



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/22/0088

Re: Property at Flat 2, 4 Mansionhouse Court, Glasgow, G41 3DD (“the Property”)

Parties:

Mr John Scanlon, 90 Drakemire Drive, Glasgow, G45 9SA (“the Applicant”)

Miss Emma O'Hara, 4 Montgomery Dr, Giffnock, Glasgow, G46 6PY (“the Respondent”)

Tribunal Members:

Gabrielle Miller (Legal Member) and Sandra Brydon (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum £800 (EIGHT HUNDRED POUNDS) should be made in favour of the Applicant.

Background

1. An application was received by the Housing and Property Chamber dated 5th January 2022. The application was submitted under Rule 110 of The First-tier for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 Regulations”). The application was based on the Applicants being misled by the Respondent into leaving the Property causing the Applicant to have his tenancy wrongfully terminated
2. On 13th April 2022 all parties were written to with the date for the Case Management Discussion (“CMD”) of 28th July 2022 at 10am by teleconferencing. The letter also requested all written representations be submitted by 5th May 2022.

3. A CMD was held on 28th July 2022 at 10am by teleconferencing. The Applicant was present and represented himself. The Respondent was present and represented herself. The Respondent stated that she had intended to move out of her parents house and live in the Property. The Applicant was behind with his rent and it was financially better for her to move into the Property. She did not move into the Property as she was offered a place to study in London. She applied for this course in April or May 2021. She was given an offer to study on 21st July 2021. She moved to London and her course started on 4th October 2021. She did not return to live in the Property at any point. Once the Applicant left the Property on 9th September 2021, the Respondent returned and cleaned it. The Tribunal noted that raising an action for eviction based upon the landlord returning to live in the Property should not be used in place of a rent arrears case if that is the reason for wanting a tenant to leave. The Tribunal asked the Respondent why she did not revoke the Notice to Leave given that she knew she no longer intended to live in the Property and while the Applicant was still residing there. The Respondent said that she was guided by her letting agent. The Respondent noted that if she had misled the Applicant to leaving the Property it had not been her intention to do so. She has since dismissed with the services of that letting agent as he had not been passing on all the information that she needed from the neighbours in the block. The Tribunal noted that this is a complex matter and the Respondent may consider getting legal advice in order to respond to the points raised by the Tribunal. The Tribunal noted that the Applicant is also entitled to get representation or a solicitor if he wishes to do so. As matters were at dispute, the Tribunal determined that the case should proceed to a hearing. The Tribunal noted points of agreement. The Tribunal raised questions that it wished to be answered and issued a direction.
4. A date was scheduled for the hearing for 26th October 2022. Parties were notified of this date by email on 16th September 2022.
5. On 10th October 2022, the Respondent emailed to say that she had been ill and required further time to gather evidence. This postponement request was granted. A new date was fixed for 19th January 2023 parties were written to notifying of this date on 30th November 2022. On 30th November 2022, the Respondent emailed asking for a postponement as she had just secured an acting job and would be doing this between 9th January – 10th February 2023. The Tribunal did not consider it appropriate to grant this further adjournment.
6. In lieu of being able to attend the Respondent appointed her father, Mr John O'Hara, to attend the hearing and represent her.
7. Both the Applicant and the Respondent lodged submissions prior to the hearing. The Respondent's submission included a statement from the Respondent and her neighbours statements in relation to the Applicant's behaviour. The Respondent's submission disputed that she had misled the Applicant. The Applicant's submission confirmed his position that he had been misled and disputed that his behaviour was inappropriate.

The hearing

8. A hearing was held on 19th January 2023 at 10am by teleconferencing. The Applicant was present and represented himself. The Respondent was not present. Mr John O'Hara, the Respondent's father, represented her.
9. Mr O'Hara told the Tribunal that he considered that there was no evidence that the Respondent did not want to move back into the Property. He said that she had not been sure if she was to keep the Property as a place that she would use it at weekends and holidays from her course in London. He noted that in his discussions with the Respondent that she considered that the last CMD was not fully representing her views as she had not fully decided to go to her course in London and did not know if she were to let out the Property again. The Tribunal said that it had noted her view. The Tribunal notes that there had been no objection to this when the CMD note was issued. The Tribunal also referenced that dates at points 5 and 8 of the CMD note should have read 2021 not 2022.
10. Mr O'Hara said that when the Applicant left the Property the Respondent still did not know what to do with the Property. She had been reluctant to let it out again due to her experience with the Applicant. When she had attended the Property on 9th September 2021 with her mother she had spoken to people who lived in the neighbouring properties. She had been unaware of the scale of the Applicant's behaviour and realised that her letting agent had not been informing her of the full situation. One of the neighbours gave her the contact details for the letting agent that she used and reassured the Respondent that it depends upon the agent that you had acting on your behalf. She contacted that agent but did not let out the Property until December 2021.
11. Mr O'Hara told the Tribunal that there were a lot of financial pressures on the Respondent from the fact that the Applicant had not paid his rent. She had sold her car, borrowed from family, spent her savings and used up her mortgage holiday allowances. The Respondent had health problems at that time and which have endured. It was due to this that the Respondent did not feel able to attend the hearing. She is on her first acting job and could not get time off. Mr O'Hara said that she had been very concerned that asking for time off for the hearing would mean that she lost her job.
12. Mr O'Hara told the Tribunal that the Respondent did not intend to relet the Property until after the Applicant had left. It was her intention to use the Property at weekends and holidays when she returned to Glasgow from London. The Tribunal raised that this statement did not align with the Respondent's position that she could not afford to have the Property with someone in it not paying the rent when she had her own outgoings. Mr O'Hara said that he intended to help with the mortgage payments. The Respondent's mother offered to pay for her London accommodation until she got a job, which she did do after a few months as she became a personal trainer while undertaking her course.

13. Mr O'Hara noted that the Respondent now thinks that in hindsight she should have had more contact with her former letting agent and been aware of the exact position regarding what was occurring in the tenancy. The Tribunal noted that she had legal obligations as a landlord. She should have been fully aware of everything that had a legal consequence with regard to the tenancy.
14. Mr O'Hara noted that the Respondent wished the Tribunal to note that she feels that this process is unfair as the Applicant is not worse off because of having to move. The Tribunal replied that this was not about his position but whether he had been misled into leaving the Property. She also notes that he left voluntarily. The tribunal noted that this does not have any bearing as it is looking to decide if he was misled to leave or not.
15. The Applicant disputes the allegations of his behaviour. The Applicant did not wish to add anything further.

Findings and reasons for decision

16. A Private Rented Tenancy commenced on 19th August 2019. The monthly rent payment for the Property was £800 per month. The Respondent is the owner of the Property and the Applicant the former tenant.
17. The Respondent was struggling to pay her mortgage payments as the Applicant was not paying his rent. The Respondent decided that she would move back into the Property to reduce her costs. She discussed this with her letting agent and they proceeded with the arrangements for the Notice to Leave.
18. A Notice to Leave was served upon the Applicant dated 23rd February 2021 stating that the Applicant must leave by 26th May 2021. The Notice to Leave was based upon ground 4 of Schedule 3 of the 2016 Act which relates to the landlord intending to return to live in the Property. The Notice to Leave was dealt with by the Respondent previous letting agent in consultation with the Respondent.
19. In April or May 2021, the Respondent applied for a course in London.
20. The Respondent was offered a place on the course on 21st July 2021.
21. On or around 5th August 2021 the Respondent accepted the place on the course in London.
22. The Applicant did not leave the Property within the notice period. An application was lodged with the Housing and Property Chamber to ask for an eviction order. A CMD was set for August 2021 but was then postponed.
23. The Applicant left the Property on or around 9th September 2021. He moved into another property in which the rent charge is £100 per month less than this property.

24. The Respondent attended the Property on 9th September 2021 to clean the Property. She had discussions with one of the neighbours on that date. The neighbour gave the Respondent details of the letting agent that she used.
25. On 10th September 2021 the Respondent contacted her current letting agent with regard to reletting the Property.
26. The Respondent started her course in London on 4th October 2021 and has remained living in London since.
27. The Respondent did not reside in the Property as her only or principal home for a period of at least three months from when the Applicant moved out.
28. The Respondent let the Property on 20th December 2021.
29. The Respondent bought the Property in 2019. This tenancy was her first as a landlord.
30. No evidence was led that the Respondent had changed her mortgage from a buy to let mortgage to a domestic mortgage.
31. An order for payment of rent arrears was granted by the Housing and Property Chamber First-tier Tribunal. This was under reference FTS/HPC/CV/21/2607 when an order for payment was granted in favour of the Respondent, in this case, against the Applicant, in this case. The order for payment for £5486.67 was granted on 3rd February 2022 following a Time To Pay Direction being accepted by parties.

Reasons for decision

32. Section 58 of the Private Housing (Tenancies)(Scotland) Act 2016 states at subsection (3) that
“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 then tenancy immediately before it was brought to an end.”

It is clear from this that the Tribunal is focused on the word ‘misled’ and whether the tenant was misled into leaving the Property.

33. There was no dispute between parties that the Notice to Leave was based upon ground 4. The law relating to ground 4 can be found at Schedule 3 of the 2016 Act paragraph 4. At sub-paragraph (1) it states *“It is an eviction ground that the landlord intends to live in the let property.”* It continues at subparagraph (2) *“The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if the landlord intends to occupy the let property as the landlord’s only or principal home for at least 3 months.”*

34. The Tribunal took these two parts of the legislation into consideration when making its decision. Neither party had submitted a structured legal argument to refute either of the above in any way.
35. The Tribunal understands that the Respondent was not necessarily fully informed by her letting agent. The Respondent has taken on a legal responsibility to be a landlord. Simply stating that her letting agent had not told her all the grounds for the Notice to Leave is not sufficient. She should have been aware of what was occurring as it was to have a significant impact upon the Applicant. The Respondent did state to her letting agent that she wished to return to live in the Property. However, it was clear that there were also significant rent arrears which could have reasonably been included as a ground in the Notice to Leave by adding ground 12. The Tribunal notes that the notice period at that time for ground 12 was 6 months and not 3 months as it was for ground 4. It may have been that this resulted from the letting agent's understanding of the case but it is reasonable to presume that the letting agent was fully aware of the large amount of outstanding arrears. It is not appropriate to use a shorter notice period to remove a tenant from their home if it is not correct and has been chosen for the shorter notice period. On balance it would appear that ground 4 was chosen as it had a shorter notice period than pursuing ground 4 and ground 12. At best the Respondent has acquiesced to the letting agent's actions in terms of this point. The Respondent was free to seek independent legal advice had she wished to do so.
36. Considering the matter as a whole the Tribunal were satisfied, on balance, that the Respondent had misled the Applicant when she said that she was to live in the Property. The meaning of "intention" was considered by the Supreme Court in the case of *S Franses Ltd v. Cavendish Hotel (London) Ltd (2019 AC 249)*. The Court applied the test outline in the speech of Lord Justice Asquith in *Cunliffe v. Goodman (1950 2 KB)* which states that the question is "if the plaintiff did no more than entertain the idea ...if she got no further than contemplative it as a (perhaps attractive) possibility then one would have to say...either that there was no evidence of a positive "intention" or that the word intention was incapable as a matter of construction of applying to anything so tentative and so indefinite" The party must "do more than contemplate" but must have decided to proceed on that basis and must have a "reasonable prospect" of so doing.
37. In subsequent cases, it has also been established that a landlord must show that the intention is not only "genuine" but also "firm and settled". It was clear that by the time that the Applicant had left the Property that the Respondent had known for some weeks that she was to move to London. Her father said that she had intended to keep the Property as a place for her to return from London at weekends and for holiday. It was very unclear from Mr O'Hara's evidence as to how this would be feasible in the long term given that the Respondent had wanted to move back into the Property to reduce her costs because the Applicant was not paying his rent. Continuing to have this unlet or not using it would amount to the same. Mr O'Hara did say that he and his wife were helping her financially but there was no evidence that this was a long term position. The Respondent then let out the Property 3 months later. Significantly

she did not live in the Property during those three months as her only or principal home. In fact she had moved out of Glasgow within that three month period to live in London where she still resides. There was no evidence presented that the Respondent had made any arrangements to move back into the Property when it became vacant. The day after it did become vacant she instructed a new letting agent albeit that the Property was not let out for three months. There was no evidence presented of the transfer of the mortgage from a buy to let to a domestic mortgage. The Respondent continued to pursue the removal of the Applicant from the Property by applying to the First-tier Tribunal with the Notice to Leave raised under ground 4. A CMD was due to be held in August but was postponed. The CMD was still to be heard on the ground 4 basis and the Applicant not moved out of the Property at the point when the Respondent had been offered or was waiting for an offer for a course in London. It is reasonable to conclude that the Respondent continued to pursue the matter to obtain an order for eviction when she no longer required to rely upon ground 4. There was no evidence that the Respondent's intention was not only genuine but also firm and settled. Given that the Respondent had been offered a course in London, she accepted her place on it then started the course it was clear that there was no reasonable prospect of the Respondent returning to live in the Property for at least three months after the Applicant moved out and she was aware of this before he moved out.

38. The Tribunal considered that a one times the monthly rent was the appropriate level to award. The Respondent had engaged with the process and provided information to the Tribunal. This is her first tenancy as a landlord. She has now changed letting agents. The Respondent had also been dealing with financial pressures cause by the Applicant not paying his rent and her own personal health matters.

Decision

39. The Tribunal determines that an order for the payment by the Applicant of £800 should be made by the Respondent. This is equivalent of one months rent payment.

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.

Gabrielle Miller

19th January 2023

Legal Member/Chair

Date

