



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/20/0636

Re: 2 Slockavullin, Kilmartin, Lochgilphead, Argyll, PA31 8QG (“the property”)

Parties:

**Peter McLardy, Herons Cottage, Ardfern, Lochgilphead, Argyll, PA31 8QN
 (“the applicant”)**

**Kris Stewart, 2 Slockavullin, Kilmartin, Lochgilphead, Argyll, PA31 8QG
 (“the respondent”)**

Tribunal Member:

Adrian Stalker (Legal Member)

Decision (in absence of the respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the notice to leave served by the applicant upon the respondent was invalid, therefore the application cannot be entertained by the Tribunal, and it is refused.

Background

1. On or about 12 December 2017, the applicant let the property to the respondent, under a private residential tenancy (“PRT”) in terms of the Private Housing (Tenancies) (Scotland) Act 2016 (“the Act”). The parties entered into a written agreement, using the Scottish Government’s Model Agreement.

2. By application dated 19 February 2020, the Applicant sought an eviction order under section 51 of the Act. He had earlier made an application for an order for payment of £2,250, being rent arrears. The rent arrears application is FTS/HPC/CV/19/4070.

3. The grounds for eviction on which the application founds are grounds 11 (breach of tenancy agreement), 12 (rent arrears) and 14 (antisocial behaviour). Those are also the grounds to which the applicant refers, in the copy notice to leave (under section 62 of the Act) which was produced with the application.

4. On 25 February 2020, notice of acceptance was granted by a legal member. A Case Management Discussion (“CMD”) was fixed, in respect of both the payment application and the eviction application.

The CMD

5. The CMD took place at 10am on 17 March 2020, at the Community Centre, Manse Brae, Lochgilphead. The applicant attended, with his wife Sylvia McLardy, and a supporter, Bettina Vettori. The respondent did not appear, and was not represented. The respondent had not made any written representations to the Tribunal, in advance of the CMD. However, he had sought to have the hearing postponed. That request was refused, on 12 March.

6. Under rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, the First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision. The applicant asked the Tribunal to grant an eviction order under section 51 of the 2016 Act, on the basis, in particular, that no rental payments had been made by the tenant since July 2019.

7. The Tribunal member sought clarification as to the manner in which the notice to leave was served. The applicant confirmed that it had been served by email, in accordance with clause 3 (“Communication”) in the tenancy agreement.

8. The Tribunal then raised an issue as the validity of the notice to leave, and whether it was possible for the Tribunal to entertain the application. That issue is described in the next section of this decision.

Eviction proceedings: the validity of the notice to leave

Relevant Statutory Provisions

9. The Tribunal finds it convenient to note certain relevant provisions in the 2016 Act. These are:

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.

....

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,

...

(3) This subsection applies if—

....

(b) the only eviction ground, or grounds, stated in the notice to leave is...

....

(ii) that the tenant has failed to comply with an obligation under the tenancy,

(iii) that the tenant has been in rent arrears for three or more consecutive months,

...

(v) that the tenant has engaged in relevant anti-social behaviour,

....

(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 purpose 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)).

10. 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).

Signed: .

(Landlord(s) or Agent):

Dated:

11. In this case, the date entered in the form, after the words “eviction order before” was “19 February 2020”. The date of signature of the notice was “21st January 2020”. Apart from the issue arising from those entries, discussed below, the correct statutory form was used, and correctly completed.

12. Also relevant, as part of the statutory background, is section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which states:

26 Service of documents

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used).

(2) The document may be served on the person—

...

(c) where subsection (3) applies, by being sent to the person using electronic communications.

(3) This subsection applies where, before the document is served, the person authorised or required to serve the document and the person on whom it is to be served agree in writing that the document may be sent to the person by being transmitted to an electronic address and in an electronic form specified by the person for the purpose.

...

(6) Where a document is served as mentioned in subsection (2)(c) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

Application of the statutory provisions

13. The Tribunal Member explained that there was an issue with the validity of the notice to leave which had been produced by applicant. As described above, the notice was sent to the respondent by email on 21 January. That was also the date entered at part 4 the notice.

14. Assuming that to be the case, under section 26(6) of the 2010, the notice to leave “is to be taken to have been received 48 hours after it is sent unless the contrary is shown.” This is confirmed, in respect of a notice to leave, by section 62(5) of the 2016 Act, which states: “it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent”. Therefore, for the purposes of the discussion which follows, the notice can be taken to have been served on 23 January 2020.

15. Under section 54, the relevant notice period in this case is 28 days, because the eviction grounds stated in the notice are all set out in section 54(3)(b). Therefore, section 54(2)(b)(i) applies. Consequently, the notice period in this case began on 23 January, being “the day the tenant receives the notice to leave from the landlord”. Under section 54(2)(b)(i), the notice period expired on 20 February.

16. Under section 62(1)(a), (b) and (d), the notice to leave must be in writing, in the prescribed form, and state a date. Under section 62(4), that date is “the day falling after the day on which the notice period defined in section 54(2) will expire.” In this case, that date was 21 February. Therefore, in order to comply with section 62(1)(b)

and (4), the date which ought to have been specified in the notice was 21 February 2020.

17. The date specified in the notice to leave produced by the applicant is 19 February 2020, being 29 days after the date when the notice was sent. That is two days earlier than the date which ought to have been stated.

18. This raises the possibility that the notice to leave produced by the applicant is not a “notice to leave” under section 62. That follows from the opening words of that section: a “notice to leave” is a notice which fulfils the four requirements (a) to (d) of section 62(1). If the notice does not fulfil any of those requirements, it is not a “notice to leave” under the Act.

19. That, in turn, calls into question the competency of the application, given section 52(2)(a) and (3). If the document given to the tenant, a copy of which accompanies the application to the Tribunal, is not a “notice to leave”, then the applicant has failed to comply with section 52(3). In that case, the Tribunal “is not to entertain” the application, and it falls to be refused.

Application of section 73

20. Under section 73(1) and (2)(d) of the 2016 Act, an error in the completion of a notice to leave does not make it “invalid” unless the error “materially affects the effect” of the notice. In the Tribunal’s view, it follows from those words that where an error in the completion of a notice to leave *does* materially affect the effect of the notice, then that error makes the document “invalid”; i.e. it is not a “notice to leave” for the purposes of the Act. That is consistent with the Tribunal’s interpretation of section 62, as described above.

21. It also follows from section 73 the test “materially affects the effect” is the only basis on which the Tribunal may conclude that a notice to leave is valid, even though there has been an error in its completion.

22. The explanatory note to section 73 of the 2016 Act states:

105. Section 73 provides 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. Of necessity, there are a number of documents which the Act requires the use of at certain times. This section ensures that a common sense approach can be taken to meeting these requirements, and a party is not penalised for an obviously minor error. The protection applies equally to landlords and tenants.

23. In the Tribunal's view, the word "effect" in section 73 (and in the explanatory note) denotes the effect the notice is intended to have, if it is completed without error. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will give the tenant certain information:

- 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 FTT, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that "An application will not be submitted to the Tribunal for an eviction order before [the date]".
- the eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is done by ticking the appropriate box in part 3 of the prescribed form.
- details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form – in terms of the notice, the provision of "evidence" appears to be optional)
- the tenant's details (section 62(1)(d) and part 1 of the prescribed form)
- the name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form)

24. These are all the parts of the form that require to be completed by the landlord or his agent.

25. In the Tribunal's view, an error in completion "affects the effect" of the notice to leave if, as a result of the error, the notice does not give the respondent that information. In this case, the error clearly "affects the effect" of the notice to leave, because a correct notice would have informed him of the date (21 February) on or after which an application to the Tribunal could be submitted. That was not done.

26. Is the effect of the notice thereby *materially* affected? In assessing the materiality of the error in this case, the Tribunal derives assistance from two considerations. Firstly, as is indicated in the explanatory note, a landlord should not be punished for "an obviously minor error" in a notice. Second, the information expressly required by the primary legislation, in section 62(1)(b) and (c), may be regarded as fundamental to the notice to leave. The notice should, at the very least, correctly inform the tenant of the "why" (the statutory ground) and the "when" of the proceedings that the landlord anticipates raising.

27. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, "an obviously minor error". It is an error which causes the notice to fail in achieving one of its fundamental purposes.

28. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “21 February” at part 4 of the notice to leave, rather than “23 February”, does materially affect the effect of the notice. It is accordingly invalid. It is not a “notice to leave” under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), “a copy of a notice to leave”, and accordingly, given section 52(2)(a), the Tribunal cannot entertain the application. It is therefore 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.

Mr Adrian Stalker

Legal Member

17/03/2020

Date