Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/18/0483

Re: Property at 29/5 Springfield Street, Edinburgh, EH6 5DU ("the Property")

Parties:

Mr Tim Murphy, C/O O'Neill Property, 16 Young Street, Edinburgh, EH2 4JB ("the Applicant")

Ms Champa Wijeyewaedena, 29/5 Springfield Street, Edinburgh, EH6 5DU ("the Respondent")

Tribunal Members:

Yvonne McKenna (Legal Member) and Eileen Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

1. This is an application by the Applicant for an order for possession in relation to an assured tenancy in terms of rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended ("the Procedure Rules").

2. On 23/02/2018, an application was made, and paperwork submitted to the Tribunal by the Applicants solicitors Paris Steele WS, seeking an eviction order. The application was acknowledged on 07/03/2018 by the Tribunal.

3. On 08/03/2018, the application and accompanying papers were considered by a legal member of the Tribunal with delegated powers of the Chamber President and it was considered that no further information was required before the application could be accepted by the Tribunal.

4. A Case Management Discussion (CMD) was held by the Tribunal on 9th May 2018 when a final hearing was scheduled for 20th July 2018.The Tribunal issued a detailed note of the proceedings and outcome of the CMD. The outcome was that a number of outstanding matters required to be addressed by the parties in advance of the hearing on the 20th July 2018. Eight Directions were made by the Tribunal in the following terms;-

- Within 14 days, the Respondent will outline in writing the detail of the repairs done to the Property, the date upon which these repairs were made, the cost of these repairs where known and whether this cost was borne by her.
- Within the same document, the Respondent will outline in detail any deductions from the rent made by her, the basis for making these deductions and details of any agreement with the Applicant relating to these deductions.
- This response should include any supporting documentation.
- Within 14 days of receipt of the Respondent`s specification outlined above, the Applicant will address in writing the points raised by the Respondent regarding the repairs and subsequent deduction and provide a clear and detailed rent account, setting out what they state is due and owing both at the service of the Notice to Quit and at today`s date. This should also specify what, if any, payments have been made since the service of the AT6 and Notice to Quit.
- In the same response the Applicant will address the increase of the rent made in April 2017, the reason and basis for this increase, how it was calculated and what notice was given to the Respondent in relation to the increase. This will also address the Respondent`s position that she did not agree to the rental increase.
- In the same response the Applicant will address how they have called upon the Respondent to make payment of the arrears they state are due, what notification was given to the Respondent as to the alleged arrears and what agreement if any was reached upon notifying the Respondent of the arrears.
- This response should include any supporting documentation.
- At the final hearing, the Applicant is to address the Tribunal on whether an order for interest and/or expenses can be made.

5. The application relies upon a Notice to Quit and a notice in terms of section 19 (also known as an "AT6") of the Housing (Scotland)Act 1988 (the 1988 Act) dated 23/10/2017 providing notice that proceedings would not be raised before 08/11/2017. Evidence of service of the said Notice to Quit and AT6 upon the Respondent by Sheriff Officers was provided with the application, service being on 23/10/2017.

6. The said AT6 relies upon four grounds under Schedule 5 to the 1988 Act; Grounds 8,11,12 and 15. The application lodged with the Tribunal relies on Grounds 8,11 and 12 only.

7. This application was a conjoined hearing with application FTS/HPC/CV/18/0484 which relates to an application under Rule 70 of the Procedure Rules being an order for payment in relation to rent arrears based upon the same facts.

The Hearing

8. The Hearing took place at George House Edinburgh on 20th July 2018. The Applicant was represented by Ms. Hill Trainee Solicitor. The Respondent represented herself.

9. The Applicant led evidence from one witness namely Ms. Lucy Weir O`Neill Property. The Respondent gave evidence herself.

10. By way of preliminary matters Ms. Hill confirmed that no interest or expenses were being sought. An up -to-date rent statement was lodged by her showing a current rent outstanding of £4655 (after deduction of the deposit being applied to the arrears on 08/05/2018). She also stated that the Applicant objected to the Tribunal having regard to a "without prejudice" letter which had apparently been sent to the Respondent suggesting a proposed compromise settlement and which the Respondent sought to introduce as evidence. Ms. Hill stated that the Applicant sought recovery of the property and an order for payment in the amount of £4655. No regard was made by the Tribunal to the letter (an offer to settle which had in any event been turned down by the Respondent and did not form part of her defence to either application before the Tribunal today)

11. The Respondent indicated in her opening remarks that she calculated less than 3 months arrears, both as at the date of the service of the AT6, and as at today`s date. She maintained that she had been told by the Chair of the CMD that it was that date which constituted "the hearing date" in so far as Ground 8 was concerned and not the date of today`s hearing and that her position was thus prejudiced. There was no mention of this in the detailed decision of the CMD.

12. The Applicant`s witness Lucy Weir gave evidence. She is a Director in the Applicant`s Property Management Agent Company. She told us that her day-to-day job entails running and managing the property for the Applicant and collecting the rent due. She said that whilst the initial lease provided for rent of £650 per calendar AT6 month, that, in terms of Clause 7 of the tenancy agreement, this provided for rent increases. She was specifically referred to the clause which states: -

"The rent payable in terms hereof shall be reviewed automatically at each anniversary of the date of entry hereunder and shall increase by a minimum of 3% or by the RPI increase over the previous year given by HM government in the preceding April, which ever is the greater."

She was unable to say why Clause 7 had not been followed exactly every year. She referred to a letter dated 23/02/2017 which was sent by O`Neill Property to the Respondent increasing her rent to £700 with effect from 1st April 2017.She was also referred to the Applicant`s rent statement. She confirmed that the rent statement had been compiled directly from O`Neill Property tenancy management software. At the date the AT6 was served there were arrears of rent of £3930 and as at today`s date the arrears she confirmed were standing at £4655.This amounts to more than 6 months of rent arrears at the date of this hearing. She also said that there has not been a nil balance due on the account since November 2015 and that there had been consistent and persistent difficulties in payment of rent since that date. She said that arrears were chased up by O`Neill Property every month either by e-mail or telephone. She was referred to examples of e-mails that were lodged as productions

sent to the Respondent chasing arrears of rent due. She explained that this was time-consuming and that she was aware that the Applicant found this very frustrating. She said in her evidence that if cash payments were made for any reason that a receipt would be provided. The rent statement did not show any cash payments. All payments were either made by bank transfer or card payment. We accepted the evidence of Ms Weir as being credible and reliable evidence.

13. The Respondent then gave evidence. In her evidence she accepted that she had gone through her own bank records and that all her payments which had been made by Bank transfer or card payment were referred to in the Applicant`s rent statement and included in that. She produced one bank statement from her current account showing that a cash withdrawal had been made on 30/04/2015 in the amount of £650. She said that she believed that she paid that amount into her rent account as a cash deposit. She said that she did not receive a receipt however for that payment and did not have any proof of payment. She was unable to show from her own bank records any payments of rent which were not included in the Applicant`s rent statement. Her position notwithstanding this concession however was that there were not three months of rent outstanding either now, at the date of the CMD or at the date of service of the AT6. She had provided the Tribunal with her own calculations. Included in her own rent account calculations she had detailed what she believed her arrears of rent to be as at the date of service of the AT6. This was £923 as at 23/10/2017. She accepted that the lease provided that rent is due at the beginning of each calendar month. In her own calculations she had credited her rent payments with £800 on 31/12/2015 which she stated was the deduction of her deposit from the arrears in lieu of rent. (There was no evidence provided that this had been agreed with the Applicant). She had also deducted from her rent arrears a payment of £180 being the cost of a repair to a shower in the property on 06/01/2017.She said that she had waited for this repair to be carried out by the Applicant and when this did not happen she had fixed it herself and deducted the costs from the rent due. (There was no evidence led that this deduction was agreed by the Applicant). Further she had deducted the sum of £377 from her rent arrears. She explained that she had at an earlier stage in the tenancy in 2014 been credited with this amount as a compensation for ongoing works at the property being carried out whilst she continued to reside there. She had expected to receive the same again and had therefore credited her account with this amount. (There was no evidence led that this was agreed to by the Applicant). The Applicant said in evidence that she had made between 20-30 cash payments to her account but these all related to payments prior to 2014 and she had been provided with no receipts.

She said that she has recently lost her job at Asda and has made an application for Job Seekers Allowance and Housing Benefit which she said was approximately a month ago. There was no evidence led by the Respondent that her arrears had accrued because of non- payment of Housing Benefit or indeed any other form of benefit.

The Respondent said that she did not suggest that the increase in rent was not valid. She said that she should have been provided with a Form AT2. In any event she said that the increase was too much and that if it were reasonable she would agree to pay for it.

She was referred to an email sent on 19/11/2014 to O`Neill Property by her. The e-mail contained the following; -

".....If the matter you`d like to discuss with me is the rent for this month you`ll have no worries I will deposit it straight away once I receive your cheque for the due moneys. I purposely made a delay just to annoy you ....."

She maintained that this was just meant as a joke. She said that she had never received a statement of rent until this action was raised. Ms. Hill referred her to an e-mail dated 09/05/2017 to her from O`Neill Property which enclosed a rent statement which she then accepted that she had received. She accepted that in terms of the rent statement that only 4 of the 40 payments had been made on the due date.

The tribunal did not accept the evidence of the Respondent as credible or reliable. We did not accept that the Chair of the CMD would indicate to the Respondent that it was that date that constituted the date of the hearing insofar as Ground 8 was concerned and then make no mention of this in the detailed CMD notes. We also did not accept that the Respondent had made a payment of £650 on the 30/04/2015 towards her rent arrears. She herself was not sure whether she had or had not. She had not provided us with any proof of that. We did not accept that she was entitled to deduct the deposit from her rent arrears when she wished to do so. We did not accept that there was an agreement for her to deduct from her rent arrears compensation which had not been agreed with the Applicant or indeed repairs that had not been agreed with the Applicant. We did not find it likely that the Respondent had made as many as 20-30 payments of rent without a receipt being provided.

Findings in Fact

14. The Applicant is the registered landlord for the Property. The Property is owned by the Applicant.

15. There was a tenancy in place between the Applicant and the Respondent. The tenancy commenced on 01/03/2010 for an initial period of 6 months until 01/09/2010. It then continued by tacit relocation.

16. The Tenancy Agreement states that it is a Short-Assured Tenancy. It is not. The Property was the subject of a previous summary application to Edinburgh Sheriff Court by the Applicant against the Respondent seeking recovery of possession. The case was determined by Sheriff Noble who issued a judgement on 08/08/2016. The Sheriff found inter alia that the Applicant had failed to prove in terms of section 32 of the 1988 Act that a valid notice was served on the Respondent prior to the creation of the tenancy. The Property is let as an assured tenancy.

17. The Tenancy Agreement provided for an initial rent of £650 per calendar month. This rent was increased to £700 per calendar month with effect from 01/04/2017.

18. On 23/10/2017 the Applicant`s solicitors served a Notice to Quit and Form AT6 addressed to the Respondent, giving the Respondent notice in terms of Section 19 of the 1988 Act of an intention to raise proceedings for possession in terms of Grounds 8,11,12 and 15 of Schedule 5 of the 1988 Act. Grounds 8,11 and 12 were

all based on there being rent arrears of at least three months as at that date. The Notice to Quit and AT6 gave the Respondent notice that proceedings would not be raised before 08/11/2017.
Ground 8 stated " Both at the date of service of the notice under section 19 of the Act relating to the proceedings for possession and at the date of the hearing, at least three months rent lawfully due from the tenant is in arrears."
Ground 8 is a mandatory ground for repossession.
Ground 11 stated "Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due."
Ground 12 stated "Some rent lawfully due from the tenant-(a)is unpaid on the date on which the proceedings for possession are begun;and (b)except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings"
Grounds 11 and 12 are discretionary grounds for repossession.

19.On 23/10/2017 a Sheriff Officer acting for the Applicant competently served the AT6 and Notice to Quit on the Respondent. The Respondent was thus provided with sufficient notice of the Applicant`s intention to raise proceedings for possession on these grounds.

20.On 23/02/2018, the notice period having expired the Applicant raised proceedings for possession with the Tribunal on the grounds 8, 11 and 12 as stated in the AT6.

21. A Section11 Notice in the required terms of the Homelessness Etc. (Scotland) Act 2003 was served on Edinburgh City Council on 23/02/2018 on the Applicant`s behalf.

22. On 23/10/2017 the Respondent was in arrears of £3,930. As at today's date the outstanding rent arrears amount to £4,655

23. No information was provided to the Tribunal regarding any delay relating to the failure in the payment of relative housing benefit or universal credit.

Reasons for Decision

24. The application was in terms of rule 65, being an order for possession in relation to assured tenancies. The Tribunal is satisfied, on the basis of the application and supporting papers, and the updated rent statement and oral submissions provided by Ms. Hill, that a valid AT6 had been issued on the Respondent; that this had expired without the breaches in terms of Grounds 8,11 and 12 being resolved; and that the non-payment of rent remained unaddressed as at today`s date. The Respondent is in arrears of at least 3 months rent both at the date of service of the AT6 and as at today`s date. Ground 8 is accordingly established.

25. There is no evidence that any failure to pay rent is due to a delay or failure in the payment of relevant housing benefit or universal credit. The Tribunal is therefore obliged to make the order.

26. For the avoidance of doubt, had Ground 8 not been found to be established, the Tribunal were satisfied that Grounds 11 and 12 of Schedule 5 to the Act were established and that it would have been reasonable in the circumstances to grant the order. There were no material circumstances brought to the attention of the Tribunal that would suggest it would be unreasonable in the circumstances of over six months of non-payment of rent and over two and a half years of continuous arrears.

Decision

27. In all the circumstances the Tribunal were satisfied to make the decision to grant an order against the Respondent for possession of the Property under Section 18 of the 1988 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.

Yvonne McKenna, Legal Member

20/07/18

Date