



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/22/4232

Re: Property at 5 Elcho Terrace, Edinburgh, EH15 2EF (“the Property”)

Parties:

Mr Matthew Johnson, 5 Beresford Gardens, Edinburgh, EH5 3ER (“the Applicant”)

Ms Aurora Dunlop, 5a Elcho Terrace, Edinburgh, EH15 2EF (“the Respondent”)

Tribunal Members:

Rory Cowan (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that they should decline to make a Wrongful Termination Order under section 58 of the Private Housing (Tenancies) (Scotland) Act 2016.

- Background

1. By application dated 24 November 2022, the Applicant sought a Wrongful Termination Order against the Respondent in terms of section 58 of the Private Housing (Tenancies)(Scotland) Act 2016 (the Application). Following a Case Management Discussion (CMD) on 9 March 2023 heard by way of conference call. An evidential Hearing was fixed for 15 May 2023 to be heard at George House 126 George Street, Edinburgh. At the CMD, it was noted that the following relevant facts were agreed between the parties:
 - 1) That the Applicant was the tenant of the Respondent.
 - 2) That the tenancy was a Private residential tenancy which commenced on 2 December 2019.
 - 3) That, on behalf of the Respondent, a Notice to Leave dated 30 May 2022 in terms ground 4 of schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 was served on the Applicant.

- 4) That in response to that Notice to Leave, the Applicant vacated the Property on or around 31 August 2022.

The issue to be determined at the said evidential Hearing was:

- 1) On 30 May 2022, when the Notice to Leave was issued, did the Respondent intend to occupy the Property as her only or principal home for a period of not less than 3 months?
2. Directions were issued for the parties to lodge their respective list of documents (and copy documents) along with any list of witnesses by close of business on 28 April 2023. In accordance with that direction, the parties lodged their document list, documents and witness lists. Prior to the evidential Hearing the parties were notified of the procedure for hearing evidence that would be adopted by the Tribunal.
 - The Hearing
3. The Applicant appeared and represented himself. He was supported by his partner Miss Dunlop, who was also initially listed as a witness for the Applicant. The Respondent was also present but was represented by Mr Bauchop solicitor. With Mr Bauchop was a Miss Cook, trainee solicitor. In addition, the Respondent was supported by a Mrs McPake. The Tribunal is grateful to all parties for their considered and helpful submissions.
4. Prior to the hearing of evidence, it was noted that there were 2 preliminary matters that required to be addressed. The first was the question of the list of authorities along with copy authorities lodged on behalf of the Respondent by email dated 5 May 2023. The second was a second list of documents along with copy documents sent to Tribunal administration by email on 12 May 2023. The Applicant objected to both being received for the same reason. That is, they were lodged after the deadline set by the Tribunal's earlier Direction.
5. In relation to the list and copy authorities, Mr Bauchop argued that such material was not covered by the earlier Direction and as such, he had relied upon what he referred to as a the "default" position under Rule 22 of the Tribunal's rules of procedure. Having heard the parties, the Tribunal agreed with Mr Bauchop. That is, the earlier Direction was aimed at the lodging of documents and witness lists and did not cover matters such as authorities. Accordingly, the list and copy authorities were not late and were therefore allowed.
6. In relation to the second document list and copy documents, the position advanced by Mr Bauchop was that it was accepted they were late and that it was "regretful" that these documents had not been included in the earlier document list. He explained that this case had been initially dealt with by a colleague but passed to him due to a diary conflict. It was on review that it was noticed that some of the intended utility bills (covering November and December of 2022) had not been lodged. There was an explanation that they may have been "stuck in" an email outbox. The final document was the sheriff officer service for the Application on the Respondent instructed by Tribunal administration. It was submitted there was no prejudice to the Applicant in the documents being allowed albeit late. The Applicant objected to the

documents being received late and did not accept the explanation given by the Respondent's solicitor. After considering matters, the Tribunal decided not to allow the second list of documents and copy documents. It was accepted that they were late, and it was accepted that they were available to the Respondent when they should have been lodged to comply with the Direction. Further, the Tribunal was also of the view that the said documents did not particularly assist with the matters in dispute especially when considering the documents already lodged (they were just other examples of similar documents lodged covering the periods before and after these documents). In relation to the sheriff officer certificate, this was already within the Application's paperwork, being something instructed by Tribunal administration. Thereafter, evidence was given by the Applicant himself followed by the Respondent. Whilst the Applicant had initially included Miss Fowler in his list of witnesses, after lunch he decided that he did not wish to call her as a witness (in essence she would not speak to anything that he had not). Mr Bauchop indicated that he had no objection and that had no desire to ask her any questions. Miss Fowler, thereafter, joined the Applicant in the hearing (she had waited in a witness room prior to that) to support him for the afternoon. Evidence was concluded and the parties both made submissions in support of their respective positions. The Tribunal thereafter adjourned the Hearing and retired to consider their decision.

- Findings in Fact and Law

7. The Tribunal makes the following findings in Fact and Law:

- a) That the Applicant leased the subjects at 5 Elcho Terrace, Edinburgh from the Respondent.
- b) That the Applicant's tenancy was a Private residential tenancy which commenced on 2 December 2019.
- c) That the rent payable under the Private Residential Tenancy was £1,395 per calendar month.
- d) That, on behalf of the Respondent, a Notice to Leave dated 30 May 2022 in terms ground 4 of schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016 was served on the Applicant.
- e) That the service of the Notice to Leave caused the Applicant to vacate the Property on or around 31 August 2022.
- f) That on 30 May 2022, when the Notice to Leave was issued, the Respondent intended to occupy the Property as her only or principal home for a period of not less than 3 months.
- g) That following the Applicant vacating the Property, the Respondent started to occupy the Property on or around 25 November 2022.
- h) That, as at 15 May 2023 the Respondent continues to occupy the Property as her only or principal home, which is a period of not less than 3 months.
- i) That any delay in the Respondent beginning to occupy the Property following the Applicant vacating the Property was as a result of building works being carried out to the Property.
- j) That the Applicant was not misled by the Respondent into vacating the Property when the Applicant vacated the Property following receipt of the Notice to Leave dated 30 May 2022.

- Reasons for Decision

8. The Applicant sought a Wrongful Termination Order against the Respondent in terms of section 58 of the Private Housing (Tenancies)(Scotland) Act 2016 (The 2016 Act). That is, he claims that he was “misled” into vacating the Property following the service of the Notice to Leave dated 30 May 2022 which had as its ground for eviction ground 4 of schedule 3 of the 2016 Act. That is, the Respondent sought possession of the Property to live in the Property as her only or principal home for a period of not less than 3 months following the Applicant ceasing to occupy the Property. This was not a case where an Eviction Order was required or granted.
9. Section 58 of the 2016 Act states as follows:

“58 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.”

10. Section 50 of the 2016 Act states as follows:

50 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.

11. Section 59 of the 2016 Act states as follows:

59 Wrongful-termination order

- (1) In this section and in sections 57, 58 and 60, “a wrongful-termination order” means an order requiring the person who was the landlord under the tenancy

immediately before it ended to pay the person who made the application for the wrongful-termination order an amount not exceeding six months' rent.

(2) Subsection (3) applies where—

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

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

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

(a) against all, some, or only one of the former joint landlords,

(b) stating that each person against whom the order is made is liable to pay a specified amount, but the cumulative total of each of the specified amounts must not exceed six months' rent,

(c) stating that each person against whom the order is made is jointly and severally liable for the whole amount to be paid.

(4) In subsections (1) and (3)(b), “rent” means—

(a) the amount that was payable in rent under the tenancy immediately before it ended, or

(b) in a case where two or more persons jointly were the tenant under the tenancy immediately before it ended, the amount mentioned in paragraph (a) divided by the number of persons who were at that time joint tenants under the tenancy.

12. As indicated, the Application called before the Tribunal for a Hearing on 15 May 2023. The issue identified at paragraph 1) above is a short one but is fundamental to an application of this type. That is, at the point the notice to Leave dated 30 May 2023 was served upon the Applicant, did the Respondent intend to occupy the Property as her only or principal home for a period of at least 3 months. Whilst it was accepted by both parties that circumstances can change, it was the Applicant's position that the Respondent did not have that intention as at 30 May 2022 and that any decision that may have been made to move into the Property was because she became aware of at very least the potential for this Application. The Applicant fairly conceded during his evidence that he was unable to positively aver one way or the other whether or on what date the Respondent may have moved into the Property.

Evidence – The Applicant

13. The Applicant started his evidence by expressing that he did not believe the Respondent had a “firm and settled intent” to occupy the Property as her only or principal home at the point the Notice to Leave was served on 30 May 2022. He referred to the email dated 19 April 2022 which forms part of Document A10.2 in the Applicants bundle (pages 112 and 113) where he had notified the Respondent's letting agents (Home Sweet Home Letting Agency) of his partner (Katy Fowler) moving into the Property. In this email there was a discussion about a new lease to include the said Katy Fowler as a joint tenant as well as discussions about a rent increase, repairs and the Applicant seeking permission to redecorate what was described as “Bedroom 2” of the Property as well as installing new blinds in the “Kitchen”. The Applicant also pointed to the email dated 19 May 2022 which forms part of Document A10.5 of the Applicant's bundle (pages 122 and 123) and was 11 days before the Notice to Leave was

issued. He pointed to the Respondent's letting agent's responses to the requests to redecorate and to install blinds and noted that this also included (in blue type) the Respondent's comments on the requests. The Applicant's position being; why would the Respondent either directly or through her agent enter into discussions about the Applicant making changes to the Property or even about increasing the rent payable at this stage if she intended to serve notice in order to live in the property herself or as he put it "that she did not have the intention to settle". This he linked to "point 5" in what he described as his "Submission document" being document A10.1 in the Applicant's bundle (pages 5,6 and 7).

14. The Applicant then referred to document A10.3 of the Applicant's bundle (page 117) and linked that to point 8 of his "submission document" and what he described as the Respondent's "deliberate" cutting of the power to an outbuilding. He described the reply by the Respondent's letting agents as "disingenuous". He also pointed to document A10.4 of the Applicant's bundle being emails between him and the Respondent's letting agents on 19 December 2021 and 21 December 2021 about an earlier incident where the power was cut. He explained that the power came from the property above (number 5a Elcho Terrace), where the Respondent was living. He explained that it was his view that the Respondent did not want him in the Property anymore and the cutting the power to the outbuildings was "intimidation". He suggested that they had "stood up" for themselves about this issue and this had led to the Notice to Leave being issued.
15. The Applicant then reiterated that the Respondent had "no firm settled intent" to occupy the Property when the Notice to Leave was issued. He indicated that he felt this was also supported by the email of 2 May 2022 being part of Document A10.6 (page 129) which was an email from the Respondent's letting agents that dealt with a number of issues including looking at the possibility of reconfiguring the power supply to the outbuildings could be controlled from the Property rather than 5a Elcho Terrace as well as alleged neighbour complaints about the outside lights being left on past midnight on 2 May 2022. He then pointed to the email dated 13 May 2022 being his reply to same and forming part of Document A10.6 at page 128. Whilst he accepted the lights had been left on, he stated that he had spoken to neighbours who claimed they had not complained, and he therefore felt the whole issue of complaints had been "fabricated". He also pointed to the speed at which the letting agents had contacted him being the next morning at 09:05hrs on 2 May 2022 as further supporting this suggestion. He then pointed to another incident where he stated complaints were "misrepresented and fabricated". He referred to a complaint via the letting agents about a window cleaner who it was claimed had to "climb over a fence". He pointed to the email dated 23 May 2022 being part of A10.6 (page 131) and his response of the same date (page 130) stating that the window cleaner had not climbed over the fence and he had "security camera footage to confirm this". He again suggested that the motivation for issuing the Notice to Leave was not a desire to live in the Property but that the Respondent was "not happy about being scrutinised for misleading statements".
16. The Applicant then turned to the issue of various quotes for building works to the Property and 5a Elcho Terrace that had been produced by the Respondent. His complaint was that some of these were dated after the Notice to Leave was

issued and pointed to Document A5.1 (page 77) as an example of that. He then referred to the terms of the Notice to Leave Document A1.3 and, in particular page 49 where at “Part 3” of the notice it was stated:

“I have various estimates and will be able to provide formal quotes when requested.”

On the basis of this, it was his submission that the Respondent should have quotes from before the date the Notice to Leave was issued. The Applicant (who is a chartered architect) then stated that in his “professional opinion” some of the proposed works would require statutory consents such as listed building consents and, for the addition of a shower room, a building warrant. He stated that there were still no building warrants for such work nor listed building consent. He suggests that the Respondent was sophisticated enough to know this as she had previously made planning applications for planned works to trees at the Property.

17. The Applicant then addressed the issue of the date it was claimed by the Respondent that she had started to occupy the Property and referred to point 11 on his submission document (page 6) as well as his email dated 7 November 2022 to the Respondent’s letting agents Document A10.8 in the Applicant’s bundle (pages 133 and 134). He suggested that he had “reached out to the landlord” and warned about the potential for a claim to this Tribunal seeking a Wrongful Termination Order. He suggested that, as a result, the Respondent would have been aware of his intention to seek such an order and that this was the reason why the Respondent may have decided to move into the Property rather than a previous intention to do so. He suggested it was “coincidental” that the Respondent would seek to move into the Property at about the same date he lodged the Application.
18. The Applicant also pointed to other incidences of what he described as “misleading information” and referred to Documents A12.1, A12.2 and A12.3 (pages 142 to 151), which largely revolved around the Respondent personally delivering mail received for the Applicant to his new letting agents and claims of “conflicts of interest” because the Respondent worked for a company related to the Respondent’s letting agents. His position being that the first delivery of such mail was in February 2023 and not “Autumn 2022” as claimed by the Respondent’s letting agents. He also claimed that the Respondent’s refusal to allow more time for them to find another property to live in was unreasonable.
19. In summary, the Applicant stated that he felt the reasons set out in the Notice to Leave were “not genuine”. This was because:
 - a) Some of the works that may have been carried out to the Property or 5a Elcho Terrace were “only agreed” after he had vacated the Property.
 - b) That some of the quotes were dated after the date of the Notice to Leave dated 30 May 2022.
 - c) That the Respondent had not obtained statutory consents for work that required them to the Property or 5a Elcho Terrace.

In relation to the question of whether the Respondent was in fact living in the Property or when such occupation may have commenced, the Applicant indicated that he “had no way of confirming whether the Respondent lives in the Property or when she may have moved in”. He further indicated that, if she had moved in, this was only due to statements made by the Respondent’s solicitors”, for which it was understood meant advice she had received about the risk of a wrongful termination order if she did not move in.

20. In terms of impact on the Applicant, he stated that his partner moved with him in on 15 April 2022. He has 2 children aged 9 and 14 years. He has shared access with his former wife. He and the children were “really settled” in the area and being forced to moved added “further disruption “to his children after his separation and divorce. He now lives in the Trinity area of Edinburgh but all his and his children’s friends are in the Portobello area. He had wanted to provide a “stable and comfortable house” for the children until his youngest had finished primary school. He felt the children had suffered the most as a result of having to move. He indicated that they were now in a worse financial position due to the size of property they require (being a 3-bedroom home with a garden) and they now pay £1,995 per month in terms of rent as well as removal costs although he had no invoices for such cost and could not confirm what they were. The Applicant also sought to make statements about impacts on mental health which were objected to by Mr Bauchop on the basis there was no supporting evidence to vouch either any formal diagnosis or that it was linked to the Notice to Leave or removing form the Property. After discussion, the Tribunal decided not to allow such evidence being led. The Applicant then referred to Document A11.1 in his bundle (pages 135 to 137) but confirmed this was aimed at vouching claims that the Respondent was not a fit and proper person to be a landlord. Standing the nature of the Application, such evidence was not appropriate and no evidence to that effect was permitted to be led. The Applicant thereafter concluded his evidence.

21. The Applicant was then cross examined by Mr Bauchop. The Applicant denied that the Respondent intended to move into the Property to allow work to be carried out to 5a Elcho Terrace and to allow the Respondent’s father to be able to visit her when the Notice to Leave was served and stated that he felt what was stated in the said notice was “disingenuous”. When asked about the Respondent’s father and any mobility issues he may suffer from, the Applicant indicated that he had “no comment” to make and had “no idea” if his health had deteriorated recently. When asked for comment on whether “unexpected works” to the Property had delayed the Respondent moving into the Property the Applicant replied that this was “too broad a statement” and that all works needed to the Property had previously been identified in discussions he had with the Respondent’s letting agents. The Applicant was asked about a burst pip and damp issues and replied that there had been no burst pipe when he had lived in the Property. He also indicated he had “no way of knowing” whether such works had only been identified whilst works were being carried out to 5a Elcho Terrace on 31 August 2022. When asked about whether the Respondent moved in on 25 November 2022, he indicated that he did not know. He also confirmed he did not know whether work had been carried to 5a Elcho Terrace or whether progress of any work had been delayed. Various council tax invoices and utility bills relative

to the Property and 5a Elcho Terrace were put to the Applicant. The Applicant agreed that these showed that the Respondent was recorded as being resident at the Property from 14 March 2023 for council tax purposes and that 5a Elcho Terrace was recorded as being empty. The Applicant thereafter indicated that he accepted that the Respondent was now occupying the Property. The Applicant also accepted that the utility bills put to him showed that the usage of gas and electricity for the Property increased after 25 November 2022 and the usage for 5a Elcho Terrace reduced. The Applicant thereafter indicated that he was “not denying” when the Respondent moved into the Property from 5a Elcho Terrace, but indicated there was “no substance to it” and that he could not say whether she was “on holiday or a guest” and that he did not “think it was relevant”.

22. Mr Bauchop then sought to put various invoices that purportedly related to building and other works to the Property and separately to 5a Elcho Terrace, Edinburgh. These were found at items 25 to 30 and 17 to 24 of the Respondent’s bundle. Whilst acknowledging that the invoices showed works were carried out to the 2 properties, the Applicant’s position was that he did not accept, at the point the Notice to Leave was issued that the Respondent had “no firm settled intent” to occupy the Property. He also made the point that the invoices produced all “post-date” the Notice to Leave. When it was put to the Applicant that the Respondent had only become aware of the Application on 6 February 2023, and 2 months after she had moved in, the Applicant’s response was that he “had no way of knowing that”. The Applicant was then referred to item 10.8 of the Applicant’s bundle being the email dated 7 November 2022. He acknowledged that the said email was sent to the Respondent’s letting agents and that no copy of the Application was attached. The Applicant also objected to the characterisation of the said email as containing a “threat” but went to state that he “believed” it was that email that “triggered” the Respondent to move into the Property and not the formal service of the Application on 6 February 2023.
23. The Applicant was then asked about his view on the question of the rent increase that was intimated prior to the Notice to Leave being served. His position was that he questioned the timing of it and when asked about whether this was dealt with by the Respondent’s letting agents, his response was that the letting agents “acted on the Respondent’s behalf” and had “stated that on numerous occasions”. The Applicant was then questioned about his position that he felt it was “unreasonable” not to have allowed him more time to find another property and vacate. His response was that it was “unexpected given the works that had been agreed to”. When it was suggested to him that the reason for this was because works to the bathroom had been scheduled for the period of the requested extra time, he responded that he had “no way of knowing that”. There was further questioning about the requirement for building warrants of which the relevance was questioned. The Applicant also conceded under question that he did “not know” if the Respondent worked for her letting agents or whether she worked for a cleaning company linked to the letting agents. He also accepted there was “legally no conflict of interest”.
24. It was then put to the Applicant by Mr Bauchop that the cutting of the power to the outbuildings was as a result of a fuse being “tripped”, but this was rejected by the Applicant on the basis that it happened when they were “outside in the garden”

and that he felt it was designed to “intimidate and antagonise” him because he had “called out her behaviour” and it was this that led to the Notice to Leave which it was claimed as “motivated” by the “conflict over the outside lighting”. It was also claimed that the issuing of the Notice to Leave was a “retaliatory eviction”. Mr Bauchop then referred to items 11.1 and 11.2 at pages 135, 137 and 139 of the Applicant’s bundle. The Applicant conceded that all these emails were issued after the Notice to Leave was issued. When Mr Bauchop suggested they were therefore not relevant, the Applicant responded indication that he felt they were in that they showed the Respondent “fabricated” allegations against him and Miss Fowler including about delivering mail in “Autumn 2022”. Similarly, the Applicant was questioned with reference to item 12.2 and 12.3 on pages 143 and 146 of the Applicant’s bundle. He agreed these emails were issued after the Notice to Leave was served, but suggested they were still relevant to the question of the Respondent’s intent when issuing the Notice to Leave on the basis that they “substantiate the point that there was discussion between the Respondent and the letting agents”.

25. The Applicant under further questioning by Mr Bauchop confirmed that there was no vouching for his removal costs, that he had lived in Portobello for 15 years and had moved into the Property in December 2019 for another property in Portobello. He was then questioned about the timing of the service of the Notice to Leave in May 2022 and why the Edinburgh Festival Fringe in August 2022 was relevant when the Notice to Leave had given 3 months (or 84days) notice? The response was that the notice period was to find an alternative property and to move to it.
26. Under questioning form, the Ordinary Member of the Tribunal, the Applicant indicated that he had moved out the Property on the basis of the Notice to Leave rather than force an eviction order because they had been served with the Notice to Leave and that he had not been aware that he could have stayed because he had not sought advice at that time. He also indicated that, regardless, he would have wanted to remove as the Respondent had made remaining at the Property “unbearable” and lived upstairs. The Applicant also confirmed that the rewiring of the outside power supply was not carried out. He also confirmed that there were no items of correspondence or emails where the terms of same were in dispute. Nothing arose from those further questions for Mr Bauchop and the Applicant’s evidence closed. The Tribunal thereafter broke for lunch.
27. Following the break for lunch, the Applicant confirmed that he was closing his case and that he did not require to call Miss Fowler as a witness. Mr Bauchop indicated that he did not wish to call her as a witness either. She thereafter joined him as a supporter but did not take an active part in proceedings.
28. The Respondent then proceeded to give her evidence. She was referred to item A4.1 on page 75 of the Applicant’s bundle. She read same and confirmed that she would adopt the affidavit as part of her evidence. She was then directed to page 38 of the Respondent’s bundle and [art 4 of the Notice to Leave. She confirmed that there were 2 reasons specified in the Notice to Leave, one being the decline in her father’s health and updating 5a Elcho Terrace, Edinburgh. She explained that she wished to update the current bedroom including adding an en-

suite bathroom, attic insulation and redecorating the hallway. She explained that some of that work was put on hold due to additional work being required. She was thereafter asked about her father's health in April and May of 2022 and explained that he had been in hospital for 6 weeks and had been "housebound" following suffering strokes. At that time, he had been trying to walk "around the house" with the aid of a "zimmer" She explained that he now had an electric wheelchair to assist with mobility. She also explained that he could not climb stairs. She then explained that her decision to move to the Property was to try and spend more time with her father and make her life "less stressful" as she had been travelling up and down to Dundee to visit her father in hospital. She explained that the Property is on the ground floor and her father knew it well. She explained that she had plans for a family Christmas in 2022 including her father and her brother and his family, but that did not go ahead due to ill health. She also confirmed that her father had not visited the Property, but that she had been trying to improve the Property to make it easier for her father to visit which she "hoped" would be in the "summer" (of 2023). She indicated that this was to coincide with a "special birthday" for her brother. Her evidence was that she moved into the Property on 25 November 2022 and had resided there since. She explained that she had "gradually" moved into the Property as building works were being carried out to 5a Elcho Terrace, Edinburgh. She indicated that she had no timescales in mind for how long she would remain in the Property but that she was "settled" in the Property for now.

29. The Respondent went on to state in her evidence that it was her intention to move into the Property in "September 2022" as that was the date that works were "scheduled to the bathroom at 5a" as she would have no bathroom facilities at 5a Elcho Terrace. She explained that she had been unable to move into the Property due to what she described as "unanticipated works". These, she explained, had been identified when the bathroom to 5a Elcho Terrace was being fitted. What had been found was that there had been a "leak" that it was claimed had "been going on for some months". This had not been noticed previously but had occurred in a "cupboard" in the "backroom by the kitchen" of the Property. She explained that this leak had been found on 5 September 2022, the day work had started on the bathroom to 5a Elcho Terrace. The leak had been caused by a burst pipe and they had required to switch off the water to the Property. This had caused additional work to be required to resolve the issue which included removing part of the staircase as well as leaving the site of the leak "open for about a month to dry out". She stated that after all the unexpected work had been completed, which included redecoration and plastering work, to various rooms in the Property, she moved in on 25 November 2022, but explained that the plaster work in the hallway was still damp having only been completed on 17 November 2022. She explained that the reason why she had waited that long to replaster was that she had received a "reasonable quote" and had proceeded with that quote. She was referred to item 27 on page 89 of the Respondent's bundle and confirmed that this was confirmation of payment to the plasterer (Sandy Walker) for those works. The Respondent also confirmed that the works to the bathroom at 5a Elcho Terrace included new pipework, tiling, joinery work and the re-enamelling of the bath and that it commenced on 5 September 2022, following the date the Applicant vacated the Property on 31 August 2022. She was referred to item 17 on page 79 of the Respondent's bundle and confirmed this was the

quote for the works to the bathroom dated 25 August 2022, that it related to 5a Elcho Terrace, had commenced on 5 September 2022 and had been completed in "November 2022". She also confirmed that she had required to use the toilet in the Property during this period as there had been no toilet upstairs in 5a Elcho Terrace. Item 19 on page 81 of the Respondent's bundle was spoken to being the invoice dated 2 November 2022 for the re-enamelling of the bath. Item 18 on page 80 being the invoice dated 7 October 2022 to install a multi fuel stove to the "snug" in 5a Elcho Terrace. Item 22 on page 84 of being the invoice dated 11 November 2022 for retiling the bathroom at 5a Elcho Terrace. Item 23 on page 85 being the invoice dated 20 April 2023 for works to the windows in both the Property and 5a Elcho Terrace that took place "18 and 19th April 2023". She also spoke to item 20 on page 82 of the Respondent's bundle which it was stated was details of a payment made for "removing two pieces of furniture from 5a to 5 Elcho Terrace". These were described as being a "chaise longue" and "a large bookcase".

30. The Respondent was asked what impact the burst pipe had on her plans. She indicated that it had delayed things as she "had to let it dry out before moving in". She also indicated that it had affected both her timescales but also her budget for the renovations she had planned.

31. The Respondent was then asked about item 3 on page 49 of the Respondent's bundle which she indicated was a council tax demand dated 14 March 2023 from Edinburgh City Council relative to the Property, which showed it was in her name and that she resided there. She confirmed that she first registered at the Property in October 2022 once she had "clear timescales for the downstairs property". She explained that she did not have an earlier statement due to October 2022 being "halfway through the council tax year and they can't issue an updated bill" despite having tried to do so. The Respondent was then asked about item 4 on page 51 of the Respondent's bundle and what it showed. She explained that it was a council tax statement for 5a Elcho Terrace dated 14 March 2023. It was in the name of the Respondent and recorded that 5a Elcho Terrace had been recorded as an "Empty Property" so no council tax was due. She explained again that she had been unable to get an updated bill for the previous year. The Respondent then asked about item 7 on page 55 of the Respondent's bundle. She explained that it was the energy bill for 5a Elcho Terrace from "E-ON" dated 2 November 2022. It covered the period 1 October 2022 to 31 October 2022. The electricity usage was shown as £86.28, and the gas usage was shown as £44.27. She confirmed during this period she had been living at 5a Elcho Terrace. The Respondent was then asked about item 8 at page 56 of the Respondent's bundle. She explained that this was the next month's energy bill for 5a Elcho Terrace, being the period 1 November 2022 to 24 November 2022. The usage for this period was £81.87 for electricity and £61.48 for gas. She confirmed again that, during this period she was still residing at 5a Elcho Terrace. Mr Bauchop then asked her about item 9 on page 57 of the Respondent's bundle which she explained was the energy bill for 5a Elcho Terrace between 26 January 2023 and 24 February 2023. This showed electricity usage of £40.64 and gas of £19.67. When asked why the usage was lower than previous figures, her response was that it was "because I had moved downstairs to 5 Elcho Terrace". She was then referred to item 10 on page 61 of the Respondent's bundle. The Respondent

explained that this was another E-ON energy bill for the period 25 February 2023 to 25 March 2023 for 5a Elcho Terrace. The sum due for gas was £14.24 and for electricity £40.97. The Respondent explained that the sums due were lower than previous ones because the 5a Elcho Terrace had been “empty” although she stated that during the winter some heating had been on to prevent “burst pipes and to maintain the property”. The Respondent was then asked about item 12 on page 66 of the Respondent’s bundle, and she explained this was a Scottish Gas statement for the Property in her name for the period 26 November 2022 to 25 December 2022. It showed electricity usage of £101.42 and gas usage of £287.38 (on page 67). The Respondent indicated that, at this stage she was living in the Property. The Respondent was then referred to item 13 on page 69 of the Respondent’s bundle which was described as being the “next utility bill for 5 Elcho Terrace”. This was again from Scottish Gas and was for the period 25 December 2022 to 26 January 2023. Per page 70, she described the electricity usage of £106.10 and gas of £415.76. She explained that during this period she had “continued to reside at 5 Elcho Terrace”.

32. Mr Bauchop then asked her about the Applicant’s claim that she only moved to the Property once she became aware of his “threat” to lodge the Application. Her response was that this was “untrue”. She was then asked why a rent increase had been suggested at the time it was. The Respondent indicated that the rent increase had been “instigated by the letting agent and not me”. She did accept that the agents had discussed the question of a rent increase with her after it had been proposed. She was then asked why she had approved a replacement hob for the Property and approved other works to be carried out? The Respondent explained that the hob “had been a longstanding issue” that “had been on the cards to replace for quite a while”. She also explained that she had give her letting agents fee authority to replace the hob and that was where she had left things. She also stated that her letting agents dealt with the management of any works required to the Property. The Respondent was then asked by Mr Bauchop why she had not allowed the Applicant extra time to stay in the Property. Her response was that she had a “potential schedule date for starting the works upstairs” and also that her letting agent had felt that 3 months should have been enough time. She was then asked about building warrants. The Respondent indicated that she was “doing the work gradually” and that she was “looking into” the issue of a building warrant for the second bathroom. The Respondent was then asked questions about who she worked for. Her response was that she worked for “HSH Cleaning agency” and her letting agents were “Home Sweet Home Lettings. She disagreed when it was suggested there may be a “conflict”. When asked if she had deliberately “cut power” to the outside lights on either 17 May 2022 or in December 2021, she said such a claim was “untrue. It was accepted that on 2 May 2022 she had cut the power due to the outside lights have been left on by the Applicant “overnight”. She also denied that the reason the Notice to Leave had been issued had anything to do with “friction” over the outside lights.

33. The Respondent was then cross examined by the Applicant. In response to a question about when she became aware of the Application, the Respondent replied, “when I received the papers on Monday 6 February 2023”. She did accept that she had been forwarded a copy of the Applicants email of 7

November 2022 (item A10.8 on page 134 of the Applicant's bundle). She explained that the advice she had received at the time from the letting agents was that "it would go through the formal process" and that it was an issue between her and the Applicant and that the agents would not be involved. When it was put to her that she "moved in response to the email of 7 November 2022" her response was that "was not true". She also explained that she "knew" she would have to "make the property suitable" for her father and to "prepare it for him" and could not move in straight away. The Applicant then asked if she had delivered postal items in "Autumn 2022" and the Respondent confirmed she had. These she described included a "financial letter for Katy Fowler" and that she had done this because she "thought it was the easiest way of forwarding" the correspondence. She also stated that she "had not been told that could have been an issue just to hand in post". She also said that she had probably learned of the Applicant's new letting agents through her own letting agents. The Tribunal then did not allow a line of questioning about the appropriateness or otherwise of discussions between the Respondent and her letting agents on the basis they were not relevant to the issue before the Tribunal. The Applicant moved on to ask why the Respondent had agreed to allow improvements to the Property shortly before the Notice to Leave was issued. She explained that she had not made a final decision about things and felt the suggested "improvements" were "minor things" and the sort of thing she would "never say no to". The Respondent confirmed under questioning that she had "switched off the outside lights on 1 May 2022. She explained that she had not sought to contact them due to the time of day and also because she did not think anyone was outside. The Applicant then asked why the Respondent did not have any written quotes from contractors that were dated before the Notice to Leave was issued. Her response was that she had been given "verbal" ones for example for the bathroom or had such quotes by "text", which were then "followed up" by email. She also stated that she would only be "taking on work she can manage bit by bit" and also that her plans were to remain at the Property "for the time being". A question about the details of a handyman for the letting agents seeking access was objected to and the line of questioning was not allowed, again due to the lack of relevance to the issue before the Tribunal. The Applicant then moved on to ask about the number of steps to the Property. The Respondent explained that there are 2 steps at the rear and 2 "shallow" steps at the front. When asked why there was no quote for "accessibility" she replied that it was "not required". A further line of questioning about what evidence had been submitted to register 5a Elcho Terrace was disallowed. The evidence about council tax had been given without objection and the Applicant's position was not that the Respondent did not live at the Property, but that she had decided only to do so once she was aware of at least the potential for the Application. The Applicant indicate that he therefore had no further questions and closed his cross examination. Mr Bauchop thereafter confirmed he had no re-examination of the Respondent.

34. The Respondent was then asked some questions by the Ordinary member of the Tribunal. The Respondent confirmed that she had first formed the view to move back into the Property "later in May" [2022]. She described a deterioration in her father's health and the decision to move back into the Property being one she had come to whilst driving up to Dundee to visit her father in hospital. She explained that she had "thought carefully" about the impact of such a decision on

the Applicant because he had been “a very good tenant”. When asked about the 19 May 2022 email, she confirmed that she had discussed it with her letting agent, but she stated that she had “not formed the view to end the lease” at that stage and that that decision was made later. The Respondent also explained that she had no immediate plans to move from the Property back into 5a Elcho Terrace as she wanted to keep the Property “available for family”. She acknowledged that she would be losing rent as a result of that decision but that she had inherited some money to allow her to “update upstairs” (5a Elcho Terrace).

35. As evidence was concluded, the parties were asked to thereafter make any submissions they wished to make. The Applicant indicated that he had little to add to what he had said already and in his Submission Document (A10.1 at pages 5 to 7 in the Applicant’s bundle). He indicated that he had suffered as a result of the “upheaval” of having to move from the Property as had been discussed in his evidence. He further stated that he could not “comment on the legal side of things” but that it was his position for the reasons set out in his evidence that he did not believe that the Respondent had a “firm and settled intent” to move into the Property when the Notice to Leave was served on 30 May 2022.
36. Mr Bauchop was then given the opportunity to make submissions on behalf of the Respondent. He submitted that the Tribunal could only find in favour of the Applicant and issue a Wrongful Termination Order if they were satisfied that the Applicant had been “misled” by the Respondent into ceasing to occupy the Property. The Notice to Leave dated 30 May 2022 was issued under Ground 4 on the basis that the Respondent intended to live in the Property as their only or principal home for at least 3 months. He submitted that there was no requirement for the Respondent to move into the Property within any particular time period and that, even after issuing a Notice to Leave, situations and circumstances can change. Despite changes in circumstances, a landlord can still be found not to have misled a tenant. He addressed the evidence and suggested that the Respondent did have the intention to occupy the Property as her only or principal home for a period of at least 3 months following the Applicant vacating same and that, as a result. The requirements of section 58 of the 2016 Act had not been met and the Application should be refused. He pointed to the affidavit of the Respondent and the evidence she gave to the Tribunal. In particular, the Respondent’s evidence that the Respondent had decided to move back into the Property as this would allow her father to visit her (rather than 5a Elcho Terrace) due to her father’s mobility issues and deteriorating health. He pointed to her evidence that her move in had been delayed due to additional, unexpected and costly work that had been required to the Property and that, once that had been completed, she moved in on 25 November 2022. He pointed to the evidence that had been given regarding the council tax bills and utility bills issued for the Property and 5a Elcho Terrace all of which had not been disputed by the Applicant and suggested these demonstrated that the Respondent had moved into the Property on 25 November 2022 and remained there. He also referred to the various invoices that had been produced to demonstrate the work carried out to 5a Elcho Terrace. In particular the invoice for the bathroom renovation which started on 5 September 2022. It was that works that it was claimed led to the

discovery of a burst pipe and the requirement to carry out unexpected works to the Property, which also required turning the water supply off to the Property. This additional work he stated included plastering, removing the staircase and wall papering, all of which explained the delay in the Respondent moving into the Property due to an impact on the Respondent's budget for the proposed renovations. He also stated that, notwithstanding these additional unexpected works, the Respondent had been using the bathroom facilities in the Property prior to 25 November 2022 due to the works to 5a Elcho Terrace's bathroom.

37. Mr Bauchop then turned to look at the various claims made by the Applicant. In relation to the suggestion that what had triggered the Respondent to move into the property, he rejected that it was the threat of the Application. He explained that the Application had not been received until 6 February 2023. He also pointed to the Respondent's denial that the threat influenced her decision and what he called "clear evidence" that the delay in moving in was caused by unexpected works being required to the Property which impacted on timescales and the Respondent's budget. He then addressed the issue of the rent increase shortly before the Notice to Leave was issued, which was matter he claimed was something the letting agents were responsible for. The same position was advanced in relation to the replacement hob, but that was a "minor" repair. He also pointed to the Respondent's evidence and that she had indicated that she had not formed the intent to move back into the Property at that stage and recounted her evidence of driving to Dundee and that intent being "crystallised" then. In terms of the Respondent's refusal to allow extra time for the Applicant, it was submitted that this was "not relevant to the question of intent", but indicated that, nonetheless, works had been scheduled that would mean no more time was possible. In relation to the lack of building warrants, again, Mr Bauchop suggested this was not "relevant" to intent. He pointed to the Respondent's evidence and her dealing with renovations in a "piecemeal" fashion, but also that it was the Respondent's understanding only works related to a new ensuite would require such approval but that was being investigated "currently". Mr Bauchop also submitted that the "conflict" between the letting agents and the Respondent, if there even was one, was not relevant to intent. He then addressed the "friction regarding the outside lights" in December 2021 and May 2022 as well as in relation to the window cleaner. He referred to the emails between the Applicant and the letting agents found in A11.1, A11.2 and A11.3 starting at page 135 in the Applicant's bundle and stated that all these emails "post dated the Notice to Leave" and could therefore "not have formed the basis for issuing the Notice to Leave". He made similar submissions relative to items A12.1, A12.2 and A12.3 found at page 142 in the Applicant's bundle onwards.

38. Mr Bauchop then turned to the question of the level of any award the Tribunal should make in the event they were not with him on the question of liability. He referred to section 59 of the 2016 Act and the maximum of the equivalent of 6 months rent and that any finding at this level would be "excessive". He submitted that the Applicant had led no evidence of any removal costs or storage costs. That in his evidence the Applicant had said he would be moving anyway. That there was no reason why alternative accommodation could not have been found in the Portobello area as the Notice to Leave had given 3 months' notice in which to find alternative accommodation and that they seemed to have left looking for a

new property until July 2022 and a busy period during the Edinburgh Festival and Fringe. He also submitted that any suggestion of medical issues that may have arisen as a result of moving should also be ignored as there was no evidence provided or led of same. The Tribunal were thereafter invited to refuse the Application.

39. The Applicant was then asked if he wished to say anything further in response. He acknowledged that he had left looking for a new property until during the "Fringe" as his partner Miss Fowler had work commitments up until that point. He also took issue with the use of "threat" when referring to his email of 7 November 2022 which he described as a "calm and reasonable request".
40. The hearing was thereafter concluded, and the Tribunal retired to consider the evidence in order to make their decision.
41. There was no dispute or difference between the parties as to the applicable law. That is, the question the Tribunal required to determine was when the Notice to Leave was issued on 30 May 2022, did the Respondent intend to occupy the Property as her only or principal home for a period of at least 3 months. As Mr Bauchop stated, there is no specific time period within which a landlord requires to take occupation after a tenant vacates (albeit an inordinate and unexplained delay could be a factor that points to no such intent). Here, the principal difficulty for the Applicant is that the evidence was that the Respondent took full occupation of the Property on or around 25 November 2022 and was still in occupation as at the date of the hearing. That evidence was not something the Applicant was in a position to challenge to any material extent. It was also supported by utility bills and, to a lesser extent the council tax demands for the Property and 5a Elcho Terrace. As a result it was noted that the Applicant expended some considerable effort in an attempt to establish that the Respondent only took occupation after receiving his email of 7 November 2022 which contained the "threat" of him seeking a wrongful termination order if the Respondent did not agree to "make a financial offer to settle this matter", the Tribunal was of the view that this "threat" was not the reason why the Respondent moved into the Property when she did. The Tribunal was satisfied with and accepted the Respondent's evidence on this point and that the reason for the delay was the works that were unexpectedly required to the Property as a result of a leak that had been found during renovation works to 5a Elcho Terrace. In terms of the Applicant's objection to the characterisation his email as a "threat", the Tribunal was satisfied that the said email contained an implicit threat that, if satisfactory proposals were not made by the Respondent, then he would seek a wrongful termination order and that "threat" is an entirely appropriate description of that correspondence. That view does not suggest that the "threat" was one that was inappropriate or in some way unlawful. Such "threats" are made in legal correspondence regularly. The Applicant went to some lengths in an attempt to demonstrate that the Respondent had been untruthful about matters after the Notice to Leave was issued in an attempt to demonstrate that she was therefore being untruthful about her intentions relative to the Notice to Leave. The Tribunal did not find those arguments compelling. Indeed, some matters he complained of as being untruthful appeared to the Tribunal to be correct. For example, the Applicant suggested that the Respondent was being untruthful when she had

claimed to deliver correspondence for Miss Fowler to the Applicants then letting agents in "Autumn 2022". When asked about it, the Respondent discussed delivering a "financial letter" for Miss Fowler to the letting agents and had thought this was the best way to do so. Having heard the evidence, the Tribunal accepted the evidence of the Respondent as being truthful. The Tribunal also took the view that the "friction" over the outside lights had no bearing on the Respondent's decision to issue the Notice to Leave. Nor did the Tribunal accept that the Respondent had "deliberately" switched off the power supply to those outside lights in order to annoy or harass the Applicant. The Respondent accepted, she had switched off the lights following them being left on after midnight. The Applicant had accepted this had occurred. The Respondent's evidence, which the Tribunal accepted as being credible and reliable was that the Applicant was a "good tenant" and this was supported by the correspondence issued by the letting agents where it was discussed that the electrical circuits for same could be changed to allow the Applicant control over them (something which the Applicant in his evidence said he had decided was unnecessary and was not required). That is not something the Respondent would be offering to do if it was her intention to use the outside lights as a means of getting at the Applicant. Likewise, the Tribunal was of the view that the email about the replacement hob, other works proposed by the Applicant or increasing rent detailed in the emails of 19 April 2022 and 19 May 2022 did not demonstrate that, by 30 May 2022, the Respondent did not have a genuine intent to occupy the Property as her only or principal home. Whilst such discussions are clearly close in time to the Notice to Leave being issued, the Tribunal accepted the evidence of the Respondent about the decision being made during a drive up to Dundee to visit her father and his deteriorating health at some point after 19 May 2022. Her evidence came across as genuine and truthful and her consideration at the time of the impact on the Applicant (whom she described a "good tenant") appeared sincere. The Tribunal was also of the view that the refusal by the Respondent to grant extra time to remain in the Property was relevant to the issue of her intent at the time the Notice to Leave was issued. It is entirely consistent that, after serving a Notice to Leave, a landlord such as the Respondent would want the Property back as soon as the notice period expired. Further, the Respondent gave evidence to explain that works were due to commence shortly after the notice period expired and she would require the Property straight away. Whilst it was noted that she did not move into the Property until 25 November 2022, the unchallenged evidence was that she did use the bathroom facilities prior to that whilst the bathroom at 5a Elcho Terrace was being renovated. Likewise, the Tribunal drew no inference from the fact that the invoices and quotes submitted by the Respondent for works to the Property and 5a Elcho Terrace were dated after the Notice to Leave. The Respondent's unchallenged evidence was that she had informal verbal quotes as well as quotes by text, which were subsequently formalised.

42. Overall, the Tribunal was of the view that the Respondent was a credible and reliable witness and, where the evidence of the Applicant and the Respondent differed, they preferred the evidence of the Respondent. She gave her evidence in a straightforward manner, with no prevarication and answered questions asked of her directly. In contrast, the Applicant had a tendency to not answer all questions directly and, at times, came across as being argumentative when

answering questions. That said, the Tribunal was not of the view that the Applicant was deliberately trying to mislead the Tribunal. The Tribunal took the view that he had likely convinced himself that the Respondent did not have the motivation for issuing the Notice to Leave that she claimed, but it appeared to the Tribunal this view likely arose as a result of the breakdown of the landlord and tenant relationship that occurred after the Notice to Leave was issued. This was demonstrated by his focus on correspondence about and incidents that was issued or occurred after the Notice to Leave had been issued.

43. As the Tribunal has found that the Applicant was not misled into leaving the Property by the Respondent when she issued the Notice to Leave, there is no reason to consider the issue of an appropriate penalty or assess the submissions made in that regard.

Decision

44. The Tribunal decided to refuse the Application and therefore to decline to issue a Wrongful Termination Order in terms of section 58 of the 2016 Act.

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.

R Cowan

Legal Member/Chair

_____ 3 July 2023 _____
Date