Housing and Property Chamber
First-tier Tribunal for Scotland

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/21/0038

Re: Property at 24 Prestonfield Avenue, Kilwinning, KA13 6TT ("the Property")

Parties:

Mrs Elizabeth Harkins, Mrs Myra Ross, 12 Alexandra Gardens, Kilwinning, KA13 7GA; 17 High Road, Saltcoats, KA21 5RY ("the Applicants")

Mr Martin Beveridge, Ms Shannon Duncan, 24 Prestonfield Avenue, Kilwinning, KA13 6TT ("the Respondents")

Tribunal Members:

Richard Mill (Legal Member) and Ann Moore (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for eviction be granted against the Respondents

Introduction

This is an eviction application under Rule 109 and Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016.

The application, which is dated 6 January 2021, has been the subject of sundry procedure which included a preliminary decision being made on 22 February 2021 to reject the application under Rule 8. This was the subject of a review at the request of the applicants and on 9 March 2021 the earlier rejection decision was set aside. Additionally throughout the applications progress through the Tribunal's administration system, numerous requests had been made for additional documentation to be provided by the applicants.

Service of the application and intimation of the Case Management Discussion (CMD) was effected by Sheriff Officers on both respondents on 1st April 2021. Written representations required to be lodged with the Tribunal by 20 April 2021 but none were received.

The CMD took place by teleconference at 10.00 am on 4 May 2021. The applicants both joined the hearing and were represented by Mr Craig Scott of Rentolease Property Management Ltd. The respondents both joined the teleconference hearing personally and represented their own interests.

The respondents offered no active opposition to the application. They advised that they have no intention to of being difficult about allowing the applicants to recover possession. They have been offered alternative accommodation.

Findings and Reasons

The property is 24 Prestonfield Avenue, Kilwinning KA13 6TT.

The applicants are Mrs Elizabeth Harkens and Mrs Myra Ross. The applicants are sisters. They are the joint heritable proprietors of the property and their joint title to the property is registered in the Registers of Scotland Land Register under title number AYR8097.

The respondents are Mr Martin Beveridge and Ms Shannon Duncan. They are unmarried partners.

The parties entered into a private residential tenancy in respect of the property which commenced on 26 November 2018. The rent was stipulated at £450 per month.

Only one of the applicants, the second applicant, Mrs Myra Ross, was named as a landlord on the written lease. The lease was entered into by the second respondent with the knowledge and consent of the first applicant. The second applicant was the only landlord to be named, for practical purposes. Both applicants are registered landlords in respect of the property. They each have responsibilities as a landlord in respect of the property. At the time the written lease was entered into by the second applicant in her sole name, she was binding both applicants to the terms and conditions of the lease entered into.

The Tribunal was satisfied that both applicants are landlords for the purposes of the legislation and for all practical purposes, notwithstanding the fact that it is the second applicant who is only named as landlord on the written lease.

The applicants maintain a joint bank account into which all the rental payments are received into. The same joint bank account is used for any expenditure which requires to be made in respect of the property. The first applicant's landlord's registration number is 121525/310/03230. The only reason that the first applicant was not involved in the specific practicalities of the lease arrangements being entered into between the

parties was due to her personal circumstances at that time. Her late husband had suddenly passed away and, in those circumstances, her sister, the second applicant, took over the main day to day responsibilities relating to the property. The first applicant has always maintained a direct interest and in addition to operating a joint bank account with the second applicant, they communicate regularly in respect of the property. The first applicant completes tax returns on an annual basis for the property.

By way of Notice to Leave dated 2 October 2020, the respondents were advised of the applicants' intention to recover the property. The ground relied upon is ground 4 contained within Part 1, Schedule 3 to the 2016 Act; namely that the landlord intends to live in the property.

Since the coming into force of the Coronavirus (Scotland) Act 2020, all eviction grounds are discretionary. Ground 4 has always been a discretionary ground for eviction. The notice periods have been extended by virtue of the 2020 Act. The relevant notice period under ground 4 is now one of 3 months.

The Notice to Leave is dated 2 October 2020. The proof of posting of the Notice to Leave to the respondents discloses that it was sent one day earlier on 1 October 2020. This has been the subject of requests for clarification from the applicants' representative. For practical and administrative purposes the letter was issued a day earlier than dated. In addition to the proof of posting the post office track and trace data has been produced which discloses that the Notice to Leave was signed for by or on behalf of the respondents on 3 October 2020.

In terms of Section 62(5) it is to be assumed that the tenant will receive a Notice to Leave 48 hours after it is sent. It is to be assumed therefore that the Notice to Leave was received on 3 October 2020 which accords with the post office track and trace information.

The Notice to Leave, dated 2 October 2020 was completed assuming that the 3 month notice period was to run from the assumed date of service, which would have been 4 October 2020.

The 3 month notice period runs from 3 October 2020 and therefore expired on 3 January 2021. The Notice to Leave requires to specify the earliest day upon which the landlord expects the Tribunal proceedings can start. In terms of Section 62(4) that is one day after the notice period expires. The notice period expired on 3 January 2021 and accordingly the Notice to Leave ought to have specified 4 January 2021 as being the earliest date upon which Tribunal proceedings could commence. The Notice to Leave states however that the date upon which the landlord expects the Tribunal proceedings can start would be 3 January 2021. It is therefore not accurately or validly completed and is one day 'short'.

The essential requirements of a Notice to Leave, which are prescribed by section 62(1) have not all been adhered to, because subsection (b) has not been met. This is

because the specified day contained within the Notice to Leave, said to be the day on which the landlord expects to become entitled to make an application for an Eviction Order to the First-tier Tribunal, is one day early.

The Tribunal considered the potential operation of Section 73 of the 2016 Act which deals with minor errors in documents. Such section applies to errors which do not make the document invalid. Some errors do make documents invalid. Section 73 does not apply to errors which materially affect the effect of the document. Section 105 of the 2016 Act contains an explanatory note to Section 73 which states that any errors in specified documents do not invalidate the document, if they are sufficiently minor that they do not materially alter the effect of the document. It is said that the purpose of section 73 is to ensure that a common-sense approach can be taken to meeting the requirements under the Act and that a party is not penalised for an obviously minor error. The protection applies equally to both landlords and tenants. Section 73(2)(d) makes specific reference to errors contained within Notices to Leave.

The fundamental requirements of a Notice to Leave are to provide information to the tenant as to why and when proceedings may be raised against them. The "why" element was flawed, all as aforementioned, but taken as a whole, may be seen as giving fair notice to the respondent as to why the applicant was to seek her eviction. The "when" part of the notice is also defective and the Tribunal finds that this is materially so. Properly calculated, the first day the applicant could have made application to the First-tier Tribunal was 30 March 2020. The Notice specified the wrong day – 20 August 2020. This was a later date but was wrong. In fact, the application was not submitted until January 2021 but that is immaterial and does not cure the defect.

The Tribunal had regard to decisions of the First-tier Tribunal in other determined cases on similar points. Though not binding on the Tribunal, these are persuasive and in any legal jurisdiction it is important that the public have confidence in the impartial decision-making of Courts and Tribunals and that the public take comfort in knowing that they will be treated equally with other service users. The Tribunal has had specific regard to the decisions in FTS/HPC/EV/18/3231 and FTS/HPC/EV/19/3416. In the 3231 case the Notice to Leave specified the wrong date by 3 days. It was held to be invalid. In the 3416 case the Notice specified the wrong date by 1 day only. It was held to be invalid.

The Notice to Leave served upon the respondent on 1 October 2020 does not specify "the day" on which the applicant was entitled to make an application for an Eviction Order to the First-tier Tribunal. It follows that the notice relied upon in this application is not a Notice to Leave in terms of Section 62(1) of the Act. One of the fundamental requirements clearly set out in the legislation at section 62(1) has not been met. Other erroneous references, mistakes and omissions are capable of being overlooked, but the four fundamental requirements in section 62(1) must be met precisely.

It is well established law in Scotland that notices to quit must comply strictly with common law and statute, and the Tribunal's view is that the same approach should apply to the statutory notices to leave required to be served on tenants under the 2016 Act.

The Notice to Leave is not valid with reference to the primary statutory provisions.

The Tribunal proceeded to consider the validity of the Notice to Leave with reference to the amendments brought about by the Coronavirus (Scotland) Act 2020. Paragraph 10 of Schedule 1 to the 2020 Act is in the following terms:

> 10. Errors in notices
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> 1. Where a notice to which this paragraph applies is completed without taking proper account of paragraphs 1 to 9 –
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> (a) the notice is not invalid by reason of that error, but
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> (b) it may not be relied upon by the landlord for the purpose of seeking an order for possession (however described) until the date on which it could have been relied upon had it been properly completed.

The Tribunal concluded that the provisions contained in Schedule 1 of the 2020 Act do provide a right of relief to the applicants to allow the Notice to Leave to be relied upon. The application was not made to the Tribunal until after the date when the Notice to Leave could be relied upon – the application is dated 6 January 2021.

Ground 4(4) states that evidence tending to show that the landlord has the intention to live in the property includes (for example) an Affidavit stating that the person has that intention. Upon request such evidence was produced and is in the form of a detailed letter dated 3 February 2021 in which the first applicant, Mrs Elizabeth Harkens, sets out the circumstances in which she seeks to enter and live in the let property. The Tribunal also had the benefit of hearing the oral evidence of the first applicant. All sources of her evidence were found to be credible and reliable, and were unchallenged. The Tribunal attached weight to all of this evidence.

There is a lengthy history to the applicants seeking to evict the respondents. The Notice to Leave currently relied upon is the third such Notice. A first Notice was issued to the respondents on 17 January 2020. The eviction ground relied upon related to ground 1 – the landlord intends to sell the property. This was not factually the case and it is said that this arose due to a miscommunication between the applicants and their letting agency. A second Notice to Leave was issued on 1 July 2020 to the respondents. This second attempt to bring the tenancy to an end also failed as the applicants agents failed to give the correct amount of notice.

The first applicant is 53 years of age. She sold her own family home on 30 September 2021 believing that the eviction process would have been concluded around then. Regrettably this was not the cases due to errors by their letting agent. The first applicant sold the home following the passing of her late husband in and her son leaving home. She required to downsize due to financial constraints and continues to live with her daughter. The first applicant is currently renting a third floor flat at 12 Alexandra Gardens, Kilwinning due to the immediate inability to take occupation of the let property. She has a number of health conditions, including knee pain (osteoarthritis). This third floor rental property which the first applicant is renting is unsuitable for her needs. The let property which is the subject of these proceedings is suitable for the first applicant's needs. This is why she intends to live in the property.

The Tribunal was satisfied on the basis of the documentary and oral evidence of the applicants that Ground 4 was established. The first applicant intends to occupy the let property as her only or principal home for at least 3 months.

The Tribunal then proceeded to consider whether the making of the eviction order was reasonable. The Tribunal weighed up the respective circumstances and needs of the parties.

The personal circumstances of the first applicant are as already set out above.

The respondents are aged 31 and 24 years of age respectively. They are both unemployed and in receipt of benefits. They have two young children to care for (15 months and 9 weeks old). They are keen to move on from the let property in order to bring about more stable and secure arrangements for themselves. They have been offered alternate suitable accommodation from the Council though have still to view this.

Weighing up the respective circumstances of the parties the Tribunal concluded that it was reasonable to grant the eviction application. The respondents were in agreement.

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.

Richard Mill

Legal Member/Chair **Date : 4 May 2021**