



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/23/1400

Re: Property at 9 Annfield Glen Road, Ayr, KA7 3PR (“the Property”)

Parties:

Mr Brian McKinlay, 4 Robsland Avenue, Ayr, KA7 2RW (“the Applicant”)

Mr James Barclay, Ms Stacie Barclay, 9 Annfield Glen Road, Ayr, KA7 3PR (“the Respondent”)

Tribunal Members:

Susan Christie (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order is granted against the Respondents for eviction of the Respondents from the Property under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016, under Ground 12A under schedule 3.

Background

1. The application for an eviction order was accepted by the tribunal on 30 June 2023. The Applicant sought an eviction Order under Ground 12A, Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 (‘the Act’).
2. The application paperwork was served on the Respondents by Sheriff Officers on 23 August 2023, personally on Stacie Barclay who also accepted James Barclay’s copy.
3. Written representations were invited from the Respondents by 11 September 2023. None were submitted.

The Case Management Discussion

1. The Case Management Discussion (CMD) took place by way of conference call commencing at 10 am or thereby on 27 September 2023.
2. The Applicant was represented by Mr Ferry, solicitor. The Applicant was seeking an eviction order based on the substantial rent arrears. Mr Ferry

explained that the Applicant had found himself in extreme difficulties. There had been no effort to repay the arrears of rent and no recent contact. He said the only contact that the Applicant had had from the Respondents was about water ingress and a repair that had been authorised some time ago and the cost covered. A Schedule of rent owed up to the date of the application was with the papers and the ongoing rent remained unpaid and the arrears had increased. The last payment of £500 being made in July 2022. The Applicant had therefore found himself in financial difficulties and had been living in local authority homeless accommodation. He owes the local authority £2,000 and the proceedings to recover that were frozen to await the outcome of this application. He has a chronic health condition. The Applicant intended to move back into the Property.

3. The Respondents entered the call late, approximately 20 minutes late. Mrs Barclay spoke on the call for them both, explaining that as the schools were off today her husband although listening was looking after the children in the background. She had not properly read the paperwork and thought someone would call her. They had also been on holiday abroad for two weeks immediately after service of the paperwork from the tribunal office. They had passed the paperwork to a solicitor although they had not spoken to the solicitor just his secretary.
4. The Respondents were fully apprised of the information that had been given to the tribunal before they joined the call and the format of the CMD before it proceeded any further.
5. The Parties entered into a private residential tenancy agreement that provided for the rent to be paid at £500 per calendar month in advance from the start of the tenancy of 4 April 2022 and thereafter monthly by 28th of the month.
6. The Respondents accept that £2,000 of rent in total has been paid by them since the beginning of the tenancy and that payments ceased around August 2022. The Respondents accept this and state they had withheld the rent due to repairs issues. They had withheld rent at the end of July 2022 due to a massive leak. They had raised matters with the Applicant himself but because of his chronic health condition he stated at one point that he had no recollection of this. Their position was that the repair was not fixed although they accepted that a tradesperson had been out. They had been contacted by a relative of the Applicant around that time and he asked them to leave so that the Applicant could move back in. They stated that they had been advised by a solicitor to withhold the rent and all paperwork and photos had been passed to that solicitor from then on. They could not say if any repairs issues had been raised in writing with the Applicant and Mrs Barclay stated that around the time of the rent payments stopping, she had fallen and broken her leg and ankle at the back door of the Property and had been in hospital. They had not raised anything regarding the Property condition for several months even with their solicitor. They said rain however still came into the kitchen when it rained. When asked if they had retained the rent, they said it was in cash in the house but conceded they could not evidence this. If the eviction case was decided at the CMD they sought sufficient time to pursue the application, they had made a application for suitable local authority accommodation having regard to their family's needs.
6. The Respondents accept that substantial contractual rent is due. In a separate application for payment, the tribunal is to consider whether any deductions

should be made in the final reckoning; the tribunal is also to consider the extent of any deposit paid that falls to be deducted from any balance due and owing.

Findings in Fact

- I. A Private Residential Tenancy (PRT) was entered into between the Parties with a start date of 4 April 2022.
- II. The contractual rent is £500 per calendar month, payable in advance.
- III. The first payment of rent of £500 was due by 4th April 2022.
- IV. The Parties agreed that the second and subsequent payments of £500 were to be paid by the 28th of the month.
- V. Four rent payments were made by the Respondents to the Applicant by bank transfer on 7th May 2022, 23rd May 2022, 9th June 2022 and 8th July 2022. This totalled £2000.
- VI. No rent had been paid by the Respondents since 8 July 2022.
- VII. Around August 2022 a repair issue was raised verbally with the Applicant and a tradesperson came out to assess it. The Parties position on whether the repairs were carried out thereafter differ.
- VIII. Notices to Leave were served on the Respondents on 28 March 2023 by Sheriff Officers. The reason given for the serving of the Notices was 'substantial rent arrears', that is 'more than 6 months' rent due'.
- IX. Pre Action letters were issued to the Respondents by the Applicant's solicitors dated 28 March 2023. Those are framed in the appropriate terms to seek engagement with the Respondents to resolve the arrears and include appropriate signposting to help that might be available.
- X. No contact was made by the Respondents with the Applicant's solicitors after service of the Notices to Leave and Pre-action letters.
- XI. Neither the Respondents nor their solicitor has contacted the Applicant's solicitor stating that rent is being withheld and why.
- XII. The rent arrears at the date of the Case Management Discussion are £6500. A further £500 is due on 28 September 2023.
- XIII. Whilst the Respondents stated they had not paid rent due to repairs matters, they conceded they had no evidence that the rent owed had been set aside.
- XIV. The Respondents could not say if any repairs issues had been raised in writing with the Applicant. They had not raised any repairs issues regarding the Property condition with the Applicant since at least the beginning of 2023.
- XV. The Respondents had not produced any material to the tribunal showing or tending to show there were any outstanding repairs that had been intimated to the Applicant that had not been attended to.
- XVI. The Respondents are not retaining rent as a lever to secure action on any outstanding repairs.
- XVII. The arrears of rent are not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

- XVIII. A Notice under Section 11 of the Homelessness etc. (Scotland) Act 2003 was sent to the relevant local authority prior to this application being made.
- XIX. The Applicant is in local authority homeless accommodation and has financial difficulties. He also has a chronic health condition. His stated intention is to live in the Property.
- XX. The Respondents and their family continue to live in the Property notwithstanding that they pay no contractual rent. The property size is not entirely suitable for the needs of their family.
- XXI. The Respondents have applied to the local authority for alternative accommodation suitable to their needs.
- XXII. The Tribunal is satisfied that Ground 12A is established at at today's date and was established at the date of service of the Notice to leave and it is reasonable to make an eviction Order.

Reasons for Decision

The tribunal considered the terms of Ground 12A of Schedule 3 of the Act.

Substantial rent arrears

- (1) *It is an eviction ground that the tenant has substantial rent arrears.*
- (2) *The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—*
 - (a) *the tenant has accrued rent arrears under the tenancy in respect of one or more periods,*
 - (b) *the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3), and*
 - (c) *the Tribunal is satisfied that it is reasonable to issue an eviction order.*
- (3) *In deciding under sub-paragraph (2) whether it is reasonable to issue an eviction order, the Tribunal is to consider—*
 - (a) *whether the tenant being in arrears of rent over the period or periods in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit,*
 - (b) *the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under paragraph 12(4)(b) (and continued in force by virtue of section 49 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022).*
- (4) *For the purpose of this paragraph—*
 - (a) *references to a relevant benefit are to—*
 - (i) *a rent allowance or rent rebate under the Housing Benefit Regulations 2006 (S.I. 2006/213),*
 - (ii) *a payment on account awarded under regulation 93 of those Regulations,*
 - (iii) *universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,*
 - (iv) *sums payable by virtue of section 73 of the Education (Scotland) Act 1980,*
 - (b) *references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.*

Upon receiving Notices to Leave and pre-action protocol letters relating to substantial rent arrears, no contact was made by them with the solicitor's acting for the Applicant. This is against the backdrop that the documents served on them intimated eviction proceedings were intended. Eviction is a serious consequence of non-payment of rent. The tribunal would have expected that the serving of Notices to Leave on the Respondents would have necessitated contact and the need to state their position, as rent retention is a tool to secure action and does not affect the

contractual obligation to pay rent. The Respondents stated that a solicitor was acting for them in this matter and had advised them to withhold rent, yet no-one had contacted the Applicant's solicitor on receipt of the Notices to make them aware. Even before that from August 2022 there was no information forthcoming to show or tend to show that they had advised that they had withheld rent due to repairs issues, or that their solicitor had in fact taken any action on their behalf. The Notices to Leave and the tribunal papers pertaining to this application had been served on the Respondents by Sheriff Officer and their importance is obvious. The tribunal noted that they had paid four out of twelve rent payments due at the time the Notices to Leave were served. They had not responded to those nor the pre-action protocol letters. The rent arrears are substantial. No payments of rent have been made since August 2022. The tribunal is not satisfied that the Respondents are retaining rent as a lever to secure action on any outstanding repairs. The tribunal finds that the Ground applies and references the findings in fact. The tribunal accepted what both Parties had said about their precarious housing positions. The non-payment has caused the Applicant financial hardship, he is in homelessness accommodation and the Applicant seeks to return to live in the Property. The tribunal had in its deliberations taken account the circumstances of the Respondents in their need for housing. They had stated that they had now given up on this Property. They had sought alternative accommodation through the local authority which seemed a reasonable step for them to take after they received intimation of the application for eviction. The Respondents asked for sufficient time if an order was made to progress their application and source local authority accommodation. The Property is a two bedroom apartment with a loft conversion. It is said there are six children in the Property. One child has an unspecified disability. Their need is for a larger property and the Property is therefore not entirely suitable for them as it is a two bedroom with a loft conversion.

A determination of the application can be made at the Case Management Discussion and the tribunal is satisfied that it could decide based on the information before it. The tribunal is satisfied on the findings in fact made and the reasons given, that the Ground is met, and it is reasonable to grant an eviction order. The tribunal has allowed the Respondents further time for the order to take effect given their circumstances.

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.



Legal Member/Chair

27 September 2023
Date

