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 the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/18/3231

Re: 23 Hazel Road, Grangemouth FK3 8PL ("the property")

Parties:

Mr Andrew Holleran, 15 Hazel Road, Grangemouth FK3 8PL ("the applicant")

RGM Solicitors, 9 La Porte Precinct, Grangemouth, FK3 8AZ ("the applicant's representatives")

Ms Ann-Marie McAlister 23 Hazel Road, Grangemouth FK3 8PL ("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 8 January 2018, 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 tenancy agreement.

2. By applications dated 23 October and 27 November 2018, the applicant sought an order for payment of a sum of money, being the current level of rent arrears (application FTS/HPC/CV/18/2877), and an eviction order under section 51 of the 2016 Act on the ground of rent arrears (application FTS/HPC/EV/18/3231).

3. The initial procedure in relation to the applications was somewhat confused. The first application (dated 23 October 2018) was made under rule 111 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Procedure Regulations"). Rule 111 is applicable to civil proceedings arising from a PRT. However, the application indicated that the applicant was seeking an eviction order. By letter to the applicant's representatives dated 22 November 2018, the Chamber's casework officer sought clarification as to whether the application ought to be amended to one under rule 109, which applies to applications for an eviction order under section 51 of the 2016 Act.

4. Subsequently, the applicant's representatives indicated that he wished to make applications under both rule 109 and rule 111. Accordingly, another application was submitted, dated 27 November 2018. The earlier application was treated as being made under rule 111. The later application was made under rule 109.

5. There was also some difficulty with the production of a notice to leave, in respect of the application for an eviction order. The first application stated that a notice to leave was attached. It was not. A copy notice to leave was subsequently produced. However, by letter to the applicant's representatives dated 24 December 2018, a casework officer pointed out that the notice to leave was undated. As at 14 January, no response had been made to that letter. An email reminder was issued to applicant's representatives. On 14 January, they sent an email to the casework officer bearing to attach a copy of a "dated Notice to Leave". This was not attached. This was pointed out in an email from a casework officer to the applicant's representatives on 15 January. They responded 6 days later, with an email dated 21 January, attaching a further copy of the Notice to Leave, on which had been entered a date.

6. By letter to the applicant's representatives dated 5 February 2019, the casework officer then pointed out that the latest copy of the Notice to Leave was dated 1 August 2018, and was apparently posted on the same day. The letter observed that under section 26(5) of the Interpretation and Legislative Reform (Scotland) Act 2010, the notice would be taken to have been received by the respondent 48 hours later, on 3 August, unless the contrary was shown. The notice stated, at part 4, "An application will not be submitted to the Tribunal for an eviction order before 29 August 2018". The letter invited the applicant's representatives to make submissions on whether service of the notice to leave was effected within the timescale set out in section 54 of the 2016 Act.

7. The applicant's representatives responded by email dated 11 February. This confirmed that the notice to leave was sent by recorded delivery track and trace. The email went on to say:

> 2. With regards to timescales, you will note that the application to the Tribunal was not submitted until 23 October 2018, thus giving the tenant further two months to vacate the property. She has refused to do so thus making this application necessary. We would also submit that the tenant was aware of the landlord's intentions to serve a notice to quit and request possession. Respondent was contacted both by the landlord and his representatives prior to the notice being served.

8. The sole ground for eviction on which the application founds is rent arrears, under paragraph 12 of schedule 3 to the Act. That is also the sole ground to which the applicant refers, in the notice to leave.

9. On 22 February 2019, notice of acceptance was granted by a legal member. A Case Management Discussion ("CMD") was fixed, in respect of both applications. This decision concerns the application for an eviction order under rule 109, and section 51 of the Act (FTS/HPC/EV/18/3231). The Tribunal has issued a separate note in respect of the CMD, as regards the application under rule 111 (FTS/HPC/CV/18/2877).

The CMD

10. The CMD took place at 2pm on 11 April 2019, at the John Player Building, Stirling Enterprise Park, Stirling. Miss Waiss, a solicitor of RGM solicitors, appeared on behalf of the applicant. The respondent did not appear, and was not represented. She had not made any representations to the Tribunal, in advance of the CMD.

11. 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. Miss Waiss asked the Tribunal to grant an eviction order under section 51 of the 2016 Act.

Eviction proceedings: the validity of the notice to leave

Relevant Statutory Provisions

12. 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…

…

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

…

(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)).

13. 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:

14. In this case, the date entered in the form, after the words “eviction order before” was “29 August 2018”. The date of signature of the notice was “1/08/2018”. Apart from the issue arising from those entries, discussed below, the correct statutory form was used, and correctly completed.

15. 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—
…
(b) by being sent to the proper address of the person—
…
(ii) by a postal service which provides for the delivery of the document to be
recorded, or
…
(4) For the purposes of subsection (2)(b), the proper address of a person is—
…
(c) in any other case, the last known address of the person.
(5) Where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom 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

16. The Tribunal Member explained that there was an issue with the validity of the notice to leave which had been produced by applicant's representatives. As described above, the notice was sent to the respondent on 1 August. That was also the date entered at part 4 the notice. Evidence (in the form of a receipt from Post Office Ltd) had been produced that the notice to leave was sent by Royal Mail Signed For (First Class) on 1 August 2018. This receipt also showed that the notice was sent to the "proper address" of the respondent, being 23 Hazel Road, Grangemouth FK3 8PL.

17. This constitutes service under section 26(2)(b) of the 2010 Act. Accordingly, under section 26(5), 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 3 August 2018.

18. Under section 54, the relevant notice period in this case is 28 days, because the only eviction ground stated in the notice is rent arrears. Therefore, section 54(3)(b)(iii) and (2)(b)(i) apply. Consequently, the notice period in this case began on

3 August, being “the day the tenant receives the notice to leave from the landlord”. Under section 54(2)(b)(i), the notice period expired on 31 August.

19. 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 1 September. Therefore, in order to comply with section 62(1)(b) and (4), the date which ought to have been specified in the notice was 1 September 2018.

20. The date specified in the notice to leave produced by the applicant’s representatives is 29 August, being 28 days after the date when the notice was sent. That is three days earlier than the date which ought to have been stated.

21. This raises the possibility that the notice to leave produced by the applicant’s representatives 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.

22. 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.

23. The Tribunal Member pointed out to Ms Waiss that errors in the completion of notices under the Act may not be fatal to the validity of the notice, given section 73 (see below). He also asked whether she wished to have this issue determined at the CMD, or whether she wished to adjourn or continue the case in order to prepare a submission. Ms Waiss indicated that she was happy to make a submission under section 73, and for the Tribunal to determine the application under rule 17(4) of the Procedure Rules, without a further CMD or hearing.

Section 73 – Minor errors

24. Ms Waiss’s submission on this matter made the following points.

25. Firstly, she accepted that the notice ought to have specified 1 September as the date for the purposes of section 62(1)(b) and (4).

26. Second, she submitted that the entry of the date 29 August was an error in the completion of the notice to leave, such that section 73 was engaged. The Tribunal accepted this point.

27. Third, she pointed out that the application for an eviction order was not made till near the end of October, some time after 1 September. Therefore, she said, the error was not prejudicial to the respondent, as the application had not been made until after the correct date. The position would have been different, if the application had been made on say, 30 or 31 August, before the date that ought to have been stated in the notice. But that had not happened.

28. Fourth, the "effect" of the notice to leave (if correct) would have been to warn the tenant that an application would be made on or after 1 September. That was, in fact, what had happened. Therefore, the error had not materially affected the effect of the document.

29. Under section 73(1) and (2)(d), 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.

30. 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.

31. What does it mean to say that an error "materially affects the effect" of a document? These words also appear in section 21 of the 2010 Act:

> **21 Forms**
> Where a form is prescribed in or under an Act of the Scottish Parliament, a form that differs from the prescribed form is not invalid unless the difference materially affects the effect of the form or is misleading.

32. Thus, section 21 may relieve the landlord of failing to use the correct form for the notice to leave. Section 73 may assist the landlord if he used the correct form, but makes a mistake in its completion. Section 73 is relevant in this case. The correct form has been used, but the wrong date has been entered.

33. As far as the Tribunal was able to ascertain, there is no reported case which considers the meaning of the term "materially affects the effect" in section 73 of the 2010 Act, or section 21 of the 2010 Act.

34. 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.

35. 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)

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

36. 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 tenant that information. In this case, the error clearly "affects the effect" of the notice to leave, because a correct notice would have informed her of the date (1 September) on or after which an application to the Tribunal could be submitted. That was not done.

37. Is the effect of the notice thereby *materially* affected? In her submission, Ms Waiss invited the Tribunal to answer that question by reference to the prejudice suffered by the tenant, in light of circumstances that occurred after the notice was

served, in particular the fact that eviction proceedings were not raised until some time after 1 September.

38. The Tribunal is not persuaded by that argument, for two reasons. Firstly, it considers that, as a general proposition, the validity of a notice to leave cannot be determined by circumstances which occur after it was served. If that were the case, it might not be possible for the First-tier Tribunal to judge whether a notice was valid, and whether an application ought to be entertained, without firstly determining what had happened after service.

39. Secondly, as already described, section 73 provides the only route by which validity may be achieved, notwithstanding an error in completion. For the reasons stated, that test entails assessing whether the notice itself provides certain requisite information. Therefore, a defect in the notice cannot be cured by events occurring after the tenant has received it.

40. 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.

41. 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.

42. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “29 August” at part 4 of the notice to leave, rather than “1 September”, 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.

43. The Tribunal wishes to make some further remarks on this issue.

44. The Act, together with the wording of part 4 of the statutory form, sets a trap for the unwary landlord. The process of working out the date to be stated in the form, by reference to sections 54 and 62 is, in the Tribunal’s view, unnecessarily complex. It is an exercise that would challenge a legally qualified person, much less a lay person. However, it is clear, on a careful analysis, that where the notice is sent by

recorded delivery, and relies on a ground set out in section 54(3), then the date stated in the notice should be 31 days after the date on which the notice is sent. Consequently, the reference to "the day after the end date of the relevant notice period (28 days…)" in part 4 of the statutory form is misleading. In essence, it takes into account the effect of section 54(2) and (3), and section 62(4), but not section 62(5) and section 26(5) of the 2010 Act.

45. Another point arises from a comparison between section 62(1)(b) and (4), and section 14(4) of the Housing (Scotland) Act 2001. The latter provision, which applies to the notice of proceedings in relation to Scottish secure tenancies under the 2001 Act, also requires a date to be stated in the notice, but says: "(4) A notice under subsection (2) must…specify—…(b) a date, *not earlier than*—". The effect of the italicised words is that, if in doubt, the landlord may err on the side of caution, by stating a date which is probably a few days later than the correct date, but is certainly not too early, and therefore avoids the notice being invalid. There is no equivalent wording in section 62.

46. If, in this case, the notice to leave had erroneously given a date after 1 September, the Tribunal would have been reluctant to regard it as invalid, especially if the error was only a matter of a few days. However, such a notice would not comply with the strict terms of section 62(4), and the only route to salvation would be section 73. If one regards the intended "effect" of the notice as informing the tenant that proceedings will not be raised before 1 September, then arguably that effect is not materially affected by a notice which states say, 3 September. In any event, it seems inevitable that this issue will arise for determination in future cases, given the complexity of the legislation.

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.

Adrien Stalker **2 May 2019**

Legal Member