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 58 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/PR/24/0462

Re: Property at Flat 3/3, 36 Clarendon Place, Glasgow, G20 7PZ ("the Property")

Parties:

Luke McColgan, 1/1 57 Kinnell Path, Glasgow, G52 3RN ("the Applicant")

Louise Olivarius, Christopher Olivarius, 12 Victoria Park Street, Glasgow, G14 9QA ("the Respondents")

Tribunal Members:

Joel Conn (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") refused the application.

1) This was an application by the Applicant under rule 110 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended ("the Rules") for a wrongful termination order

2) The wrongful termination order sought an award of "the maximum compensation". The application was dated 22 January 2024 and lodged on 29 January 2024. A revised application, in materially similar terms, was lodged during the sifting process. The Applicant relied on a WhatsApp text message from the first named Respondent on 23 March 2023 stating:

> *Hey pal I left a message but wanted you to know asap - we have decided to put the flat on the market – a difficult decision but unfortunately a necessary one. Lease ends start of April but happy to hold off til your term ends if that helps you out? Sorry again chat this evening if youre free?" (all sic)*

Thereafter, he left by 30 May 2023 (a date agreed by further text exchange) but has since found that the Respondents re-let the Property.

3) Supporting papers, in particular the lease and a WhatsApp exchange from 23 March to 19 April 2023 were lodged by the Applicant. As part of the sift process, the Applicant further lodged written submissions as to the applicability of section 58 to the circumstances (as no Notice to Leave had been issued to him). In advance of the case management discussion ("CMD") the Respondents lodged written submissions and productions, including a further section of the WhatsApp exchange, taking the exchange up to 29 May 2023. The Applicant in turn produced further submissions and productions in response to those.

The Hearing

4) The matter called for a CMD of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote telephone conference call, on 8 November 2024 at 11:30. I was addressed by the Applicant and first named Respondent and the second named Respondent was also present on the call.

5) I sought to clarify the sum sought in the application. The application papers included the Tenancy Agreement, which was an unsigned and undated "short assured tenancy" style agreement, stating that it ran from 5 October 2022 "and will end on: 06/04/23". (As this was a Private Residential Tenancy the inclusion of such an end date in the Tenancy Agreement was not relevant nor applicable.) The Tenancy Agreement stated a rent of £650 per month. The Applicant confirmed he sought an order for £3,900 (being 6x£650).

6) The Respondent accepted that the Tenancy Agreement lodged had been provided to the Applicant but said that there were further WhatsApp messages where she agreed to only £600/m for the last three months of the Tenancy, and insisted that the Applicant's liability prior to that had been only one-half of the rent as he had been a joint tenant in all earlier agreements. The Applicant confirmed that he had been a joint tenant from October 2019 and had then received subsequent replacement tenancy agreements but he made no other concession.

7) In light of the preliminary matter for discussion (as to whether section 58 of the 2016 Act applied), I then discontinued further discussion as to what rent was agreed so as to consider the preliminary matter. Further, the Respondent's submissions regarding the condition the Property, arrears of rent, and the reasons for her not selling the Property were not discussed as of this point in the CMD. In light of my decision on the preliminary matter none of these points were discussed in full.

8) In regard to the preliminary matter, the Applicant said that he had intended to remain at the Property until the completion of his studies in Autumn 2025, and only sought new accommodation after the first named Respondent's text of 23 March 2023. I reviewed the Applicant's written submissions on whether section 58 applied in the absence of a Notice to Leave. Prior to the CMD, I had read the authorities the Applicant referred to:

Armour v Anderson, 1994 SC 488 (specifically page 494)

Smith v MacDonald, [2021] UT 20

Combe and Robson, "A Review of the First Wrongful-Termination Orders Made Under the Private Housing (Tenancies) (Scotland) Act 2016: Do They Sufficiently Protect Those Misled Into Giving Up a Tenancy?", *2021 Juridical Review 88*

(The first two authorities are referred to in the third. The Applicant's submission on their relevance – that they support a "purposive approach" on interpretation of a provision like section 58 – is materially the same as the comment made by Combe and Robson on page 96 (footnote 41).)

9) The Applicant's written submissions provided the following arguments:

A stringent application of s.58 (together with section 50) which requires there to be a formal notice to leave that complies with section 62 and related regulations before a wrongful-termination order can be obtained seems contrary to the aims of the statute given that landlords can circumvent responsibility by producing communications which fall short of s.62. This creates a lacuna in the law which is undoubtedly being abused by landlords, especially today when the majority of tenant/landlord communication is conducted on these platforms. This leaves tenants such as myself who were unaware of the complexities of the law in a position with no legal recourse, even though they have been wronged in a manner which contradicts the aims of the 2016 Act. By applying a purposive approach the FtT has the opportunity to address the shortcomings of the legislation and bring it up to date with modern practices.

Adopting a purposive approach to interpretation would be consonant with case law where there is a practical power imbalance…

I submit that the landlord's communication satisfies aspects of s.62. In many modern contexts, electronic communications are treated as if they are written, which would suffice for s.62(1)(a). Next, s.62(1)(b) is met as the WhatsApp communication clearly states "lease ends start of April..". This is a clear expression of intent to end the tenancy. It can be reasonably deduced that a failure to vacate the property by this date would have led to the landlord seeking an eviction order. …

As I was unaware of my legal rights I did not understand that this was illegal under the 2016 Act and as such made plans to vacate. A scenario in which s.58 of the Act was designed to provide recourse for. I also contend that s.62(1)(c) is also met by the communication provided. Due to the fact the text expresses a clear intent for the landlord to sell the property – "we have decided to put the flat on the market". This is a relevant eviction ground as required by the statute. As such, upon receiving of this WhatsApp message and due to my ignorance of the law at the time, I believed I had to vacate the property and did so accordingly at my own expense.

Lastly, this was not the only communication I received regarding the sham notice to leave, we engaged in a telephone call that same day in which my

former landlord expressed her reasoning behind the sale of the property and confirmed when I would be able to vacate. Whilst this may not conform to the legislative requirements for a notice to leave, it served to supplement the landlord's original communication and reinforce their intention to terminate the lease. (all *sic*)

10) Combe and Robson review five decisions (at pages 95-98) of the Tribunal where it refused an application for an order under section 58 on the basis that the tenancy had not been brought to an end "in accordance with section 50" (ie by the landlord issuing a "notice to leave" and the tenant leaving) due to something other than a proper Notice to Leave being provided to the tenant. Their analysis is:

> *Sometimes the First-tier Tribunal has chosen to take a (highly?) formalistic approach to interpretation. This has served as a roadblock for some tenants seeking a remedy where they have been led to believe their tenancy is ending and they should quit the premises.* (page 95)

and in conclusion:

> *…s.58 as a whole only applies where a PRT "has been brought to an end in accordance with section 50". Section 50 talks of a "notice to leave", which is defined in s.62 as being in writing as well as needing to meet other formal requirements.*
>
> *The emerging jurisprudence from the First-tier Tribunal unfortunately seems to suggest a cynical landlord could test the waters by sending correspondence that falls short of a notice to leave to a tenant in the hope that they do not stay the course and wait for a notice that meets the statutory requirements.* (pages 99-100)

11) The Applicant initially confirmed that he was satisfied to rely on his written submissions provided in the papers (and the authorities referred to therein), and that he had no other authorities to refer to nor further submissions to make on the preliminary matter. Specifically, I asked whether he relied on the summary of Tribunal decisions by Combe and Robson. He confirmed that he was (though see postscript). I adjourned to consider the matter.

12) No motion was made by either party for expenses.

Findings in Fact

13) The first named Respondent sent a WhatsApp text message to the Applicant on 23 March 2023 stating:

> *Hey pal I left a message but wanted you to know asap - we have decided to put the flat on the market - a difficult decision but unfortunately a necessary one. Lease ends start of April but happy to hold off til your term ends if that helps you out? Sorry again chat this evening if youre free?"* (all *sic*)

14) The Applicant never received a Notice to Leave complying with the statutory requirements under section 62 of the 2016 Act from or on behalf of the Respondents.

15) Between 6 April and 5 May 2023 the Applicant and first named Respondent entered into an exchange of text messages on whether a date for the Applicant to vacate the Property could be agreed, with the first named Respondent proposing 30 May 2023.

16) On 5 May 2023, the Applicant texted the first named Respondent saying:
Louise that's me found somewhere else for the 1st of next month so I will be out of here by 30th x (all *sic*)

17) The Applicant left the Property on or about 30 May 2023.

Reasons for Decision

18) I was obliged to the Applicant for the detailed written submissions and reference to authorities. I was unable to identify any further authorities of assistance, and in particular did not identify any Upper Tribunal authorities on the subject. For completeness, though not binding on me I find the reasoning in the five decisions reviewed by Combe and Robson to be generally the same as my own.

19) In regard to wrongful termination, the relevant provision is at section 58 of the 2016 Act:
(1) This section applies where a private residential tenancy has been brought to an end in accordance with section 50.
(2) An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy ("the former tenant").
(3) The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end. …

20) For completeness, the terms of section 50 are:
(1) A tenancy which is a private residential tenancy comes to an end if—
(a) the tenant has received a notice to leave from the landlord, and
(b) the tenant has ceased to occupy the let property.
(2) A tenancy comes to an end under subsection (1) on the later of—
(a) the day specified in the notice to leave in accordance with section 62(1)(b), or
(b) the day on which the tenant ceases to occupy the let property.
(3) For the avoidance of doubt, a tenancy which is to come to an end under subsection (1) may be brought to an end earlier in accordance with section 48.

which requires consideration of section 62 for the definition of a Notice to Leave:
(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.

21) On any reading, the WhatsApp message of 23 March 2023 is not a Notice to Leave compliant with section 62. It is in writing, and paraphrases a relevant ground for eviction, but does not comply with the other significant requirements. I accept the criticisms by Combe and Robson that a "a cynical landlord could test the waters" by sending something other than a Notice to Leave and seeing what happens next. As it would be time wasted if the tenant did not leave, it seems that such a "cynical landlord" would be unwise to do so but if they were not just "cynical" but actively trying to convince a tenant to leave on false grounds, then it is conceivable that such an exploitative landlord could try this route so as to avoid potential liability under section 58. This exploitation can only occur, however, where a tenant fails to obtain the most rudimentary guidance as to the correct procedures.

22) The Applicant provided oral submissions that he had tried to locate a source of advice but, due to his university and work commitments, had lacked time and he only became aware of the irregularity in the process the following year when he studied Housing Law (as part of his law degree). It does not, however, require legal training to locate online sources of basic advice from local authority, Scottish Government, and advice charities. The Applicant had adequate opportunity to satisfy himself as to his rights and position, and bring the Respondents' procedural irregularity to their attention. He did not, and instead agreed a date to leave the Property. It leaves him in a situation where section 58 is not engaged as there was no termination by way of a Notice to Leave being issued by the landlord followed by the tenant leaving.

23) There is a temptation to follow the above with a determination as to how the Tenancy came to be terminated. I do not make such a determination but an examination of the options solidifies my thinking. On a practical basis, both parties have long since acted as if the Tenancy ceased to be in place. The Applicant left the Property and commenced occupying somewhere else, and the Respondents have since re-let the Property. Such actions do not, however, terminate a PRT given the terms of section 44: "A tenancy which is a private residential tenancy may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part" (being Part 5 of the 2016 Act).

24) Part 5 of the Act provides for three means of termination: voluntarily termination by a tenant (section 48), termination by a Notice to Leave and the tenant leaving (section 50), or by eviction order from this Tribunal (section 51). (Termination due to death of the tenant does not feature in Part 6, but that is

not a termination brought about by either party.) It is possible that the WhatsApp exchange amounts to a termination under section 48, albeit one where it was all prompted by the Respondent and where the Applicant may well argue that his text on 5 May 2023 finalising that he would leave by 30 May 2023 was not "given freely and without coercion of any kind" as required by section 49(1)(a)(i). There is however no provision for wrongful termination where section 48 termination has been obtained by coercion. Section 48(1) reads as if there can only be termination under that section if section 49 has been fully complied with. Incompatibility with section 49 means no termination under section 48, but if the tenant has left by then it begs the question as to what mechanism has terminated the tenancy.

25) Further, would falsehoods within a landlord's Notice to Leave represent "coercion"? A section 48 termination can follow after a landlord's Notice to Leave has been issued (section 50(3)). It is not inconceivable that a tenant might only provide their own notice due to a desire to leave on their own accord on a date of their choosing, after receipt of the landlord's notice to leave. The notice by the landlord prompting this decision may contain falsehoods, of which the tenant is unaware. If the tenant still leaves, this would leave a question as to whether the tenancy has been terminated under section 48 or 50, or not properly terminated at all.

26) The above analysis shows that there may be further potential gaps in the operation of the termination provisions beyond the single one identified by the Applicant (and within Combe and Robson), including further areas where a tenant may lack a statutory remedy if they leave but are subsequently disgruntled about what they find out about the landlord's actions. This does not give cause to read solutions into the legislation. The terms of section 58 are clear and do not apply here. A "purposive" approach to section 58 would simply create more issues. To hold that section 58 is engaged pre-supposes that section 50 has been engaged but it clearly has not because there is no compliant Notice to Leave. To achieve what the Applicant seeks, a "purposive" interpretation would be needed to sections 50, 58 and 62. That would then open the question as to what state that leaves the legislation's intention that Notices to Leave are in clear and standard form, and used in a standard fashion.

27) If the Scottish Parliament had intended there to be a general "wrongful cessation of occupation" remedy, then that could have been drafted. Instead it drafted two specific "wrongful termination" provisions, covering two of the three types of statutory termination. The addition of further remedies is a matter for legislation, not interpretation. The tenant is already protected by a right to expect a formal Notice to Leave, and to decline to leave without one or without a determination by this Tribunal, as well as a right to a determination by this Tribunal if the grounds are disputed or doubted. All of this mitigates against a wrong occurring in the first place but, if insisted upon by the tenant, the tenant will further be able to claim wrongful termination. There is no basis for this Tribunal reading in additional statutory remedies, especially where that requires twisting the other statutory protections out of shape.

Decision

28) In all the circumstances, I refuse the order for wrongful termination on the grounds the section 58 does not apply. I decline to make any findings on any other disputed issue in the circumstances.

Postscript

29) As stated above, after hearing submissions on the preliminary matter, I adjourned to reconsider the authorities quoted and – though not asked to by the Applicant – consider the Tribunal's decisions that had been summarised by Combe and Robson.

30) After adjournment, I provided oral confirmation that I was refusing the application. At that point, the Applicant stated that he had misunderstood the CMD procedure and did have submissions to make and further authorities to rely upon. I expressed surprise at this, as I had asked specifically about further submissions or authorities prior to the adjournment.

31) Nonetheless, conscious of the right of a party to seek a review of any decision under Rule 39, I asked for details of the further authorities he wished to refer to. He referred to the following:

Bargeton v Danzan Properties Ltd, PR/20/2529, 18 February 2021
Hutchin-Bellur v Matheson, PR/20/1947, 9 January 2021

I noted that the first of these was referred to by Combe and Robson and was a case where there had been a refusal due to a lack of a Notice to Leave. I then obtained the decision in the second from the Tribunal's website and noted that it was a decision where there had been a written Notice to Leave. I expressed these views to the Applicant and he did not demur. I sought further confirmation from the Applicant as to whether he had any authorities where an informal request to leave, such as by text, had been regarded as relevant for a section 58 claim. He confirmed that he had none. I then stated that my decision to refuse would stand and this written decision would be issued in due course.

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.

J Conn

8 November 2024

Legal Member/Chair **Date**