



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 52 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/20/0180

Re: Property at 23 Moravia Avenue, Bothwell, G71 8QA (“the Property”)

Parties:

Mr James Smith, 40 Mough Lane, Chadderton, Oldham, OL9 9PJ (“the Applicant”)

Miss Lynne MacDonald, Mr Steven Munro, 23 Moravia Avenue, Bothwell, G71 8QA (“the Respondents”)

Tribunal Members:

Nairn Young (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision (in absence of the Respondents)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:

- Background
1. This application is for an eviction order to remove the Respondents from the Property, which they occupy in terms of a private residential tenancy agreement with the Applicant. It called for a hearing by teleconference at 10am on 12 October 2020. The Applicant was represented on the call by Mr Moffat of Anderson Strathern LLP, solicitors. The Respondents did not call in to the hearing and were not represented.
 2. The matter had called previously for a case management discussion (‘CMD’) on 14 August 2020. The first-named Respondent had appeared at that CMD

and intimated an intention to defend the application on various grounds. A direction was made requiring these grounds to be specified in writing and some particular questions to be answered by 31 August 2020. The Respondents did not answer that direction. The same direction required the Applicant to address various questions regarding the characterisation of the notice relied on by him in terms of s.52(3) of the Private Housing (Tenancies) (Scotland) Act 2016 ('the Act') as a 'notice to leave', and its validity as such, by 28 September 2020. The Applicant submitted written representations to the Tribunal on these questions on that date.

3. The Respondents received notification of this hearing by letter dated 11 September 2020.
4. Given their failure to engage with the Tribunal process since the CMD, and the prejudice any adjournment would cause to the Applicant, in the form of inconvenience, delay and expense in instructing a representative, the Tribunal considered it was in the interests of justice to proceed to determine the preliminary matter of the validity of the notice in the Respondents' absence. There would be little or no prejudice to the Respondents in doing so.
 - Findings in Fact
5. The Applicant rents the Property to the Respondents in terms of a private residential tenancy with a start date of 24 June 2019.
6. In terms of that tenancy, rent of £420 is due on the 28th day of each month.
7. The Respondents occupied the Property in terms of various other tenancy agreements, which were not private residential tenancies, immediately prior to the start date of the private residential tenancy.
8. On 28 November 2019 sheriff officers instructed by the Applicant deposited written notices purporting to be notices to leave at the Property, addressed to the Respondents, as well as sending the notices by ordinary post.

9. Each notice used the template set out in Schedule 5 of the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017.

10. Insofar as is relevant to this decision, that template was completed as follows:

(a) In Part 1, the notices stated that the tenants had lived in the property since 24 June 2019.

(b) In Part 2, they stated that the Applicant intended to apply to the Tribunal for an eviction order on the ground that the Respondents were in rent arrears over three consecutive months.

(c) In Part 3, they gave as further particulars of how that ground had arisen only, "Monthly rent- £420, Current arrears- £890," and stated that a rent statement had been attached as supporting evidence.

(d) In Part 4, they stated that an application for an eviction order would not be submitted to the Tribunal before 27 December 2019, being the earliest date such an application could be made.

11. Each notice was accompanied by a rent statement, giving the following information:

Rent Due

28th June 2019 £420.00

28th July 2019 £420.00

28th August 2019 £420.00

28th September 2019 £420.00

28th October 2019 £420.00

£2,100.00

Rent Paid

23rd August 2019 £710.00

25th October 2019 £420.00

£1,310.00

Arrears due as of 21st November 2019: £890.00

12. The total rent paid entered on the rent statements was erroneously recorded as £1,310 rather than the intended figure of £1,130. The arrears alleged to be due were also miscalculated and erroneously given on the rent statement as £890, rather than £930.

13. The Respondents have continued to occupy the property following service of the notices.

14. This application was made on 20 January 2020.

- Relevant Law

15. In order for the Tribunal to consider an application for an eviction order, a landlord must have given the tenant a notice to leave. This requirement is imposed by section 52 of the Act, which states (so far as relevant):

“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),

...

(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.”

16.A ‘notice to leave’ is defined in the Act at s.62, as follows:

“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.”

17. In relation to the date to be entered in terms of s.62(1)(b), the notice period is defined at s.54 of the Act, which reads:

“54 Restriction on applying during the notice period

...

(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,

(ii) 84 days after it begins if subsection (3) does not apply.

(3) This subsection applies if—

(a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

...

(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).”

18. The Scottish Ministers have also made the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (‘the Regulations’) in part under the power granted to them by s.62(1)(d). Reg.6 states:

“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.”

The form set out in schedule 5 is in four parts. Part 1 requires details of the tenant and property the notice relates to to be completed, including a prompt that reads, “The tenants(s) has lived at the property since:”.

Part 3 is entitled, “DETAILS AND EVIDENCE OF EVICTION GROUND(S),” and contains the prompt:

“I also inform you that I am seeking eviction under the above ground(s) for the following reasons:

[State particulars of how you believe the ground(s) have arisen- continue on additional sheets of paper if required. Please give as much detail as possible including relevant dates, and in cases of rent arrears insert the amount of arrears outstanding and the period over which it has built up.]

It is important that the Tenant fully understands why you are seeking to evict them and that the action you are taking is justified. The provision of supporting evidence with this notice can help do that.”

19. The Act also states at s.73:

“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)).”

20. Finally, some provisions of the Interpretation and Legislative Reform (Scotland) Act 2010 (‘the Interpretation Act’) are also of relevance in this case, as follow:

“1 Application of Part 1

(1) This Part applies to—

(a) Acts of the Scottish Parliament the Bills for which receive Royal Assent on or after the day on which this Part comes into force,

(b) Scottish instruments made on or after that day, in the case of Scottish instruments made as mentioned in paragraph (a) ... of the definition of "Scottish instrument" in subsection (4)

...

(2) This Part does not apply in so far as—

(a) the Act or instrument provides otherwise, or

(b) the context of the Act or instrument otherwise requires.

(4) In this Part, “Scottish instrument” means an instrument of a type mentioned in subsection (5) made under—

(a) an Act of the Scottish Parliament (whenever passed)

...

(5) The types of instrument are—

...

(c) regulations

...

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.

...

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—

(a) by being delivered personally to 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,

...

(4) For the purposes of subsection (2)(b), the proper address of a person is—

...

(c) ... 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. ...”

- Discussion

21. The Applicant was required to address various questions in terms of the direction made following the CMD in this case, focussed on what appeared to be errors in completion of the notices, as follows:

- a) The date entered as the date the Respondents have occupied the Property from was the start date of the private residential tenancy, and not the date when the Respondents had originally taken up residence there.
- b) Part 3 of the notices did not give any information as to the length of time that the alleged arrears had been in existence.

c) The date entered in terms of s.62(1)(b) did not appear to have been correctly calculated.

22. The Applicant submitted written representations in relation to each of these issues. As will be seen from the following, in the course of the CMD, certain other issues in relation to the notices became apparent and were discussed. In each case, the key questions to be determined by the Tribunal are:

- Has there been an error in the completion of the notice that may affect its status or validity?
- If so, can that error be overlooked?

23. It is helpful, before considering the specific questions relating to these notices, to make some more general observations on the relevant law.

Errors in Notices

24. Fundamentally, there are two provisions under which a landlord may seek to argue that an error in the constitution of a notice should not affect its validity, but they operate in significantly different ways. S.73 of the Act may only be applied to errors in the types of document it specifies. However, any error in completing those documents is within its scope, if the error does not materially affect the effect of the document.

25. On the other hand, s.21 of the Interpretation Act may be applied to any type of document. But its scope only extends to errors in the form of the document, insofar as that is prescribed. It is also limited in application to errors that do not materially affect the effect of the document, but there is a further requirement that any error to which it may apply should not be misleading.

26. In this case, the most important limitation contained in s.73 of the Act is that it may only apply to a, “notice to leave (as defined by section 62(1)),” (s.73(2)(d)). S.62(1) contains various requirements that a notice must satisfy, in order to constitute a notice to leave. If the inclusion of the words, “as defined by section 62(1),” in s.73(2)(d) is to have any meaning, it can only be that a notice that fails to meet those requirements does not fall within the scope of s.73. In other words, an error in a notice that constitutes a failure to meet the requirements of s.62(1) may not be ignored on the basis of s.73, since it does not merely make a notice to leave invalid, but rather means the notice is not a ‘notice to leave’ at all.

27. An important adjunct to that position relates to the form of the notice, however. One of the requirements of s.62(1) is that a notice should fulfil the requirements made by the Scottish Ministers in regulations. The Regulations (which are made in part under that section) require a notice to leave to be in the form specified, for the purposes of s.50(1)(a) of the Act. On one interpretation, it might be considered that that requirement therefore is not of relevance for the purposes of proceedings under s.52 of the Act (such as these). However, a proper interpretation of the requirement in the context of the Act is that it must also apply here. S.50 and s.52 form part of a complete process whereby a private residential tenancy may be brought to an end by a landlord. On giving a notice to leave to a tenant, a landlord cannot know whether the tenant will leave voluntarily (and therefore terminate the tenancy in terms of s.50), or remain until ordered to leave by the Tribunal in terms of s.52. It would be absurd for a notice that would not constitute a notice to leave for the purposes of s.50 to be able to constitute such a notice only if the tenant ignores it.

28. The requirement to conform to the Regulations therefore applies. Failure to do so would potentially mean a notice is not a notice to leave. However, in that specific case, a landlord may have resort to s.21 of the Interpretation Act, on the basis that it is the use of a form that differs from that prescribed that is at issue. If the difference does not materially affect the effect of the form and is

not misleading, the form is not 'invalid', which in this context must mean it is to be taken as having the same effect as if the form prescribed had been used.

29. Finally, it is worth noting that s.73 of the Act, as well as allowing minor errors to be overlooked, must also be taken to mean that errors that do materially affect the effect of the documents to which it applies render those documents invalid.

The Date Used in Part 1 of the Notices

30. Turning to the issues addressed at the hearing (as they are numbered at para.21 above): on question a), the Applicant submitted that, since the notice is drafted with reference to the private residential tenancy, the date stated in this case is correct. While there were previous tenancies, the Act and Regulations cannot have expected that the notice would refer to those. That would lead to significant confusion and is not what the legislation intended. Insofar as the date entered in this case is erroneous, it does not affect the effect of the notice, so should be overlooked in terms of s.73(1) of the Act.
31. The Tribunal does not agree that the date used in this case is correct. The prompt in the form is, "The tenants(s) has lived at the property since:." This information appears to be required in relation to the calculation of the notice period and, in particular, the application s.54(3) where, "the tenant has been entitled to occupy the let property for not more than six months." There is no mention in either provision that the relevant occupation is limited to occupation under the private residential tenancy. On a plain reading of the words used, previous entitlement to occupy has to be included and so, if the private residential tenancy is the last of a chain of tenancy agreements, it is the date when the tenant started to live at the property in terms of the first of those that is required. There is no reason to believe that that would lead to confusion on the part of a landlord, who should surely be aware of the history of the tenant's occupation.

32. The use of the incorrect date here is not a failure that goes to the constitution of the notice as a notice to leave, since it is not required by s.62 of the Act. Specifically, it is not the use of a different form from that prescribed: a date has been entered where one is required, albeit one that is wrong. The issue is therefore whether or not s.73 must be applied either to excuse the error, or to render the notice invalid because of it. As has already been discussed, that question is intrinsically linked to the question of whether these notices are notices to leave, in terms of s.62: a question which will be further addressed below.

The Information Provided at Part 3 of the Notices

33. In relation to question b), the Applicant submitted that there was no deficiency in the information provided in the notices, such that they failed to conform to the requirements of the Regulations. The notices were served with reference to rent statements which provided details of how long the Respondent had been in arrears. The fact that this information was not entered in Part 3 of the notices is not therefore significant. The errors in recording the total payments and outstanding arrears were not significant either, since they had the effect of diminishing the Respondent's actual liability, and, in any case, did not have any impact on the ground relied on.

34. The Tribunal does not agree that sufficient information was provided in the notices in this case to meet the requirements of the Regulations. Part 3 of the prescribed form specifically requires, "in cases of rent arrears insert the amount of arrears outstanding and the period over which it has built up." The period of arrears is essential information for a tenant, since the ground relied on is that the Respondents were in rent arrears over three consecutive months. It is possible to infer that information from the rent statement provided, but that document is described in the notice itself as being only supporting evidence for what should have already been specified.

35. However, in contrast to the error regarding the date from which the Respondents had occupied the Property, this is a failure to follow the form prescribed, since it omits required information altogether. It is therefore necessary to consider whether s.21 of the Interpretation Act applies to allow that failure to be overlooked.
36. The Tribunal considers that, in this case, it does. The failure to include the information as required in the form does not materially affect its effect, because the rent statement has been provided along with the notices, containing sufficient information for the Respondents to be made aware how long they were being alleged to have been in arrears. For the same reason, the failure cannot be characterised as being misleading. The notices should therefore be taken as if in the form prescribed.
37. This conclusion is not undermined by the erroneous information included in the rent statement, since it does not impact on the period over which the arrears are alleged to have existed. The effect of s.73 of the Act in reference to the error in recording the current arrears in the notice itself is again an issue bound up with the status of the notice, which question will be considered next.

The Date Entered in Terms of s.62(1)(b)

38. In relation to the requirements of s.62(1), the Applicant recognised that s.62(5) states that it is assumed that the tenant will receive the notice 48 hours after it was sent. He submitted, however, that the fact that the notice was served by sheriff officers allowed this assumption to be rebutted. In effect, s.62(5) does not apply. Rather, since the notice was delivered on 28 November 2019, the notice period runs for the 28 days following that date. The notice period therefore expires on 26 December 2019. The first day that the Applicant could raise the action was therefore 27 December 2019, being one day after the expiry of the notice period. This is the date specified in the

notice. The notice therefore satisfies all of the requirements of s.62(1) and is consequently a notice to leave.

39. The Applicant's position is predicated on the contention that the assumption in s.62(5) can be rebutted. The Tribunal does not consider this to be a sound contention. Parliament chose to use the word 'assumed', rather than 'presumed' in this provision for a reason. While a presumption is capable of rebuttal, an assumption is not. That fits with the context in which this particular assumption is being made. The issue is what date has to be entered on the notice to comply with s.62(1)(b), when the notice is being sent (rather than delivered into the tenant's hands). When a landlord is entering that date, they will be unaware of when the tenant will receive the notice. It is therefore necessary for them to be given a date upon which they must assume the tenant will receive it. This is in fact a protection for landlords. If that assumption could be overturned, all a tenant would have to do to prevent a notice from meeting the definition of a notice to leave would be to show that they received it sooner than the two days stipulated (which in many cases- particularly where e-mail is used- it will be).

40. The Applicant submitted at the hearing that delivery of a notice to a property by sheriff officers has the same effect as personal service, although was unable to point to any authority to support that position. The Tribunal does not see any reason to apply that assumption to these circumstances: it would seem clearly contrary to the scheme of the Act. If a notice sent by e-mail is not taken to be delivered until 48 hours after it is sent, why would one left at a property by sheriff officers be any different? (The Tribunal observes that the terms of s.26 of the Interpretation Act may further undermine the Applicant's position; although, this was not a point that was canvassed at the hearing and it has not featured in its reasoning in this case.)

Outcome

41. The notices are therefore assumed to have been received on 30 November 2019. The notice period ended on 28 December 2019 and the date that

should have been entered on the notice in terms of s.62(1)(b) is 29 December 2019. The notices therefore do not meet the definition of a 'notice to leave' in the Act and the Tribunal cannot entertain the application, in terms of s.52(2), and it must be refused.

42. The errors in the date the Respondents have been living at the Property and the arrears recorded on the notices are therefore no longer at issue. Nonetheless, it is worth recording that the Tribunal would have considered that these were minor errors that did not invalidate the notices, had they been notices to leave. Neither error would materially affect the effect of the notices. In the first case, the relevant notice period is fixed by the ground relied on, not by the length of time the Respondents have occupied the Property. In the second, the effect of the error was to downplay the level of arrears rather than exaggerate them. In any event, the key question in reference to the existence of the ground relied on is the length of time the arrears have subsisted for.

- Decision

Application 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.

N. Young

Legal Member/Chair

12 October 2020

Date