



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/22/0403

Re: Property at 1 Cloverhill, Ayr, Ayrshire, KA7 3NJ (“the Property”)

Parties:

Mr John Joseph McGinn, Mrs Anne Barclay McGinn, 9 Loch Park, Ayr, KA7 4EU (“the Applicants”)

Mr Lee Holden, 1 Cloverhill, Ayr, Ayrshire, KA7 3NJ (“the Respondent”)

Tribunal Members:

Nicola Irvine (Legal Member) and Leslie Forrest (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Applicants are entitled to the Order sought for recovery of possession of the property.

Background

1. The Applicants made an application to the Tribunal dated 9 February 2022 seeking an order for eviction in terms of the Housing (Scotland) Act 1988 (“the 1988 Act”) and Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Rules and Procedure) Regulations 2017 (“the 2017 Rules”).
2. This application previously came before the Tribunal for a Case Management Discussion (“CMD”) on 16 June 2022 and a Hearing on 28 July 2022. Reference is made to the Notes and Notices of Direction issued following the CMD and Hearing.

3. On 30 August 2022, the Tribunal received written submissions from the Applicants' representative.
4. On 6 September 2022, the Tribunal received the Respondent's second inventory of productions and list of witnesses.

The Hearing

5. The Hearing took place by video conference. Both Applicants participated in the Hearing and were represented by Mr Bell. The Respondent participated by telephone and was represented by Mr Tierney. Mr McKeown, who is a colleague of Mr Bell, joined the video conference as an observer.
6. The Tribunal noted that the written submissions lodged on behalf of the Applicants dealt with the issue of personal bar. The Respondent's representative indicated at the outset of the Hearing that, having considered those submissions, the issue of personal bar was no longer a live issue for the Tribunal. Both parties' representatives confirmed that the only issue for the Tribunal to determine was whether it is reasonable for the application to be granted. The Applicants' representative advised that he intended to lead evidence from the First Applicant and Mr Tierney advised that he intended to lead evidence only from the Respondent. Evidence was lead from those witnesses and submissions made by the parties' representatives. The evidence and submissions are summarised below.
7. At the conclusion of the Hearing, the Tribunal members adjourned to consider the evidence and submission made and indicated to parties that a written decision would be issued in due course.

Summary of evidence

Mr John Joseph McGinn

8. The First Applicant is 64 years of age and lives with his wife, the Second Applicant at 9 Loch Park, Ayr. The Applicants own property at 1 Cloverhill,

Ayr, which is the subject of the present application. That property previously belonged to the First Applicant's parents. Title was transferred to the Applicants in 2014. The First Applicant's father moved into a care home and thereafter the Applicants decided to rent the property. They appointed Murphy Scoular as their agents and in April 2017, the Respondent was identified by the agent as a suitable tenant. The Applicants have never been landlords before. At the start of the tenancy, he attended at the property and introduced himself to the Respondent. He explained to the Respondent that this was his first venture as a landlord and that he might sell the property in 3 or 4 years but in the meantime, the rental payments would be used to help fund his father's care costs.

9. The pandemic affected his financial position because his business ceased trading. He became a self-employed hairdresser, renting a chair. His income reduced significantly as a result, to around 50% of his previous income.
10. On 1 February 2021 he telephoned the Respondent to advise that the Applicants intended to sell the property. On 2 February 2021, he attended at the property with a letter for the Respondent, confirming the intention to sell the property and advising the Respondent that he would be given the first option to purchase the property. The Respondent said that he would have to look at his finances and later said that he would be unable to get a mortgage to buy the property.
11. The Applicants instructed Purple Bricks to market the property. Viewings of the property took place and the Respondent was present at those viewings. The Applicants tried to minimise the disruption to the Respondent in relation to the viewings. An offer was received by the Applicants from a couple who wished to buy the property and that was accepted. The proposed date of entry was 2 August 2021.
12. He attended at the property in June 2021 to undertake an inspection of the property. The Respondent had taken very good care of the property. The Respondent told him that it was highly unlikely that he would move out of the property by 2 August 2021. The Respondent told him that he had taken advice and that he should "dig his heels in" and that he had a good case for

staying in the property. He sent details to the Respondent of other rental properties available in the area but the Respondent told him that those properties were not suitable. The proposed purchaser withdrew the offer to purchase the property.

13. He instructed a solicitor to serve notices on the Respondent, giving 6 months' notice to leave the property. The Respondent did not leave and the present application was made after expiry of the notices.

14. He was reasonable in his dealings with the Respondent throughout the tenancy. Around the time that coronavirus lockdown measures were introduced, the Respondent asked him to reduce the rent from £715 per month to £300 per month. The Respondent told him that he was a self employed salesman in a kitchen and bathroom business in Kilmarnock and that his income had reduced. They agreed a reduced rent of £300 for 3 months from April to June 2020, rent at £500 for July 2020 and then a return to £715 per month from August 2020.

15. In March 2021, the Respondent told him that it would take him 2 months to move out of the property and asked to have rent reduced to £300 per month for the period it would take to find alternative accommodation. The parties agreed on a reduced rent of £500 per month to August 2021 when the house sale was due to settle. When the Respondent told him in June 2021 that he was unlikely to move out, the Applicants' solicitor wrote to the Respondent requesting payment of the full rental payments from March 2021 onwards. To his credit, the Respondent paid the sum of £645 representing the difference between the reduced rent and the full rental payments due from March 2021 to June 2021.

16. Under cross examination, he explained that his financial circumstances changed after the start of the pandemic and those financial circumstances remain unchanged. The Respondent is still paying £715 per month in rent. Asked whether he had considered selling the property with a "sitting tenant", he explained that he had been given advice from Purple Bricks to the effect that he would be unable to achieve market value if he sold the property with a sitting tenant. Since receiving that advice, he has not

explored the sale of the property with a sitting tenant. He has not done anything to remarket the property while the current proceedings are outstanding. He paid Purple Bricks for marketing the property, even although the proposed sale did not proceed.

17. He accepted that the Respondent is a reliable tenant. He gave details of an incident which Murphy Scoular reported to him which involved the Respondent. After the first year of the tenancy, he increased the rent by £10 per month. The Respondent attended at the office of Murphy Scoular and created a scene. Murphy Scoular told him that they were on the point of calling the police to attend. He later told the Respondent that Murphy Scoular were not involved in the increase in rent and that the Respondent should speak to him directly if there was an issue.

18. He is not aware of any issue the Respondent has with the neighbours. The Respondent has looked after the property. The Respondent carried out work at the property, some of that without permission. The Respondent replaced 3 carpets, although there was no need to do so. The Respondent had a new backdoor fitted, changed the locks, fitted an alarm, removed a fireplace, fitted a new kitchen and bathroom and blinds and curtains.

19. He has never considered mediation to resolve the issue between the Applicants and Respondent. He did not consider that mediation was a viable solution. The alternative to recovery of possession would be the Respondent purchasing the property but he is unable to do so.

20. He was aware of a friend of the Respondent, namely Lloyd Anslow. When asked if he was aware that Mr Anslow might fund the purchase of the property for the Respondent, he advised that he contacted Mr Anslow by telephone. There was no discussion about Mr Anslow purchasing the property and Mr Anslow told him that the house was not worth the price the Applicants wanted for it and that the best thing the Applicants could do was to pay the Respondent to leave.

21. In response to questions from the Tribunal, he advised that there is no mortgage over the property. He is 64 years of age and plans to retire soon.

Selling the property will help him plan his financial affairs to enable him to retire. At present, he struggles in meeting the cost of living, given his reduced income. He expects that the property has increased in value since he had a home report prepared in February 2021.

Lee Holden

22. The Respondent is 45 years of age and resides at the property at 1 Cloverhill, Ayr. He is unemployed and registered as disabled. He suffers from a number of health conditions. He was diagnosed in 2015 as suffering from Asperger's syndrome. He also suffers from anxiety, obsessive compulsive disorder, agoraphobia, misophonia and has had issues with alcohol misuse in the past. Prior to moving to the property, he lived for 21 years at a flat in Kyle Street, Ayr. He misused alcohol regularly whilst living there. The living conditions were such that his mental health was in poor condition. There was too much noise and some neighbours were troublesome. His income from benefits increased and he looked at the private housing market in order to move away from that environment. He became a self published author just before he moved to the property at Cloverhill. He applied for a tenancy at the Applicants' property and was successful in that application. The living conditions were much improved and that had a beneficial impact on his mental health. He identified some aspects of a property which calm him; he likes to have a place to store his belongings, and likes carpets, blinds and curtains within a property. These items help him to relax. He made some improvements to the Applicants' property to help him to relax. During his time at the property his mental health has improved considerably. The eviction process has caused his mental health to deteriorate.

23. He has made every effort to find alternative accommodation. He has made applications for other properties in the private rental section but has been unsuccessful. There are fewer properties available to rent now in comparison to when he moved into the property. He has applied for a tenancy in 70-80 properties. His friend, Lloyd Anslow, has told him that he will try to assist by buying a rental property and renting it to him. He asked this friend if he would buy the Applicants' property but was told that he would not buy it because he would incur additional tax because it is a second

property. Mr Anslow received a mortgage offer in March 2022 but that offer has expired. He intends to apply for a mortgage again to enable him to purchase a property.

24. He has applied to the local authority for alternative accommodation but has been told that that may take 3 or 4 years.

25. Under cross examination, he explained that when he secured the tenancy at the property in March 2017, it took him until November that year to move into the property. He finds change difficult to manage. He had troublesome neighbours at his last address and that motivated him to look to the private rental sector for alternative accommodation.

26. Whilst living at his previous address, he looked on the website of Rightmove for alternative accommodation and viewed 4 properties. He applied for and was successful in gaining his current tenancy. He is not undergoing medical treatment for Asperger's syndrome but has been referred by his general practitioner to support meetings. He does not attend those meetings. All of his medical conditions were worse whilst living in his previous accommodation.

27. He has been told by estate agents that between 40 and 200 people are applying for tenancies to each property in the private rented sector. He viewed a property in Kilmaurs but was told that 46 people were interested in renting that property. He accepted that his requirements (storage space, carpets, blinds and curtains) for a rental property were not unusual. He has looked in a number of different areas in Scotland and England for alternative accommodation.

28. He managed to fund the improvements to the Applicants' property by taking out a loan of £25,000 over 7 years, which he has defaulted on. He obtained that loan just before he moved to the property. He may be given some assistance from his father to fund a deposit for a new property, if he manages to secure an alternative tenancy. If the Tribunal granted the present application, he could not live with his father because his father (who

lives near Leeds) suffers from medical conditions which make him vulnerable.

29. During the pandemic, he lost income of approximately £100 per week and as a consequence, he asked the Applicants to reduce the rent due. If the rent had not been reduced, he would have had to make sacrifices.

30. In response to questions from the Tribunal, he explained that Lloyd Anslow has been a friend of his since 2007. Mr Anslow is prepared to assist him by purchasing a property and renting it to him. Mr Anslow is not in a position to do that right now but is working towards it. He asked Mr Anslow to give evidence to the Tribunal but he did not wish to do so.

31. He recalled an issue he had with the Applicants' agent, Murphy Scoular. He explained that he contacted Murphy Scoular by telephone after receiving notification of a rent increase. The representative that he spoke to was shouting at him and terminated the call. The Respondent decided to attend the office of Murphy Scoular and had an argument with the representative that he had spoken to on the telephone. After that incident, the Respondent told the First Applicant about his mental health issues and the First Applicant said that he already knew about that.

32. If the Tribunal granted an order for eviction, he would not have anywhere to go. He was homeless at the age of 18 and is worried about the situation in which he finds himself.

Submissions for the Applicants

33. The relationship between the parties is governed by a short assured tenancy. When the tenancy was created, the legal position was that the tenancy could be brought to an end at its own discretion and an eviction order would have been mandatory. The First Applicant advised the Respondent at the outset that it was the intention of the Applicants to sell the property after a few years. It was however accepted that, since the introduction of the

Coronavirus legislation, an eviction order will only be granted if the Tribunal is satisfied that it is reasonable to do so.

34. It was submitted that there were inconsistencies in the Respondent's evidence. On the one hand he said that he suffers from anxiety and on the other he gave an account of attending the office of the Applicants' agent and having an argument with the agent. It was noted that the Respondent did not express any anxiety about that.

35. The Respondent gave details of his requirements for alternative accommodation, namely that the property has blinds and curtains, carpets, storage space and a bath. These requirements do not set a high bar. The Respondent has the same options available to him as any other individual looking for a tenancy in the private rented market; the Respondent does not appear to be restricted anymore than anyone else in his position.

36. The Respondent made a general claim of having made efforts to find alternative accommodation. He did not however mention any of the properties that the Applicants suggested he should consider.

37. The Respondent was not credible in relation to the evidence he gave about the loan he arranged. The tenor of the Respondent's evidence was suspiciously unclear on many aspects.

38. The Tribunal had two options: to grant the application and allow the Applicants to sell the property in order to alleviate their financial concerns; or to allow the Respondent to remain in the property indefinitely.

39. The balance of reasonableness favours the Applicants. The Respondent has the ability to find somewhere else to live and has the ability to ask for help. The Applicants have given the Respondent the requisite notices and those have expired.

Submissions for the Respondent

40. The Respondent is asking the Tribunal to have regard to his specific health issues. Living in the wrong environment in the past had an adverse impact

on the Respondent's health before moving to the property. He has derived a great deal of benefit from living in the property. The Tribunal must take account of the Respondent's health when considering the issue of reasonableness.

41. The Respondent has not been sitting idly by; he has made efforts to try to identify suitable alternative accommodation. As well as searching for properties in the private rented sector, the Respondent has registered with his local authority to try to find alternative accommodation. He has had no offers of alternative accommodation. The availability of properties in the private rental sector is vastly reduced. The Respondent's friend, Lloyd Anslow, received a mortgage offer in March to enable him to purchase a property in order to assist the Respondent. Although that mortgage offer expired, it is his intention to assist the Respondent. It is not a question of there being an indefinite period of time before that happens, Mr Anslow intends to assist the Respondent.

42. The Applicants have not explored the potential for a sale of the property with the Respondent still living there as a sitting tenant.

43. The Tribunal should have regard to the imminent developments in the law regarding evictions. The Scottish Government announced on 6 September 2022 an intention to introduce emergency legislation to bring about a moratorium on evictions. There have been suggestions that the moratorium will subsist until March 2023 and may be similar to the moratorium which was introduced during the pandemic. If the Tribunal granted an eviction order, there is every possibility that emergency legislation will have been drafted. If minded to grant the application, it is open to the Tribunal to defer enforcement until March 2023.

44. The Applicants accept that the Respondent has been a good tenant.

Findings in fact

45. The parties entered into a short assured tenancy which commenced 25 April 2017.

46.The term of the tenancy was from 25 April 2017 to 25 October 2017 and continued thereafter on a monthly basis.

47.The Applicants' representative served the Notice to Quit on the Respondent by recorded delivery on 23 July 2021.

48.The Applicants' representative served the Notice in terms of Section 33 of the 1988 Act on the Respondent by recorded delivery on 23 July 2021, advising that vacant possession was required as at 25 January 2022.

49.The Applicants' representative served a Section 11 Notice on South Ayrshire Council by email on 9 February 2021.

Reasons for decision

50.It was not in dispute that the relationship between the parties was governed by a short assured tenancy which commenced 25 April 2017. There was no issue regarding service of the requisite Notices on the Respondent. The only issue between the parties was whether it is reasonable for an eviction order to be granted.

51.The evidence of the First Applicant was largely unchallenged. He told the Respondent at the outset of the tenancy that the Applicants intended to sell the property in a few years. He explained that almost 4 years after the start of tenancy, he told the Respondent that the Applicants intended to sell the property. There was no evidence to indicate that the Respondent had any difficulty with that intention being intimated. The Applicants took steps to market the property for sale and they accepted an offer for the purchase of the property. The Respondent was aware of that process. Months after the offer had been accepted, the Respondent told the Applicants that it was highly unlikely that he would move out of the property. The proposed purchaser withdrew the offer. The Applicants incurred expense in respect of the marketing of the property for sale. The Applicants' financial circumstances changed following the pandemic and they now wish to realise an asset by selling the property in order to alleviate their financial worries.

52. The Tribunal found the First Applicant to be credible and reliable. He gave his evidence in a straightforward manner and made concessions under cross examination.
53. The evidence of the Respondent was at times quite general in nature. He said that he has been looking for alternative accommodation since he learned of the Applicants' intention to sell the property. He gave only 1 specific example of a property which he viewed in Kilmaurs. When asked by the Tribunal about the funding of improvements at the property, the Respondent was reluctant to go into detail about the loan he arranged. This gave the impression that at times he was guarded in the evidence he gave and was not as forthright as the First Applicant.
54. The Respondent's evidence was that the circumstances of his tenancy at Kyle Street were very damaging to his mental health. However, the Tribunal noted that whilst still living at that address, the Respondent was in sufficiently good health to write his self published work, view and apply for tenancies, apply for and obtain a substantial loan and arrange a move to his new address. His mental health appears to be far better now and the Respondent should therefore be in a position to manage a move to another property.
55. The Respondent's position was that, taking account of his health issues, it is not reasonable for the Tribunal to grant an eviction order. The Tribunal took account of the health conditions mentioned by the Respondent. No physical disability was mentioned. The Respondent explained that due to his medical conditions, he had specific requirements for a rental property.
56. The Tribunal agreed with the submission made on behalf of the Applicants that the Respondent's requirements for another property do not set a high bar and that he has the same options and opportunities available to him as any other individual trying to secure alternative accommodation.
57. The Applicants, through their agent, served a Notice to Quit and Notice in terms of Section 33 of the 1988 Act on the Respondent on 23 July 2021. The

Notices indicated that vacant possession was required by 25 January 2022. As at the date of the Hearing, the Respondent had 14 months' notice that vacant possession was required; in addition he was aware some 19 months ago (since February 2021) that the Applicants intended to sell. In that time, the Respondent has been unable to secure alternative accommodation.

58. The Tribunal took account of the conduct of the parties throughout the tenancy. The Applicants were reasonable in handling the Respondent's request for a rent reduction on two separate occasions. They were conscious of the disruption to the Respondent during the marketing of the property and they tried to minimise the inconvenience to the Respondent. There was no evidence to indicate that there was any issue with the Respondent paying rent throughout the tenancy. The evidence of the First Applicant and the Respondent was to the effect that the Respondent had taken good care of the property throughout the tenancy.

59. In all of the circumstances, the Tribunal was satisfied that, on balance, it is reasonable to grant the application for an eviction order against the Respondent.

60. The Tribunal was asked to consider deferring execution of an order for eviction, standing the fact that emergency legislation is to be introduced by the Scottish Government to place a moratorium on evictions. The Tribunal was not persuaded to defer enforcement. No information has been given by the Scottish Government about the proposed provisions of emergency legislation. The motivation behind the proposed emergency legislation is to assist individuals to deal with what is colloquially known as the "cost of living crisis". There was no indication from the Respondent that he struggles with the cost of living. In fact, the evidence before the Tribunal is that the Applicants are struggling to deal with the cost of living, given their reduced income. In any event, the Tribunal was not prepared to speculate as to the terms of the emergency legislation to be introduced.

61. The Tribunal was not prepared to order any deferral on the execution of the eviction order. The evidence of the Respondent was to the effect that he finds change difficult. In his evidence he explained that although he secured

a tenancy to the property owned by the Applicants in March 2017, he did not in fact move into the property until November 2017. He has had 19 months to find alternative accommodation since learning of the Applicants' intention to sell the property and he has been unable to do so. The Tribunal was not persuaded that it is appropriate in the circumstances to defer execution of the eviction order. If the parties reach agreement about deferral of the execution of the eviction order, that is a matter for them.

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.

N Irvine

Legal Member/Chair

14 September 2022

Date