

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber), statutory successor to the Private Rented Housing Committee in terms of the Tribunals (Scotland) Act 2014 and the First tier-Tribunal for Scotland (Transfer of Functions of the Private Rented Housing Committees) Regulations 2016

STATEMENT OF DECISION UNDER SECTION 24(1) OF THE HOUSING (SCOTLAND) ACT 2006

In connection with

Chamber Reference number: PRHP/RT/16/0230

Re: Property at Flat 3f2, 22 Gillespie Crescent, Edinburgh EH10 4HU (“the house”)

The Parties:

- **City of Edinburgh Council (“Third Party Applicant”)**
- **Mr David Ngunjiri (“Tenant”)**
- **Medwin Investments Limited c/o their agents Edinburgh Holiday Party Lets (EHPL) and Mr Mark Fortune, sole director of said EHPL (“Landlord”)**
- **Ms Elizabeth G Mackay, Trustee in the sequestration of Mark Edward Fortune (Interested Person”)**
- **Mr Mark Edward Fortune (“Interested Person”)**

Tribunal Members: Mrs Aileen Devanny (Chairing Legal Member); Mrs Sara Hesp, (Ordinary Member)

DECISION

The Committee, having made such enquiries in relation to the application submitted for a determination as to whether the Landlord has complied with the duty imposed by Section 14(1) (b) in relation to the house concerned, and taking account of the application and written representations and copies of Land Certificates, determined that the application before the Tribunal is invalid and falls to be rejected.

BACKGROUND

1. By application received 28 June 2016 the Third Party Applicant applied to the Private Rented Housing Panel (hereinafter referred to as "PRHP") for a determination of whether the Landlord had failed to comply with the duties imposed by Section 14(1) (b) of the Act. The application named the landlord as Medwin Investments Limited and the landlord's representative as the company/organization Edinburgh Holiday Party Lets (EHPL) and the contact for EHPL as Mr. Mark Fortune. The application was made in terms of Section 22(1A) of the Housing (Scotland) Act 2006.

2. The application stated that the Third Party Applicant considered that the Landlord had failed to comply with the duty to ensure that the house meets the repairing standard and in particular that the Landlord had failed to ensure compliance with Section 13(1)(b), (c), (d), (e) and (f) of the Act which states that " the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order; the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order; any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order; any furnishings provided by the landlord under the tenancy are capable of being used safely for the purpose for which they are designed; and the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire". The Third Party Applicant's complaint of disrepair within the application related to repairing the shower screen, replacing the shower tray panel and repair to a bathroom ceiling; repair to a freezer door to ensure that the door shuts; fitting hard wired smoke detection devices in line with Scottish Government statutory guidance; providing carbon monoxide detector (s) as required by the Scottish Government statutory guidance; ensure that all cooking appliances are working; and ensure the electrical safety checks are carried out as is the gas safety checks and appropriate certification provided. The Third Party Applicant also submitted to PRHP that between October 2015 and April 2016 the house had been let out to several individuals who considered the house to be their only or main residence. The occupant and alleged tenant at the date of the making of the application was Mr. David Ngunjiri and by e-mail dated 29 August 2016 Mr. Ngunjiri confirmed to the Third Party Applicant that he was still living in the house. No copy of the tenancy or occupancy agreement was provided for Mr. Ngunjiri. However, the Third Party Applicant provided copy statements and a previous agreement involving another individual's occupancy of the house.

3. By minute dated 5 September 2016 a convener with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application under Section 23(1) of the 2006 Act to a Private Rented Housing Committee.

The Committee comprised the following members:

Mrs. Aileen Devanny, Legal Member
Mrs. Sara Hesp, Surveyor Member

4. The Private Rented Housing Committee served Notice of Referral under and in terms of Schedule 2 Paragraph 1 of the Act upon the Landlord, Landlord's representative and Third Party Applicant with a copy to Mr. Ngunjiri as Tenant.

FINDINGS

5. Although Medwin Investment Limited were the registered owners of the house according to the Land Certificate MID120498 downloaded on 5 September 2016, inquiries and written submissions received referred to a judgment of Lord Jones in Elizabeth MacKay v Medwin Investments Limited dated 21 October 2015. That Court of Session Judgment concluded that the disposition of the house in favour of Medwin Investments Limited is voidable and falls to be reduced.

The Third Party Applicant, having carried out enquiries, accepts that the house has been put back into the name of Mr. Fortune. This is reflected in Land Certificate MID120498 downloaded 31 January 2017 (copy attached). The most recent version of the Land Certificate shows that Mark Edward Fortune has been the registered owner since 24 November 2008. The power to enter into a tenancy agreement arises from ownership of the house. It follows that since Mr. Fortune was the sole owner of the house at the date of making the application to PRHP, that Medwin Investments Limited could not be the landlords of the house at that date. Notification of required works by the Third Party Applicant was on Medwin Investments Limited on 6 June 2016 which is a date after the previously mentioned judgement was issued and after it was established that Medwin Investments limited were not the owners of the house albeit that the Land Certificate had not been altered at that date.

REASONS FOR THE DECISION

6. The First- tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 at Schedule 1 details the procedural rules which apply to the procedure to be followed in tribunal proceedings relating to applications made under Section 22 (1A) of the 2006 Act. Rule 42 states the information which must be detailed within the application and that includes the name and address of the landlord. Furthermore, the application must be accompanied by a copy of the notification to the landlord of the work requiring to be done. The application submitted in this case did not correctly identify the landlord of the house. This is an understandable error given the provisions in the Land Certificate but an incorrect application still the same. There was no notification of the works requiring to be carried out on the landlord prior to making the application. In light of the information now before the tribunal, the tribunal considers that the application submitted is not valid and must be rejected. The validity of the application was considered only in relation to its compliance with Rule 42.

The decision of the tribunal was unanimous.

OBSERVATION OF THE TRIBUNAL

7. The tribunal has issued two Directions on the parties to obtain information to enable the competency of the application to be determined. Information and written representations were provided to the tribunal on a "without prejudice" basis by Mr. Coutts of Medwin Investments Limited and Mr. Fortune. The term "without prejudice" is used in negotiations where parties do not wish these negotiations subsequently referred to in judicial proceedings. It is not appropriate to include such a restriction in written representations submitted to the tribunal, which is a judicial body. This has resulted in the tribunal being unable to consider some of the correspondence submitted by these parties.

APPEAL PROVISIONS

8. A landlord 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A Devanny

**Chairing Member of the Tribunal
Dated: 8 February 2017**

REGISTERS OF SCOTLAND



Registers Direct - Land Register: View Title MID120498

Search Summary

Date:	31/01/2017	Time:	14:51:10
Search No.:	2017-00370080	User Reference:	PRHP.RT.16.0230

Sasine Search Sheet:	28320
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A. PROPERTY SECTION

Title Number:	MID120498	Date of First Registration:	24/11/2008
Date Title Sheet updated to:	15/08/2016	Hectarage Code:	0
Real Right:	OWNERSHIP	Cadastral Unit:	MID120498

Description:

Subjects within the land edged red on the Title Plan being the eastmost half of the third flat or fourth storey from the level of the street entering by the common stair 22, GILLESPIE CRESCENT, EDINBURGH EH10 4HU Together with a right in common with the other proprietors of said tenement to the green behind the same and with right of access to the subjects in this Title and to the roof of said tenement for the purpose of sweeping the vents of the dwellinghouse in this Title and other necessary purposes by the common stair and common passages in said tenement and by the hatchway in the ceiling at the top of the said common stair; Together also with the solum of the piece of ground on which the said dwellinghouse in this Title and pertinents are erected, jointly and in common with the other proprietors of the other dwellinghouses in the tenement of which the dwellinghouse in this Title forms a part; Declaring always that the gable walls of the said tenement and the boundary walls of said backgreen shall be mutual and are hereby disposed to that extent between the proprietors of the said tenement and the adjoining proprietors.

Notes:

1. The subjects in this Title are affected by a caveat in terms of section 67(2) of the Land Registration etc. (Scotland) Act 2012 granted by the Court of Session in relation to an action raised under section 67(1)(a) of the said Act in favour of Elizabeth G Mackay as Trustee of Mark Edward Fortune, 4b Essex Brae, Edinburgh, EH4 6LN for a period of 12 months as of 9th April 2015.

2. The above noted caveat has been renewed in terms of an order granted under section 69(2) of the Land Registration etc. (Scotland) Act 2012 for a period of 12 months as of 5th April 2016.

This is a Plain Copy which reflects the position at the date the Title Sheet was last updated.

B. PROPRIETORSHIP SECTION

Title Number: MID120498

Entry Number	Date of Registration	Proprietor	Consideration	Date of Entry
1	24/11/2008 The date of entry and consideration fields are intentionally blank	MARK EDWARD FORTUNE 4b, Essex Brae, Edinburgh.		

Notes:

1. Schedule of Inhibition, by Contract Heating Limited;- against Mr M Fortune, 4B Essex Brae, Edinburgh per J McNamara, Registers of Scotland, recorded Register of Inhibitions and Adjudications 11 Jun. 2010.

2. In terms of the Bankruptcy (Scotland) Act 1985, the estate of the said Mark Edward Fortune has vested in the trustee in sequestration of the said Mark Edward Fortune. The title of the said Mark Edward Fortune is subject to the following entries in the Register of Inhibitions: Certified Copy Interlocutor (Sequestration) granting warrant to cite Mark Fortune, of 4B Essex Brae, Edinburgh. By Certified Copy Interlocutor, dated 6 Feb.2014, the Sheriff makes an order under and in terms of section 63 of the Bankruptcy (Scotland) Act 1985, allows the warrant to cite dated 24 Dec 2010 to be amended and in respect that the original warrant to cite was never recorded. Date of warrant 24 Dec 2010, per David Ritchie, Registers of Scotland, recorded in the Register of Inhibitions and Adjudications 11 Feb. 2014. and Memorandum of Renewal, dated 30 May 2014, in respect of sequestrated estate of Mark Fortune, 4B Essex Brae, Edinburgh. Date of Sequestration 24 Dec. 2010; with Certified Copy Interlocutor, dated 22 May 2014, in terms of the Bankruptcy (Scotland) Act 1985 authorises the Keeper of the Registers of Inhibitions to record the said memorandum or as near as may be, notwithstanding the expiry of the period of three years mention(ed) in subsection 14(3)(b) of the said Act. Per J McNamara, Registers of Scotland, recorded in the Register of Inhibitions and Adjudications 2 Jun. 2014.

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C. SECURITIES SECTION

Title Number: MID120498

Entry Number	Specification	Date Of Registration
1	Standard Security by MARK EDWARD FORTUNE 4B Essex Brae, Edinburgh to BANK OF SCOTLAND PLC incorporated under the Companies Acts (Company	24/11/2008

Number SC327000), Birmingham Midshires Division,
Pendeford Business Park, Wobaston Road,
Wolverhampton WV9 5HZ.

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D. BURDENS SECTION

Title Number:	MID120498	Number of Burdens:	2
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Entry Number	Burden Preamble
1	Feu Charter by the Preses of the Governors of James Gillespie's Hospital and Free School (who and whose successors are herein referred to as "the Superiors") to the Trustees for the firm of W. and D. McGregor ("the disponees") and their disponees or assignees, recorded G.R.S. (Edinburgh) 14 Dec. 1869, of subjects of which the subjects in this Title form part, contains the following burdens
2	Disposition by the Trustees of the Gillespie Crescent Building Association to the Trustees of the Scottish Property Investment Company and to their successors and assignees recorded G.R.S. (Edinburgh) 24 Feb. 1872 of the subjects in this Title, contains the following burdens

Entry Number	Burden Detail
1	Feu Charter by the Preses of the Governors of James Gillespie's Hospital and Free School (who and whose successors are herein referred to as "the Superiors") to the Trustees for the firm of W. and D. McGregor ("the disponees") and their disponees or assignees, recorded G.R.S. (Edinburgh) 14 Dec. 1869, of subjects of which the subjects in this Title form part, contains the following burdens: Declaring that my disponees and their disponees and assignees shall be bound to erect on the ground before disposed and thereafter to keep up and maintain thereon in all time coming Tenements of shops and dwellinghouses fronting Leven Street and to the extent of about forty feet fronting the new Street at the end next Leven Street and tenements of main doors and flats along the remainder of the line of the said new Street the tenements in said new Street being set back from the line of the Street to the distance of eleven feet that the elevations and plans of the said tenements and a description of the materials style and character of the same shall be submitted to and receive the approval of the Superiors to and receive the approval of the Superiors or their Architect before the buildings are commenced and it is specially provided that the said tenements shall not be subdivided into smaller houses than three rooms and a kitchen in each declaring further as it is hereby expressly provided and declared that my said Disponees and their foresaids shall not have it in their power at any future time to alter but shall be expressly limited restricted and prohibited from altering the front or external appearance of the said tenements to be erected as aforesaid on the said ground without the approval of the Superiors Architect or to convert the same or any part thereof into different buildings without the express written consent of the Superiors and their successors as also declaring that there shall at no time nor in any event be erected on the said ground any manufactories requiring for their operation collections of soot or blood or distilleries breweries candleworks tanworks kilns for burning lime or brick nor any steam engine nor shall any manufactory or other business or trade be

carried on which can be reckoned a nuisance to the public or the neighbouring proprietors of which nuisance the Superiors are to be sole judges so far as they consider their interests or those of their vassals affected thereby nor shall any dunghill be collected for sale or for any other purpose than for the improvement of the foresaid piece of ground and my said disponees and their foresaids shall be further restricted and prohibited from selling spirits or malt liquors or allowing the same to be sold by their tenants or others in the tenements to be erected along the said new Street but exclusive of the return of the corner tenement at Leven Street paying therefor the said disponees and their foresaids to the Governors of the said Hospital and Free School and their foresaids and to their assignees or to the Treasurer of the said Hospital for the time being the following feuduty videlicet;- in all time thereafter the sum of four hundred pounds sterling per annum payable said feuduties at two terms in the year Martinmas and Whitsunday by equal portions and continuing payment of the said feuduties by equal portions half yearly in all time with interest at the rate of five per centum per annum on each half yearly payment from the date on which the same shall have fallen due and till payment thereof. Note 1: The new street referred to in the above Feu Charter is now known as Gillespie Crescent. Note 2: the feuduty payable under the above Feu Charter is extinguished by virtue of section 7 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and is shown only in so far as it affects/assists with the interpretation of other real burdens contained in this Title Sheet [in respect of maintenance obligations, liability for common repairs etc].

**Entry
Number**
Burden Detail

2

Disposition by the Trustees of the Gillespie Crescent Building Association to the Trustees of the Scottish Property Investment Company and to their successors and assignees recorded G.R.S. (Edinburgh) 24 Feb. 1872 of the subjects in this Title, contains the following burdens: Under the burden of payment of the yearly payment the said disposes and their foresaids to the Superior of the subjects disposed from and after Whitsunday 1875 and in all time thereafter at the rate of Three ponds ten shillings and per annum being the proportion of the feuduty hereby allocated on the subjects hereby disposed of the expense of upholding and keeping in a proper tenantable repair, the roof, pipes drains street pavement and causeway, gables, chimneys, boundary walls, railings street doors and all others of whatever nature, common or mutual to the tenement 22 Gillespie Crescent, Edinburgh, of which the subjects hereby disposed form a part, and under the like burden of a proportion, in similar manner of the expense of renewing any of the said common or mutual subjects should that be necessary, and of erecting or constructing any other mutual subject that may be necessary to the peaceful and comfortable possession of the said tenement although not of the same nature with any of the mutual subjects above specified; And also with and under the burden condition that in the event of the said disponees or their foresaids deviating or allowing any deviation from the plans of the said tenement by any kind of lights windows or skylights being put into the roof of said subjects hereby disposed to them they and their foresaids shall in all time thereafter be bound at their own expense to maintain and uphold the whole roof of the said tenement but reserving to them right to claim from the proprietors of the westmost half of the top flat of the said tenement in the event of their also deviating or allowing any deviation from said plans by any kind of lights windows or skylights being put into the roof of said westmost half of the top flat, one half of the expense of maintaining and upholding said roof in terms of the conditions of, to that effect inserted in the Disposition granted by us as

Trustees foresaid of said westmost half flat and with the right to the said disponees and their foresaids in the event of the proprietor of the said westmost half flat making or allowing such deviation so long as the said disponees and their foresaids shall not do so to insist in the proprietor of said westmost half of the top flat of the said tenement and his successors therein and in terms of the said Disposition thereof keeping up and maintaining the whole of the said roof at their own expense. Note: the feuduty payable under the above Feu Charter [etc] is extinguished by virtue of section 7 of the Abolition of Feudal Tenure (Scotland) Act 2000 and is shown only in so far as it affects/assists with the interpretation of other real burdens contained in this Title Sheet [in respect of maintenance obligations, liability for common repairs etc].

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