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/22/3161**

**Re: Property at 14/1 William Street, Edinburgh, EH3 7NH ("the Property")**

**Parties:**

**Mr Hamish Mitchell, 48 West Bowling Green Street, Edinburgh, EH6 5PB ("the Applicant")**

**Mr Jonathan Adams, 14/1 William Street, Edinburgh, EH3 7NH ("the Respondent")**

**Tribunal Members:**

**Neil Kinnear (Legal Member) and Angus Lamont (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that**

## Background

[1] This was an application for an eviction order dated 1st September 2022 and brought in terms of Rule 109 (Application for an eviction order) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended (hereinafter referred to as "the Procedural Rules").

[2] The Applicant sought an eviction order in relation to the Property against the Respondent, and provided with his application copies of the private residential tenancy agreement, notice to leave with proof of service, section 11 notice with proof of service, and evidence of his intention to carry out extensive upgrading work to the Property.

[3] All of these documents and forms excepting possibly the notice to leave had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, the *Coronavirus (Scotland) Act 2020*, and the *Cost*

*of Living (Tenant Protection) (Scotland) Act 2022* (hereinafter referred to as "the 2022 Act"), and the procedures set out in those Acts appeared to have been correctly followed and applied.

[4] The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 13th January 2023, and the Tribunal was provided with the execution of service.

[5] The representatives of both parties provided the Tribunal with helpful written submissions and further documentary evidence in advance of the Case Management Discussion.

[6] A Case Management Discussion was held at 10:00 on 27th February 2023 by Tele-Conference. The Applicant participated, and was represented by Mrs Harrison, solicitor. The Respondent participated, and was represented by Mr Wilson, of Community Help and Advice Initiative.

[7] The Tribunal and participants had a lengthy discussion concerning the various issues in this application which were in dispute. Mrs Harrison noted that the Applicant strongly refuted the criticisms of his conduct contained in paragraphs 1.8, 5.2 and 5.3 of the Respondent's written submissions. Mr Wilson confirmed that these were matters his client wished included to provide background to the factual circumstances, but that they would not be the subject of evidence being led at a hearing as they were not strictly relevant to the main contested issues in this application concerning firstly, whether the tenant required to move out whilst the works are carried out or not, and secondly regarding the reasonableness of the Tribunal granting the order sought.

[8] Mrs Harrison indicated to the Tribunal and Mr Wilson that the Applicant sought to amend his application by adding in new grounds 11 and 12 in addition to the existing ground 3. The former ground related to the Respondent having a further party living at the Property without permission from the Applicant, and the latter ground in relation to rent arrears accrued.

[9] The Tribunal and parties were agreed that Mrs Harrison would lodge and intimate to the Respondent a written amendment, and that Mr Wilson be allowed 28 days to respond to that by 27th March 2023 all in terms of Rules 13 and 14 of the Procedural Rules.

[10] Mr Wilson confirmed that in due course he wished to make a legal submission that the 2022 Act applied to this application, as he submitted that the application was made on the date when the application was accepted by the Tribunal and not the date when it was received by the Tribunal, as set out in paragraphs 4.1 to 4.5 of his written submissions.

[11] The parties and the Tribunal agreed that it would be sensible to continue the application to a further Case Management Discussion to allow Mrs Harrison to lodge her written amendment and Mr Wilson to lodge his written response, and the Tribunal could then consider parties' arguments and reach a decision on whether or not to allow the amendment.

[12] By e-mail to the Tribunal dated 7th March 2023, the Applicant lodged a written amendment to his application adding in new grounds 11 and 12 in addition to the existing ground 3. Ground 11 related to the Respondent having a further party living at the Property without permission from the Applicant, and ground 12 related to rent arrears accrued since October 2022.

[13] By e-mail to the Tribunal dated 27th April 2023, the Respondent lodged a supplementary submission in which he confirmed that he did not object to the Applicant's amendment, and did not seek to defend the Application for the order sought on any of grounds 3, 11 or 12. He did, however, continue to insist upon his submission that the 2022 Act applied to this application on the basis that the application was made on the date when the application was accepted by the Tribunal and not the date when it was received by the Tribunal, and provided supplementary detailed legal submissions to his original written submissions.

**Continued Case Management Discussion**

[14] A continued Case Management Discussion was held at 10:00 on 3rd May 2023 by Tele-Conference. The Applicant participated, and was again represented by Mrs Harrison, solicitor. The Respondent participated, and was again represented by Mr Wilson, of Community Help and Advice Initiative.

[15] The Tribunal noted that the notice to leave specified a date before which an application would not be submitted to the Tribunal for an eviction order of 19th July 2022. The notice was dated 25th April 2022 and was personally served on the same date. On that basis, the date specified on the notice should have been 18th July 2022.

[16] Mrs Harrison invited the Tribunal with reference to the application and papers to grant the order sought on grounds 3, 4 and 12 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act 2016*. She asked for the Tribunal's permission to include grounds 11 and 12 in the application as a stated basis on which an eviction order is sought in terms of section 52(5)(b) of the *Private Housing (Tenancies) (Scotland) Act* 2016.

[17] The original notice to leave dated 26th July 2022 relied on ground 3 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act* 2016. It narrated that the Applicant intends to refurbish the Let Property. The Applicant intends to replace the kitchen, the bathroom and the heating system.

[18] In relation to ground 11 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act* 2016, Mrs Harrison indicated that the Respondent had a further party living at the Property without seeking the permission of the Applicant in terms of clause 11 of the lease agreement.

[19] In relation to ground 12 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act* 2016, Mrs Harrison indicated that rental of £950.00 per month was payable in advance in terms of clause 7 of the private residential tenancy agreement. The Respondent had been in arrears of rent since October 2022, and currently had accrued rent arrears of £2,075.00.

[20] Mr Wilson accepted that all three grounds relied upon by the Applicant had been made out and that the Respondent did not oppose the granting of the order sought.

[21] He then addressed the Tribunal in more detail in relation to his submission that the 2022 Act applied to this application on the basis that the application was made on the date when the application was accepted by the Tribunal and not the date when it was received by the Tribunal.

[22] Mr Wilson argued that Schedule 2 to the 2022 Act applied to this application upon the basis that it was "raised" after the 28th October 2022. He accepted that the application was first received by the Tribunal on 1st September 2022, but submitted that "raised" for the purposes of the 2022 Act should be interpreted having regard to Rule 5 of the Procedural Rules.

[23] Rule 5(3) of the Procedural Rules provides that an application is held to be made on the date that the Tribunal receives the last of any outstanding documents necessary to meet the required manner of lodgement.

[24] Mr Wilson argued that as the final document requested by the Tribunal from the Applicant was not received until 11th November 2022, that the provisions of Schedule 2 of the 2022 Act applied.

[25] Mrs Harrison argued that the provisions of the 2022 Act did not apply to this application. She submitted that "raised" for the purposes of the 2022 Act meant the date when the Tribunal first received the application, namely 1st September 2022.

**Statement of Reasons**

[26] In terms of Section 51 of the *Private Housing (Tenancies) (Scotland) Act 2016* ("the Act") as amended by the *Coronavirus (Scotland) Act 2020*, the Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

[27] Section 52(2)(3) and (4) of the Act provide:
"(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.
(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so."

[28] Section 54 of the Act provides:
"(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,
(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—
(i) that the tenant is not occupying the let property as the tenant's home,
(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,
(iiia) that the tenant has substantial rent arrears,
(iv) that the tenant has a relevant conviction,
(v) that the tenant has engaged in relevant anti-social behaviour,
(vi) that the tenant associates in the let property with a person who has a relevant conviction or 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).”

[29] Section 62 of the Act provides:

“(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

[30] Section 73 of the Act provides:

(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)).”

[31] The relevant period in relation to the original notice to leave was 84 days in terms of section 54 of the Act. In terms of section 62 of the Act, the notice to leave required to specify the day on which the Applicant expected to become entitled to make an application for an eviction order to the Tribunal. That date was the day falling after the relevant period of 84 days had expired, which relevant period commenced on the day when the Respondents received the original notice to leave, which was 25th April 2022.

[32] That being so, the correct date which ought to have been specified in the notice to leave before which the Applicants expected to become entitled to make an application for an eviction order to the Tribunal ought to have been 18th July 2022.

[33] However, the Tribunal took the view that in circumstances where any error in the date provided a longer period than was required in terms of sections 54 and 62, it did not make the notice to leave invalid as it did not affect the effect of the document in terms of section 73 of the Act in circumstances where the tenant received a longer period of notice than required.

[34] Para 3 of Schedule 3 to the Act provides that it is an eviction ground that the landlord intends to carry out significantly disruptive works to, or in relation to, the let property. The Tribunal may find that this ground applies if (1) the landlord intends to refurbish the let property (or any premises of which the let property forms part), (2) the landlord is entitled to do so, (3) it would be impracticable for the tenant to continue to occupy the property given the nature of the refurbishment intended by the landlord, and (4) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of those facts.

[35] The Tribunal was satisfied that ground 3 had been established. The work which the Applicant intends to carry out is extensive and he is entitled to carry that work out. It would be impracticable for the tenant to continue to occupy the Property while the work is carried out. The Applicant had made out that it was reasonable to issue an eviction order, and the Respondent did not oppose the granting of the order on this ground.

[36] Para 11 of Schedule 3 to the Act provides that it is an eviction ground that the tenant has failed to comply with an obligation under the tenancy. The Tribunal may find that this ground applies (1) the tenant has failed to comply with a term of the tenancy, and (2) the Tribunal is satisfied that it is reasonable to issue an eviction order on account of that fact.

[37] Para 12 of Schedule 3 to the Act provides that it is an eviction ground that the tenant has been in rent arrears for three or more consecutive months. The Tribunal may find that this ground applies if (1) for three or more consecutive months the tenant has been in arrears of rent, and (2) the Tribunal is satisfied that it is reasonable on account of that fact to issue an eviction order. In deciding whether it is reasonable to issue an eviction order, the Tribunal is to consider whether the tenant’s being in arrears of rent over the period in question is wholly or partly a consequence of a delay or

failure in the payment of a relevant benefit, and the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under the *Rent Arrears Pre-action Requirements (Coronavirus) (Scotland) Regulations 2020*.

[38] The Tribunal granted permission to include grounds 11 and 12 in the application as a stated basis on which an eviction order is sought in terms of section 52(5)(b) of the *Private Housing (Tenancies) (Scotland) Act* 2016, and was satisfied that both grounds had been established.

[39] The Tribunal was satisfied that ground 11 had been established. The tenant failed to comply with Clause 11 of the tenancy agreement by having a further party living at the Property without seeking the permission of the Applicant. The Applicant had made out that it was reasonable to issue an eviction order, and the Respondent did not oppose the granting of the order on this ground.

[40] The Tribunal was satisfied that ground 12 had been established. The tenant was in substantial arrears of rent and had been in arrears for a continuous period in excess of three months. The Tribunal was further satisfied that the tenant being in arrears was not wholly or partly due to any delay or failure in the payment of a relevant benefit. There was no evidence to establish any such reason for rent arrears. The Applicant had made out that it was reasonable to issue an eviction order, and the Respondent did not oppose the granting of the order on this ground.

[41] The remaining question which the Tribunal required to consider was that of whether the provisions of the 2022 Act applied to enforcement of the order sought. To answer that question, it is first important to explain the procedural history of the application.

[42] The application and accompanying documents were first received by the Tribunal on 1st September 2022. By letter to the Applicant's representative dated 30th September 2022, the Tribunal requested that the Applicant provide evidence regarding personal service of the notice to leave upon the Respondent and evidence of intimation of the section 11 notice upon the local authority.

[43] The Applicant's representative by e-mail to the Tribunal dated 14th October 2022 provided the information sought in the Tribunal's letter of 30th September 2022. Thereafter, the Tribunal by letter to the Applicant's representative dated 11th November 2022 requested that the Applicant provide a copy of the written lease agreement.

[44] The Applicant's representative provided a copy of the written lease agreement in response to the Tribunal's request by e-mail of 11th November 2022, and thereafter a notice of acceptance by the Tribunal dated 30th November 2022 was provided to the Applicant.

[45] The 2022 Act came into force on 28th October 2022. Paragraph 1(1) of Schedule 2 provides that "where a decree for removing is granted in proceedings raised after this paragraph comes into force, no person may – (a) serve a charge for removing in respect of the decree, (b) execute the decree." Paragraph 1(3) of Schedule 2 provides that paragraph 1(3) "applies until the earlier of – (a) the end of a period of 6 months

beginning with the day on which the decree for removing is or was granted, (b) the expiry or suspension of this paragraph in accordance with Part 2". Paragraph 1(10) defines "decree of removing" as including an order for eviction by the Tribunal under section 51 of the *Private Housing (Tenancies) (Scotland) Act 2016*.

[46] Unfortunately, the 2022 Act does not define what is meant by the term "in proceedings raised after this paragraph comes into force". Mr Wilson argued that "raised" must be interpreted with reference to Rule 5 of the Procedural Rules as meaning the date when the application is made. Mrs Harrison argued that "raised" must be interpreted to mean the date when the application was first received by the Tribunal.

[47] Rule 5(1) of the Procedural Rules provides that "an application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in" *inter alia* Rule 109.

[48] Rule 109 provides as follows:
"Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—
(a) state—
(i) the name, address and registration number (if any) of the landlord;
(ii) the name, address and profession of any representative of the landlord;
(iii) the name and address of the tenant if known; and
(iv) the ground or grounds for eviction;
(b) be accompanied by—
(i) evidence showing that the eviction ground or grounds has been met;
(ii) a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act; and
(iii) a copy of the notice given to the local authority as required under section 56(1) of the 2016 Act; and
(iv) a copy of Form BB (notice to the occupier) under schedule 6 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (if applicable): and
(c) be signed and dated by the landlord or a representative of the landlord.".

[49] Curiously, Rule 109 does not specifically provide that an application must be accompanied by evidence of service of the notice to leave upon the tenant, nor evidence of intimation of the section 11 notice upon the local authority, albeit it might perhaps be argued that it is implied that these should be provided with those notices.

[50] Yet more curiously, Rule 109 does not provide that an application must be accompanied by a copy of the lease agreement, despite the fact there requires to be a lease agreement between the parties if there is to be a basis for bringing an application for eviction to the Tribunal.

[51] Rule 5(2) of the Procedural Rules provides that the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

[52] Rule 5(3) of the Procedural Rules provides that if it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

[53] In this application, the Tribunal did not need to consider the question of whether or not evidence of service of the notice to leave upon the tenant and evidence of intimation of the section 11 notice upon the local authority are by implication mandatory requirements for lodgement under Rule 109, as those were provided to the Tribunal on 14th October 2022 which predates the coming into force of the provisions of Schedule 2 of the 2022 Act.

[54] It is undoubtedly the case that the Tribunal thereafter requested that the Applicant provide a copy of the written lease agreement, and that this was not sought and provided till after the coming into force of the provisions of Schedule 2 of the 2022 Act. However, it is clearly not a mandatory requirement for lodging in terms of Rule 109 of the Procedural Rules that a copy of the written lease agreement be provided.

[55] That being so, in terms of Rule 5(3) of the Procedural Rule, the Tribunal received the last of any outstanding documents necessary to meet the required manner for lodgement at latest on 14th October 2022, and in those circumstances that is the date when the application is held to have been made.

[56] For that reason, the Tribunal considered that the provisions of Schedule 2 of the 2022 Act did not apply to enforcement of the eviction order which it granted.

[57] For completeness, albeit that Tribunal did not require to make a decision upon whether “raised” for the purposes of the 2022 Act should be interpreted as meaning held to have been made in terms of Rule 5 of the Procedural Rules, or interpreted as meaning the date when the Tribunal first received the application, the Tribunal favoured the latter interpretation.

[58] It appeared to the Tribunal that procedural injustice might result if the former interpretation were to be applied, in circumstances where there is inevitable uncertainty with regard to how quickly the Tribunal administratively processes different applications.

[59] The Tribunal could envisage applications received by it upon the same day which required it to request that outstanding documents necessary to meet the required manner for lodgement be provided, being processed more swiftly, or less swiftly, simply by virtue of the process of administration.

[60] That might result in applications lodged on the same date by different applicants being treated differently with respect to the application or not of the provisions of Schedule 2 of the 2022 Act, which would appear to create potential uncertainty and injustice to different applicants.

[61] Further, the Tribunal noted that paragraph 72 of the explanatory notes to the 2022 Act states that whether an order is subject to the restrictions contained within the 2022 Act depends, in part, on "…when proceedings for the order were raised with the court or tribunal (i.e. when the landlord first submitted an application to the court or tribunal for the order)…". This paragraph supports the interpretation which the Tribunal favoured.

**Decision**

[62] In these circumstances, the Tribunal made an eviction order against the Respondent in this application.

**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 Kinnear

**3 May 2023**

**Legal Member/Chair** **Date**