



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/21/1024

Re: Property at 8 East Pilmore, Invergowrie, Dundee, DD2 5EL (“the Property”)

Parties:

Ms Sharon Marshall, 5 Carron Place, Broughty Ferry, Dundee, DD5 3HR (“the Applicant”)

Mr Kyle Hutchison, 10 East Pilmore, Invergowrie, Dundee, DD2 5EL (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatrige (Legal Member)

Decision in absence of the Respondent

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

A Background

[1] This is an application under rule 110 of the Procedural Rules made by the Applicant on 29 April 2021. The Applicant seeks a wrongful termination order to be made by the Tribunal in terms of S 59 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act). As the tenancy was not terminated by an eviction order from the tribunal, the application is made under S 58 of the Act.

[2] The documents lodged in this case consist of:

1. Private Residential Tenancy agreement between the parties for the property commencing on 1 July 2020.
2. Copy email Respondent to Applicant 13 October 2020 21:04 hours and reply by Applicant 14 October 2020 17:59 hours
3. Letter Applicant to Respondent dated 15 January 2021
4. Recent sales information for 5 Carron Place DD5 3HR printout
5. Email 1 June 2021 from Respondent to tribunal

6. Email Respondent to Applicant dated 8 October 2020 21:02 hours and reply of Applicant dated 8 October 2020 21:59 hours
7. Email from Respondent to Applicant 11 October 2020 at 14:18 hours
8. Emails Respondent to Applicant 12 October 16:56 hours, reply Applicant to Respondent 17:24 hours, reply Respondent to Applicant 18 :52 hours and reply Applicant to Respondent 21:37 hours
9. Email Applicant to Respondent dated 16 December 2020 at 10:07 hours and reply by Respondent to Applicant 16 December 2021 at 17:16 hours
10. Email Respondent to Applicant 2 January 2021 at 13:20 hours and reply Applicant to Respondent dated 2 January 2021 at 16:34 hours
11. Email Respondent to Applicant dated 24 December 2020 at 15:32 hours and reply by Applicant to Respondent 31 December 2020 at 12:22 hours
12. Email exchange between the parties on 15 and 16 January 2021 (4 emails)
13. Deposit Protection Certificate from Safe Deposits Scotland for the tenancy dated 9 June 2020
14. Extract of qualified acceptance letter by Gilson Gray solicitors regarding sale of the property dated 7 January 2021
15. Confirmation of repayment of deposit to Applicant 10 February 2021
16. Email with Respondent's representations 15 July 2021
17. Written Representations of Applicant with supporting notes dated 15 July 2021
18. SMS messages between parties 2 November 2020 and 27 November 2020.

[3] All documents together with the Case Management Note (CMD) and Directions dated 19 June 2021 are referred to for their terms and held to be incorporated herein.

[4] A first CMD was held on 18 June 2021 and attended by both parties. A second CMD took place on 22 July 2021 at 10 am. Both parties had been notified of the date and time at the first CMD. The Tribunal sent the joining details to the Respondent by email on 22 June 2021. This was sent to the email address used for previous communications and I am satisfied that other communications to said email, such as the Direction issued on the previous day, were received and responded to by the Respondent. The Respondent did not participate in the second CMD. The Tribunal proceeded in his absence in terms of Rule 29 of the Procedural Rules as it was satisfied that the Respondent had received the necessary notification in terms of Rule 17 (2) of the Procedural Rules.

B The second Case Management Discussion

[1] The Applicant set out why she considers that the application should be considered valid. She stated that to her the notice received by email on 13 October 2021 was clear and thus she felt she had no choice but to vacate the premises. She had trusted the landlord to adhere to the legal requirements and accepted that she would have a 3 months notice period. When asked why she had replied to the Respondent's email "Thanks for letting me know. I'm okay with that as it meets the minimum term we discussed at the outset" she stated the Respondent had stated at the start of the tenancy he might market the property after 6 months. She stated she would not have moved had she known that she would have to leave after 6 months. She expected 9 months to a year. She was not going to argue with the Respondent

She accepted she would have to find somewhere else. She had not sought legal advice but appreciates this may have been a good idea. He should have given her the correct notice period.

[2] The main position in the written representations from the Applicant was that the tenancy came to an end in terms of S 50 of the Act because she considered the notice, whether it was legal or not, binding as it was taken in good faith. Without that she would not have left the property. She queried why it should be possible for the notice not to be considered valid as this would leave the landlord with no negative consequences although he had not adhered to the notice period.

C Findings in Fact

1. The parties entered into a Private Residential Tenancy over the property commencing on 1 July 2020 (Clause 6)
2. The tenancy agreement provided that the landlord or the tenant may end this agreement in accordance with Part 5 of the Private Housing (Tenancies) (Scotland) Act 2016 (Clause 7)
3. On 8 October 2020 the Respondent emailed the Applicant to advise her that he had received an unexpected offer for the property and told her he would consider this further. He stated it had always been his intention to let the property for a minimum of 6 months. He stated "I will give you 3 months notice. Any prospective buyer will need to work around this timescale"
4. On 8 October 2020 the Respondent replied: "Thanks for letting me know. I'm okay with that as it meets the minimum term we discussed at the outset."
5. On 13 October 2020 the Respondent sent an email to the Applicant stating:"The house is being sold. Please take this email as notice that there will be no extension to the tenancy beyond the 5th of January. Should you require the full 3 months from today and need an extra week up to the 12th of January please let me know as soon as possible."
6. On 14 October 2020 the Applicant sent an email to the Respondent stating:" Hopefully I will vacate before 5 January. "
7. The Applicant moved out on 23 December 2020 without an eviction order having been applied for or granted by the First-tier Tribunal.

D Reasons for Decision:

For ease of reference the relevant sections of the 2016 Act are listed below:

S 59 Wrongful-termination order

(1)In this section and in sections 57, 58 and 60, "a wrongful-termination order" means an order requiring the person who was the landlord under the tenancy immediately before it ended to pay the person who made the application for the wrongful-termination order an amount not exceeding six months' rent.

(2)Subsection (3) applies where—

(a)the First-tier Tribunal intends to make a wrongful-termination order under section 57 or 58, and

(b) two or more persons jointly were the landlord under the tenancy in question immediately before it was brought to an end.

(3) The Tribunal may make a wrongful-termination order—

(a) against all, some, or only one of the former joint landlords,

(b) stating that each person against whom the order is made is liable to pay a specified amount, but the cumulative total of each of the specified amounts must not exceed six months' rent,

(c) stating that each person against whom the order is made is jointly and severally liable for the whole amount to be paid.

(4) In subsections (1) and (3)(b), "rent" means—

(a) the amount that was payable in rent under the tenancy immediately before it ended, or

(b) in a case where two or more persons jointly were the tenant under the tenancy immediately before it ended, the amount mentioned in paragraph (a) divided by the number of persons who were at that time joint tenants under the tenancy.

S 58 Wrongful termination without eviction order

(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.

(2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy ("the former tenant").

(3) 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 the tenancy immediately before it was brought to an end.

(4) In a case where two or more persons jointly were the landlord under the tenancy immediately before it ended, the reference to the landlord in subsection (3) is to any one of those persons.

S 50 Termination by notice to leave and tenant leaving

(1) A tenancy which is a private residential tenancy comes to an end if—

(a) the tenant has received a notice to leave from the landlord, and

(b) the tenant has ceased to occupy the let property.

(2) A tenancy comes to an end under subsection (1) on the later of—

(a) the day specified in the notice to leave in accordance with section 62(1)(b), or

(b) the day on which the tenant ceases to occupy the let property.

(3) For the avoidance of doubt, a tenancy which is to come to an end under subsection (1) may be brought to an end earlier in accordance with section 48.

S 48 Tenant's ability to bring tenancy to an end

(1) A tenant may bring to an end a tenancy which is a private residential tenancy by giving the landlord a notice which fulfils the requirements described in section 49.

(2) A tenancy comes to an end in accordance with subsection (1) on the day on which the notice states (in whatever terms) that it is to come to an end.

(3) But a tenancy does not come to an end in accordance with subsection (1) if—

(a) before the day mentioned in subsection (2), the tenant makes a request to the landlord to continue the tenancy after that day, and

(b) the landlord agrees to the request.

(4) In subsections (1) and (3), in a case where two or more persons jointly are the landlord under the tenancy, references to the landlord are to any of those persons.

S 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.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(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 purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

S 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—

(a) a notice under section 14(3), 16(3)(c), 22(1) or 61(1),

(b) the document by which a referral is made to a rent officer under section 24(1),

(c) the document by which an application is made to a rent officer under section 42(1), and

(d) a notice to leave (as defined by section 62(1)).

[1] As the parties both agree that the tenancy was not terminated by an eviction order from the Housing and Property Chamber under S 51 of the Act, the only possible provision on which the application can be based is S 58.

The legal issue identified and explained to the parties is as follows:
In terms of S 59 the Tribunal can only grant a wrongful termination order for cases which either fall under S 58 or 57.

S 58 (1) requires that " a private residential tenancy has been brought to an end in accordance with section 50."

S 50 (1) provides "(1)A tenancy which is a private residential tenancy comes to an end if—

(a) the tenant has received a notice to leave from the landlord, and

(b) the tenant has ceased to occupy the let property. "

The meaning of the term "notice to leave" referred to in S 50 is defined in S 62 (1) which states "(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."

[2] The requirements mentioned in S 62 (1) (d) of the Act are specified in The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 SSI 2017/297 (the Regulations).

Regulation 5 provides: Notice to leave

6. A notice to leave given by the landlord to the tenant under section 50(1)(a) (termination by notice to leave and tenant leaving) of the Act must be in the form set out in schedule 5.

Schedule 5 then provides the specific form to be completed, setting out important information for tenants on where to obtain advice if they receive a notice, in part 2 listing the grounds for eviction, in part 3 giving details of why the ground in question would apply and providing evidence and in part 4 stating the earliest date on which an eviction order can be applied for and information of the calculation of said date.

[3] The Applicant's position is that the email of 13 October 2020 from the Respondent is the notice on which the application is based.

The Respondent stated at the first CMD that he considers the "notice", if at all, to be his email of 8 October 2020.

When considering the arguments made by both parties in their respective email representations of 15 July 2021 in answer to the Directions issued to both parties on 19 June 2021 it is somewhat disappointing that neither party actually addressed the question asked by the Tribunal.

[4] The Appellant argued that she considered the notice binding, "legal or not", which does not answer the question as to whether or not the notice complied with the requirements in S 62 of the Act.

[5] The Respondent stated "The 'notice' we are referring to in the CMD is from emails of the 8th of October and the 13th of October simply informing Ms Marshall that I had received and accepted an offer to buy the house and that i would not be extending the tenancy beyond the agreed timeframe. This wasn't a notice to leave under S 50. Had Ms Marshall indicated or requested she wanted to stay beyond the 5th of January then I and any prospective buyer of 8 East Pilmore would have worked around her- as per my first email on the 8th of October. The following emails between Ms Marshall and myself prove that the tenancy ended naturally and Ms Marshall made no objection or attempt to renew either verbally or in writing."

[6] The Respondents representations are somewhat worrying as he seems to think that the tenancy had a natural time limit of 6 months, which is not stated in the tenancy agreement and which would not be valid for a Private Residential Tenancy. Clause 7 of the tenancy agreement specifically refers to the tenancy having to be brought to an end in terms of Part 5 of the Private Housing *Tenancies) (Scotland) Act 2016, which requires either the tenant to give notice, the landlord to given notice and the tenant leaving or the Tribunal to grant an eviction order.

[7] The email of 8 October 2020 cannot constitute a valid Notice to Leave as it clearly states that the landlord is still considering his position and "will give 3 months notice", meaning that this is not given at this stage.

{8} The email of 13 October 2020 is in writing, as required by S 62 (1) (a).

It does state the reason for the notice, namely that the property is being sold, but does not actually state the ground of eviction as required by S 62 (1) (c) of the Act. It does not refer to ground 1 of Schedule 3 of the Act, which would be the appropriate ground in terms of the Act when the landlord intends to sell the property.

It does not specify the date on which the landlord expects to become entitled to make an application to the Tribunal as required in S 62 (1) (b). In fact it does not in any way refer to any further proceedings being necessary before the tenant was expected to vacate the property and does not mention eviction proceedings or an application to the Tribunal.

Furthermore, the email of 13 October 2020 does not conform to the formal requirements set out in the Regulations. It is not made in the correct format as set out in Schedule 5 of the Regulations and does not contain the necessary information to tenants.

Apart from that it also refers to a notice period of 3 months, which the Appellant correctly identified as too short. The notice period for a Notice to Leave under the ground 1 of Schedule 3 of the Act would have been 6 months.

{9} The Tribunal considered briefly if the 'notice' could be deemed valid applying S 73 of the Act. This states: 73Minor 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—

(a)a notice under section 14(3), 16(3)(c), 22(1) or 61(1),

(b)the document by which a referral is made to a rent officer under section 24(1),

(c)the document by which an application is made to a rent officer under section 42(1), and

(d)a notice to leave (as defined by section 62(1)).

However, the Tribunal considered that the email was not a document "showing minor errors in the completion of the document" but was so deficient that the content materially affected the effect of the document. The email of 13 October 2020 did not provide the tenant with the necessary information about the ground for eviction, did not provide the information about the date an eviction action could be applied for and thus did not notify the tenant of the procedure required to evict a tenant, did not provide information about advice for tenants or the correct notice period and thus was not just wrongly completed. It did not provide the necessary information. It was not a calculation or spelling error but a document of a fundamentally different nature. Ironically, the matter which the Appellant considered to be the "misleading" factor, namely the mention of 3 months notice, would not have rendered an otherwise correct Notice to Leave invalid due to the provisions of paragraph 10 of Schedule 1

to the Coronavirus (Scotland) Act 2020, which specifically states "(1)Where a notice to which this paragraph applies is completed without taking proper account of paragraphs 1 to 9—

(a)the notice is not invalid by reason of that error, but

(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 correctly completed."

thus recognising the difficulties of many landlords and tenants to identify the correct extended notice periods which were introduced by this act.

The email of 13 October 2020 cannot be held to be a valid Notice to Leave.

[10] Because the Notice to Leave was not valid it follows that the tenancy did not come to an end by the landlord giving a Notice to Leave and the tenant leaving, which is the requirement in S 50. As S 50 does not apply, neither does S 58. Because S 58 does not apply in this case the Tribunal cannot make a wrongful termination order and must dismiss the application.

Decision:

The application is dismissed.

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.

**Petra Hennig McFatridge
Legal Member**

Date 22 July 2021

