



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

Chamber Ref: FTS/HPC/EV/23/0942

Property at 184 Menzies Road, Glasgow, G21 3ND (“the Property”)

Parties:

Mr Derek Magill, 48 Whiteford Road, Stepps, Glasgow, G33 6GB (“the Applicant”)

Elizabeth Riach, 184 Menzies Road, Glasgow, G21 3ND (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member) and Sandra Brydon (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be refused.

Background

- 1.** The Applicant seeks an eviction order in terms of Section 51 of the 2016 Act. A Notice to Leave, Section 11 Notice and evidence in support of the eviction ground were lodged with the application. The application is based on ground 1 of schedule 3 of the Act – the landlord intends to sell the let property.
- 2.** Sheriff Officers served a copy of the application on the Respondent. Both parties were advised that a case management discussion (“CMD”) would take place by telephone conference call on 21 August 2023 at 10am and that they were required to participate.
- 3.** The CMD took place on 21 August 2023. Ms Young, solicitor represented the Applicant. The Respondent did not participate and did not contact the Tribunal in advance of the CMD. A related application under reference CV/23/0944 was also discussed.

4. Ms Young told the Tribunal that the Respondent is still residing at the property. However, she has not been in contact with the Applicant or her firm. She advised the Tribunal that the Applicant seeks an eviction order as he intends to sell the property. It was purchased to provide an additional source of income. However, the Respondent has incurred rent arrears of £23,100.
5. The Tribunal noted that most of the paperwork lodged with the application appears to be in order. However, there is an issue with the Notice to Leave. Although dated 21 September 2022, the Notice was not served by Sheriff Officer until 23 September 2022. The date specified in Part 4 is 16 December 2023. This may be incorrect. As a result, the Notice to Leave may not comply with Section 62(1)(b) of the 2016 Act.
6. Following discussion, Ms Young requested a continuation of the CMD so that she could investigate and lodge submissions in relation to the validity of the Notice. The Tribunal agreed to the request and indicated that written submissions should be submitted no later than 14 days before the new date.
7. The parties were notified that a further CMD would take place by telephone conference call on 22 November 2023 at 10am. Prior to the CMD, the Applicant's representative lodged submissions and an updated rent statement. The submissions relate to the validity of the Notice to leave and state:- the Notice was served by Sheriff Officer which means that the Applicant does not require to allow time for the Notice to be received (Smith v McDonald 2021 UT 20); Section 26(5) of the Interpretation and Legislative Reform (Scotland) Act 2010 allows for personal service and the Respondent is deemed to have received the Notice on 23 September 2023; It is accepted that the Notice to leave does not "conform precisely" to section 62(4) and 54(2) but this does not invalidate the notice; The Tribunal can entertain an application in breach of Section 54 if the Tribunal considers it reasonable to do so; The Respondent was given 84 days notice – at most the notice period was a day short; The application was not raised immediately. It was raised on 23 March 2023, about 6 months after expiry of the notice period. The Respondent has not been prejudiced; Section 73 allows for minor errors in documents. The error in question is a minor one. The Tribunal should exercise its discretionary power under Section 52(4).
8. The CMD took place on 22 November 2023. The Applicant was represented by Ms Brown, solicitor. The Respondent did not participate and did not contact the Tribunal prior to the CMD.

Case Management Discussion

9. Ms Brown told the Tribunal that the Respondent remains in occupation of the property. She referred the Tribunal to the submissions lodged in advance of the CMD. The Tribunal adjourned the CMD for a short period to allow Ms Brown to consider the FTT decision in the case of Holleran v McAllister (EV/18/3231). Following the adjournment, Ms Brown invited the Tribunal to conclude that the

Notice to leave is valid. She stated that it was in the interests of justice that the Tribunal consider the application and make a decision in favour of the Applicant. She stated that there are substantial rent arrears and that the Respondent has not submitted a defence or engaged with the Tribunal.

10. Ms Brown advised the Tribunal that the Applicant intends to sell the property as he wishes to retire. He cannot continue to let out the property due to increased mortgage costs and no rental income for some time. He does not own any other rental properties. In response to questions about the delay in service the Notice to leave and raising proceedings, Ms Brown said that there were personal issues, which took priority over matter and led to the delay. The Applicant also hoped that the rent arrears would resolve. However, although he has tried to contact the Respondent, she has failed to engage with him and the arrears now stand at £24,200. Ms Brown was unable to provide much information regarding the Respondent, due to her failure to engage. It is understood that there have been periods of unemployment. It is not known whether she lives at the property alone or whether she has any health issues or disabilities.

Findings in Fact

11. The Applicant is the owner and Landlord of the property.
12. The Respondent is the tenant of the property in terms of a private residential tenancy agreement.
13. The Applicant served a Notice to leave on the Respondent on 23 September 2023. The Notice states that the earliest date that tribunal proceedings can start is 16 December 2022.

Reasons for Decision

14. The application to the Tribunal was submitted with a Notice to Leave dated 21 September 2022, together with an Sheriff Officer certificate of service which establishes that it was served on 23 September 2022. The Notice to leave states that an application to the Tribunal is to be made on ground 1, landlord intends to sell the let property. Part 4 of the notice indicates that the earliest date that an application to the Tribunal can be made is 16 December 2022. The application to the Tribunal was made after the expiry of the notice period. The relevant sections of the 2016 Act are as follows .

52 Applications for eviction orders and consideration of them

...

- (2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

- (a) subsection (3), or
 - (b) any of sections 54 to 56 (but see subsection (4)).
- (3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.**
- (4) Despite subsection (2)(b) the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

54 Restriction on applying during the notice period

- (1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.
- (2) The relevant period in relation to a notice to leave—
- (a) begins on the day the tenant receives the notice to leave from the landlord, and
 - (b) expires on the day falling—
 - (i) 28 days after it begins if subsection (3) applies
 - (ii) 84 days after it begins if subsection (3) does not apply
- (4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

62 Meaning of notice to leave and stated eviction ground

- (1) References in this Part to a notice to leave are to a notice which—
- (a) is in writing,
 - (b) **specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,**
 - (c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and
 - (d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

...

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purposes of subsection (4), it is to be assumed that the tenant will receive the Notice to leave 48 hours after it is sent

73 Minor errors in documents

- (1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.
- (2) This section applies to –
 - (d) a notice to leave (as defined by section 62(1))

15. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

Part 4 THE END OF THE NOTICE PERIOD

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).

16. It is not in dispute that the ground 1 is not one of the grounds specified in Section 54(3). As a result, the notice period is 84 days and not 28 days. The Tribunal is also satisfied that, as the Notice was served personally by Sheriff Officer, Section 62(5) does not apply and the Applicant did not have to allow an additional 48 hours when calculating the date to be inserted in Part 4 of the Notice. However, the date specified in Part 4 of the Notice is 16 December 2022. This is clearly incorrect. In terms of section 62(4) of the 2016 Act, the Notice must state a date being **“the day falling after the day on which the notice period defined in section 54(2) will expire.”** As the 84-day notice period started on 23 September 2022, the date in Part 4 should be 17 December 2022.
17. Having determined that the date specified in Part 4 of the Notice is incorrect, the Tribunal proceeded to consider the implications of the error for the application. The Tribunal had regard to the decision of the Tribunal in the case of *Holleran v McAllister* (HPC/EV/18/3231). As it is a decision at first instance, it is not binding on the Tribunal. However, the Tribunal is satisfied that the reasons for the decision in that case were correct, in factual circumstances similar to the present case. In *Holleran*, an application was submitted to the Tribunal with a Notice to leave which was dated 1 August 2018. The Applicant lodged evidence that it had been sent to the tenant by recorded delivery post

on the same date. The date specified in Part 4 was 29 August 2018. As 48 hours had to be allowed for sending the notice by post, the Tribunal determined that the date ought to have been 1 September 2018. The application was refused on the grounds that it was incompetent as the Notice was not a “notice to leave” in terms of section 62. This meant that the Tribunal could not entertain the application in terms of section 52(2)(a).

18. As the Tribunal points out in the decision with statement of reasons in the Holleran case, the opening words of Section 62 indicate that a Notice to Leave has to fulfil the four requirements specified in Sections (a) to (d) of that section. It follows that a Notice to Leave which does not fulfil these requirements is not a “Notice to leave” in terms of the 2016 Act. The Notice submitted with the present application does not fulfil the requirement specified in Section 62(b), as the Notice wrongly indicates that the Applicant expected to be able to make an application to the Tribunal on 16 December 2022. As a result, the Notice which has been submitted is not a “Notice to leave” in terms of Section 62. This calls into question the competency of the application. As the application to the Tribunal has to be accompanied by a “Notice to Leave”, the Applicant has failed to comply with Section 52(3) of the 2016 Act and the Tribunal cannot entertain the application.

19. As in the Holleran case, the Applicant seeks to rely on Section 73 of the 2016 Act, which states that a minor error will not invalidate a Notice to leave. The Applicant’s solicitor put forward a similar argument, pointing out that the wrong date had been an error which had not prejudiced the Respondent as the application had not been submitted until several months after the specified date.

20. In terms of Section 73, an error does not invalidate the notice unless it “materially affects the effect” of the notice. As the Tribunal points out in the Holleran case, this means that where an error does “materially affect the effect” the notice is invalid. The explanatory note to Section 73 in the 2016 Act says, “Any errors ...do not invalidate the document if they are sufficiently minor that they do not materially alter the effect of the document...” The word “effect” appears to refer to the effect the notice is supposed to have if there had been no error. Section 62 defines a Notice to leave. It stipulates the information that the landlord must give to the tenant when giving notice. This includes (Section 62(b)) the day on which the landlord expects to be able to make an application for an eviction order. When a landlord uses the prescribed form, this date is specified in Part 4. In the present case, the Respondent has not been given that information because the date inserted is earlier than the date upon which the Applicant would become entitled to make the application. As such, the error **does** affect the effect of the notice because if there had been no error, the date specified would have been the 17 December.

21. The question which then arises is whether the effect is “materially” affected. In the Holleran case, the Tribunal rejected the argument that there was no

prejudice to the tenant as the application was not made until some time after the correct date had passed. The Tribunal's reasoning (which is endorsed by this Tribunal) is that the validity of a notice cannot be determined and defects in the notice cannot be cured by events which have occurred after the notice was served. Either the notice was valid or not when it was given to the tenant. Section 73 is clearly designed to protect landlord from minor errors which may be made when completing a notice to leave. Spelling mistakes in names and addresses, using the wrong version of the notice, etc.. However, an error in relation to a fundamental aspect of the notice as defined by Section 62 cannot be regarded as minor. It is perhaps arguable that if a later date had been inserted, the Notice would have been valid. This is because Part 4 of the prescribed form states that the date must be "**at least the day after**" the expiry of the notice period. However, that was not the case,

22. For the sake of completeness, the Tribunal notes that the Applicant referred to the interests of justice, the level of the arrears, the fact that the Respondent has not engaged with the Tribunal process and to Section 52(2) of the 2016 Act. The Tribunal is satisfied that, as the application is incompetent, the interests of justice can only be met by refusing the application. The Applicant has to comply with the legislation, whether or not the Respondent participates. The Applicant had the opportunity to consider the matter and to withdraw the application and start again. They chose not to do so. Furthermore, although the arrears are certainly substantial, the Applicant chose not to include ground 12 of the 2016 Act, which would have involved a shorter notice period. Section 52(4) and 54 apply when an Applicant makes an application to the Tribunal before the notice period has expired. It is therefore not relevant to the present case.
23. For the reasons outlined, the Tribunal refuses the application on the ground that it is incompetent as the application has not been accompanied by a valid Notice to leave.
24. As the application is refused, the Tribunal did not consider the eviction ground or the issue of reasonableness

Decision

25. The Tribunal determines that the application should be refused.

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.



Josephine Bonnar, Legal Member

22 November 2023