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/20/2450

Re: Property at Flat 4, 14 Main Street, Milngavie, Glasgow, G62 6BL ("the Property")

Parties:

Mr Angus Gregor Beith, 3 Deerdykes Road, Westfield, Cumbernauld, Glasgow, G68 9HF ("the Applicant")

Miss Seonaid Campbell, Flat 4, 14 Main Street, Milngavie, Glasgow, G62 6BL ("the Respondent")

Tribunal Members:

Jim Bauld (Legal Member) and Frances Wood (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. By application dated 23 November 2020 , the applicant sought an order under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") and in terms of rule 109 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. In the application form, the applicant indicated that the order being sought is based on two grounds contained within schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016, namely ground 3 , that the applicant intends to refurbish the property and ground 5, namely that a family member of the applicant intends live in the property

2. On 25 January 2021 the application was accepted by the tribunal and referred for determination by the tribunal

3. A Case Management Discussion (CMD) was set to take place on 5 March 2021 and appropriate intimation of that hearing was given to both parties

4. The Case Management Discussion (CMD) took place on 5 March 2021 via telephone case conference. The applicant was in attendance. The Respondent did not attend and was not represented

5. The tribunal explained the purpose of the CMD and the powers available to the tribunal to determine matters. The tribunal asked various questions with regard to the application and the documents lodged in support of it.

Applicant's submissions

6. The applicant indicated to the tribunal that the notice to leave had been handed to the respondent on 15 August 2020. He is now aware that the appropriate period of notice should have been six months. He was questioned by the tribunal about the validity of the notice. He indicated that the respondent had agreed when she took the tenancy that it was to be a short term arrangement and that he always intended to carry out certain refurbishment works. He claimed that the notice to leave had been updated by his email of 7 October.

7. The applicant confirmed that the building warrant which had been lodged with the papers relates to the works which he wishes to do to the property. These are works to internally remodel the layout of the flat. A wall will be removed and rebuilt and a new door created for access to one of the rooms.

8. He confirmed that although he had intended to carry out these works at the time of service of the NTL, he will not now immediately carry out the refurbishment works in terms of the building warrant If the tribunal granted the eviction order. He confirmed that the current reason he is seeking the order is to allow his daughter to live in this flat. She has recently lost her job and has returned to stay with her mother. He wishes to try to support his daughter. He agreed that there is nothing in the tenancy agreement which indicates that it is to be a short term arrangement. He conceded that the private residential tenancy is intended to be an open ended agreement.

Findings in Fact

9. The Applicant and Respondent as respectively the landlord and tenant entered into a tenancy of the property which commenced on 28 November 2019

10. The tenancy was a private residential tenancy in terms of the 2016 Act

11. The agreed monthly rental was £400

12. On 15 August 2020, the applicant served upon the tenant a purported Notice to leave as required by the 2016 Act. The Notice was served personally upon the respondent and bore to become effective on 1 October 2020.

13. The notice informed the respondent that the landlord wished to seek recovery of possession and that the reason for eviction was the ground set out in ground 3 of schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016.

Discussion and reasons for decision

The Private Residential Tenancy

14. The private residential tenancy (PRT) was introduced on 1 December 2017 in terms of the 2016 Act. This tenancy was intended to create open ended tenancies within the private rented sector. It is not possible under the PRT to create a time limited tenancy.

15. In terms of the 2016 Act as originally passed, a landlord who wishes to remove a tenant is required to serve on that tenant a notice to leave. That notice must set out the eviction ground which the landlord intends to use. The notice must also give an appropriate period of notice before the landlord can then apply to this tribunal for the eviction order.

16. The 2016 Act sets out eighteen possible different grounds for eviction. When the 2016 Act was originally introduced a significant number of those grounds were mandatory. If the landlord was able to demonstrate the ground existed then the tribunal was obliged to grant the order.

17. The notice period to be given to a tenant in terms of this Act as originally passed was either 28 days or 84 days depending on the ground being used or the length of time the tenant had already occupied the property.

18. However, on 7 April 2020 the Coronavirus (Scotland) Act 2020 (“the 2020 Act”) came into force. Schedule 1 of that Act amended the law relating to evictions both in the private rented sector and in the public or social rented sector.

19. Schedule 1 of the 2020 Act extended the notice periods to be given to tenants in respect of many of the grounds under the 2016 Act. Notice periods in some cases were extended from 28 days to three or six months. The same schedule also amended the mandatory grounds to introduce a reasonableness test thus making the granting of an eviction order discretionary

The Notice to Leave and ground 3

20. It is a requirement of the 2016 Act that prior to seeking an eviction order from the tribunal that a landlord must serve a notice to leave upon the tenant.

21. Section 62 of the 2016 Act sets out the requirements which are needed to constitute a valid notice to leave.

22. The section creates four requirements for the notice to leave. The notice must be in writing, it must give an appropriate period of notice by specifying a date

upon which the landlord expects to be able to make the application to the tribunal, it must state the eviction ground which is intended to be used and it must fulfil any other requirements which have been prescribed by the Scottish ministers in regulations

23. In this case the landlord served a notice to leave on 15 August 2020. A copy of the notice to leave was lodged with the application. The notice indicates that the landlord intends to use ground 3, namely that the landlord intends to refurbish the let property. The notice to leave indicates that an application will not be submitted to the tribunal for an eviction order before 1 October 2020. The 2016 Act indicates that a notice to leave is assumed to be received by the tenant 48 hours after it is sent. The notice period required commences after that assumed receipt. The date to be specified in the notice to leave as the date upon which the landlord can apply to the tribunal is stated (in section 62(4) of the 2016 Act) to be "the day falling after the day on which the notice period" expires.

24. In this in this case that means the notice to leave served by the applicant gave the tenant 44 days' notice.

25. At the time of serving this notice the appropriate period of notice for this ground in terms of the 2016 Act as amended by the 2020 Act was six months. The notice to leave served upon the tenant does not provide the correct period of notice. Accordingly the notice is invalid and cannot be used to found an application for eviction based on ground 3.

26. The tribunal note the terms of paragraph 10 of schedule 1 to the 2020 Act. That provision sets out that where a notice to leave has been completed without taking proper account of paragraphs 1 to 9 of schedule 1 to the 2020 act, the notice is not invalid by reason of that error but may not be relied upon by the landlord for the purpose of seeking an order for possession until the date on which it could have been relied upon had it been correctly completed.

27. The tribunal concludes that this provision cannot? be used by this applicant. Firstly the tribunal does not accept that the notice to leave was completed without taking proper account of the provisions of schedule 1 of the 2020 Act. The landlord indicated that he simply gave six weeks' notice because he believed that in terms of his tenancy agreement he was only required to give one month's notice. Even taking into account the terms of the 2016 Act prior to it being amended, 84 days' notice was required to be given for ground 3 in terms of section 54 (2) of the 2016 Act. This tenancy had been running for more than six months prior to the service of the notice to leave.

28. At the date of serving a notice to leave the appropriate period of notice was actually six months in terms of the amended provisions. It is clear to the tribunal that the landlord simply completed the notice based on his own flawed understanding of the law and at no point considered the actual legal provisions, on which he told the Tribunal he did not take any advice.

29. Even if the provisions of paragraph 10 of schedule 1 of the 2020 Act applied, then the notice to leave served by the landlord would have required to be read as indicating that an application to the tribunal would not be made prior to 18 February 2021. The application to the tribunal was made on 23 November 2020 which is almost three months too soon.

30. The tribunal also notes the terms of section 54 of the 2016 Act. That section says a landlord may not make an application to the tribunal for an eviction order against the tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice. Section 52 indicates that the tribunal may entertain an application made in breach of section 54 if the tribunal considers it is reasonable to do so. In this case the tribunal does not think it is reasonable to exercise the discretion available in terms of sections 52 and 54.

Ground 3 and reasonableness

31. If the tribunal is wrong in all of its conclusions regarding the validity of the notice and whether the notice should be interpreted in accordance with the amended provisions of the 2016 Act, then the tribunal would require to consider whether the ground for eviction was proved and whether it was reasonable to grant the order. The eviction ground is that "the landlord intends to carry out significantly disruptive works to, or in relation to, the let property".

32. The applicant lodged with the application a copy of the building warrant which he has obtained from East Dunbartonshire Council. This building warrant indicates that the applicant has approval for works to the property which appears to involve the removal and re-siting of an internal wall and the creation of a new door into one of the rooms within the property.

33. During the CMD, the applicant however confirmed that his current wish is to recover the property to allow his daughter to live in it. If he recovers the property he will not immediately carry out these refurbishment works.

34. While the tribunal therefore accepts that the landlord does at some point intend to carry out "significantly disruptive works" to the property and that the ground would therefore be established, the tribunal would then be obliged to consider, in terms of the currently amended provisions of the 2016 Act, whether it would be reasonable to grant this order.

35. In determining whether it is reasonable to grant the order, the tribunal is required to balance all the evidence which has been presented and to weigh the various factors which apply to the parties. The Tribunal has a duty, in such cases, to consider the whole of the circumstances in which the application is made.It follows that anything that might dispose the tribunal to grant the order or decline to grant the order will be relevant.

36. Given the applicant's own admission at the CMD that these works will not take place at the current time then the tribunal finds that it would not be reasonable to issue an eviction order which would have the effect of rendering the respondent homeless. The balance of reasonableness in this case is heavily weighted towards the respondent. She has occupied this house for over a year. The granting of an eviction order to remove her with its attendant upheaval, especially during a pandemic, would not be justified to allow the applicant to carry out non urgent refurbishment works at some indeterminate point in the future. The fact that the applicant himself confirmed he will not do those works immediately strengthens the tribunal's view in this matter.

37. The tribunal would take the view that the respondent's right to continue to occupy this property would far outweigh the applicant's desire to carry out the refurbishment works. These works are not necessary works of repair but are simply works that the applicant wishes to carry out for other reasons.

The use of ground 5

38. In the application, the applicant also indicates that he wishes to rely upon ground 5 within schedule 3 of the 2016 Act. That ground allows eviction where the landlord can demonstrate that a member of the landlord's family intends to live in the let property. That ground has always been discretionary even before the amendments introduced by the 2020 Act.

39. The notice to leave which was served upon the tenant made no mention of ground 5. The first mention of the potential wish by the landlord to use this ground is in an email to the respondent dated 7 October 2020 which the applicant considered had amended the earlier Notice to Leave.

40. In that email the applicant acknowledges that he is now aware that the notice served on 15 August in respect of ground 3 required a minimum period of six months. He then indicates to the respondent that he wishes his eldest daughter to move into the property when it becomes vacant. He then states "*as I gave you notice on 15 August 2020 I will require you to vacate flat four at the latest by 15 November 2020*".

41. At the CMD the applicant attempted to argue that he had thus given notice to the applicant relating to ground 5. The tribunal reject this argument. The law requires that a notice to leave is served upon a tenant setting out the ground to be used. No notice to leave has ever been served upon this respondent indicating the use of ground 5. An email sent almost two months after a notice cannot possibly amend the notice.

42. Section 52 (5) of the 2016 Act indicates that a tribunal may not consider whether an eviction ground applies unless it is a ground which is stated in the notice to leave or has been included with the tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought. No permission has been granted by the tribunal to allow this ground to be included

in the application. For the avoidance of doubt, if such permission was being sought at the CMD then the tribunal refuses that permission. It would be entirely inappropriate and unreasonable to grant an order for eviction based on a ground which has only ever been intimated to a respondent via email without any formal notice at all.

Decision

In all the circumstances of this application, the tribunal refuses the application.

The application is founded on a notice to leave in respect of ground 3 which does not meet the requirements of the 2016 Act and thus is incompetent.

If the tribunal has erred in this finding then the tribunal finds that the granting of the eviction order would not be reasonable and the tribunal refuses to grant same.

The application in respect of ground 5 cannot be considered as no notice to leave has been served in respect of this ground.

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.

	11 March 2021
Legal Member/Chair	**Date**