respondents were not familiar with documents such as the MAF report and the EWS1. Ms Ross explained that the Respondents relied upon Warners' advice. Ms Ross confirmed that she looked over the report before sending to Warners. She was asked if she read page 31 of the report. In response she said that it is common knowledge that cladding is a problem in some buildings. Ms Ross explained that cladding is not on the Respondents' own property and that it is higher up on the block. The Respondents thought that they could have obtained an

individual survey relating to their flat alone. It was suggested to Ms Ross that since they were part-way through the notice period, the Respondents should have investigated the issue in more detail. Ms Ross explained that when the notice to leave was served, the MAF report was not available. There were other flats for sale in the development and the Respondents had no reason to think that their property would not sell. It was suggested to Ms Ross that the Respondents were not proactive enough. In response, Ms Ross explained that the Respondents did all that they could at the time to try to sell the property. It was suggested to Ms Ross that there was a possibility that the notice to leave could have been retracted if the Respondents had done more to find out about the difficulties in selling the property. Ms Ross was not prepared to speculate on what might have happened. Her evidence was that the Respondents intended to sell the property as soon as the Applicants vacated the property and had done everything they possibly could.

- [24] In response to questions from the Tribunal, Ms Ross explained that she had read articles in the press about potential problems in relation to flatted properties with cladding. Nothing happened between July and September. The Respondents decided to wait until the Applicants vacated the property. Ideally they would have progressed to have a home report prepared before the Applicants moved out. The Respondents followed the advice they were given by their letting agent because attempts to gain access through the letting agent had proved unsuccessful. Reference was made to an email sent by Home Lettings to the First Respondent on 16 July 2021 at 12:35 which stated “Really disappointed with the tenants attitude and response.....If we do not hear back from them by Monday, we will raise an application to the FTT for access.” The Respondents did not enquire about the detailed reasons for not getting access and were unaware of the emails about the kitchen and the tenants’ conditions for getting entry. The Respondents told Warners that they could not progress the sale of the property at that time because they could not gain access. The Respondents do not know whether the position changed between July and September 2021 in relation to obtaining individual fire surveys.

Mr Malcolm Nixon

- [25] The Second Respondent is Malcolm Nixon and lives with the First Respondent. He is the joint proprietor of the property at 1/10 Ocean Way, Edinburgh. Mr Nixon agreed with everything Ms Ross said in evidence. He explained that the Respondents started the process with the intention to sell the property. He explained that there are circumstances preventing a sale, and that the Respondents have no control over that. The Respondents gave the Applicants the legally required notice and the Respondents now find themselves in an unfortunate situation because they cannot sell the property.

[26] In response to questions from the Tribunal, Mr Nixon explained that not all cladding is flammable and that the Respondents had no way of knowing about the cladding on their property. The Respondents did not think that it would be a problem, despite their flatted property being part of a block.

Submissions

[27] Mr Khalid made submissions about the documents lodged by the Respondents. He noted that at no time have the Respondents produced a home report or a letter of engagement from an estate agent. It was submitted that in terms of the legislation, the Respondents have not produced the prescribed documents required in order to support the ground of eviction by failing to produce a home report or letter of engagement by an estate agent.

[28] Ms Ross explained that it was the Respondents' intention to sell the property and it still is their intention.

Findings in Fact

[29] The Tribunal found that:-

- a) The parties entered into a private residential tenancy which commenced on 27 April 2020.
- b) The Respondents' agent served a notice to leave on the Applicants dated 18 March 2021.
- c) The notice to leave indicated that the Respondents intended to sell the property.
- d) The Applicants vacated the property on 31 August 2021, before the expiry of the period of notice.
- e) The Applicants were not misled by the Respondents into ceasing to occupy the property.

Reason for Decision

[30] Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 provides:-

“Wrongful termination without eviction order

(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.

(2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy (“the former tenant”).

(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.

(4) In a case where two or more persons jointly were the landlord under the tenancy immediately before it ended, the reference to the landlord in subsection (3) is to any one of those persons.”

[31] Section 50 of the Private Housing (Tenancies) (Scotland) Act 2016 provides:-

Termination by notice to leave and tenant leaving

(1) A tenancy which is 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 let property.

(2) A tenancy comes to an end under subsection (1) on the later of—

- (a) the day specified in the notice to leave in accordance with section 62(1)(b), or
- (b) the day on which the tenant ceases to occupy the let property.

(3) For the avoidance of doubt, a tenancy which is to come to an end under subsection (1) may be brought to an end earlier in accordance with section 48.

[32] It was not in dispute that the tenancy had been brought to an end in terms of section 50 by the Applicants receiving a Notice to Leave from the Respondents, which caused the Applicants to cease to occupy the property.

[33] The issue for the Tribunal was whether or not the Applicants were misled into ceasing to occupy the property by the Respondents immediately before it was brought to an end. In considering this issue, the Tribunal had regard to the ground relied upon by the Respondents in the Notice to Leave, namely ground 1.

[34] Section 62 of the Private Housing (Tenancies) (Scotland) Act 2016 provides:-

Meaning of notice to leave and stated eviction ground

(1) References in this Part to a notice to leave are to a notice which—

- (a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

[35] The eviction grounds upon which a landlord may rely are set out in Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016. Ground 1, which the Respondents relied upon provides:-

Landlord intends to sell

(1) It is an eviction ground that the landlord intends to sell the let property.

(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if the landlord—

(a) is entitled to sell the let property, and

(b) intends to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it.

(3) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(b) includes (for example)—

(a) a letter of engagement from a solicitor or estate agent concerning the sale of the let property,

(b) a recently prepared document that anyone responsible for marketing the let property would be required to possess under section 98 of the Housing (Scotland) Act 2006 were the property already on the market.

- [36] The issue for the Tribunal to determine was whether the Respondents, at the time when the notice to leave was issued to the Applicants, intended to sell or market the property for sale within 3 months of the Applicants ceasing to occupy the property. The Tribunal concluded that the Respondents did have that intention and therefore they did not mislead the Applicants into ceasing to occupy the property immediately before it was brought to an end.
- [37] The Tribunal found all 4 witnesses to be credible and reliable in their evidence. The Tribunal recognised that the Applicants were disappointed at leaving the property and then discovering that the property had been re-let. However, the Tribunal accepted the evidence of the Respondents, that they intended to sell the property and did not foresee any difficulty in doing so. The fact that the Respondents were unable to sell the property does not mean that they misled the Applicants at the time they were given notice. The Tribunal accepted that the unexpected turn of events which was not anticipated by the Respondents, caused the Respondents to re-let the property, rather than selling it.
- [38] The Applicants submitted that the Respondents had failed to produce what was described as “prescribed” documents required to support the ground of eviction. The ground of eviction relied upon sets out examples of documentation which might be produced to evidence the intention to sell the property. The Tribunal disagreed with the Applicants’ interpretation of ground 1. The Respondents produced copies of email correspondence they had with their letting agent and the agent appointed by them to deal with the marketing and conveyancing associated with the sale of the property. The Tribunal was satisfied that the documentation produced supported their intention to sell the property.
- [39] The Tribunal was satisfied that the Respondents were entitled to sell the property and that they intended to sell the property, or at least market it for sale within 3 months of the Applicants ceasing to occupy it.

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.

Nicola Irvine

Legal Member/Chair

30 May 2022

Date