



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”)**

**Chamber Ref: FTS/HPC/EV/24/1679**

**Property at 1 Smithy Cottages, Duncow, Dumfries, DG1 1TA (“the Property”)**

**Parties:**

**Mrs Joan Stroud, Tetten Hall, Duncow, Dumfries, DG1 1TA (“the Applicant”)**

**Mr Alan Lang, Mrs Appolina Lang, 1 Smithy Cottages, Duncow, Dumfries, DG1 1TA (“the Respondent”)**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and Gerard Darroch (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be refused.**

**Background**

1. The Applicant seeks an eviction order in terms of Section 51 of the 2016 Act. A tenancy agreement, Notice to Leave, Section 11 Notice and evidence in support of the eviction ground were lodged with the application. The application is based on ground 1 of schedule 3 of the Act, the landlord intends to sell the let property and ground 1A, the landlord intends to sell the property to alleviate financial hardship.
2. The application was served on the Respondents by Sheriff Officer. Both parties were notified that a case management discussion (“CMD”) would take place by telephone conference call on 23 October 2024 at 2pm and that they were required to participate. Prior to the CMD, Mr Lang lodged a brief submission indicating that the application is not opposed but that the Respondents require time to obtain alternative accommodation. He said that they are planning to

purchase a property.

3. The CMD took place on 23 October 2024. Ms Wisbach, solicitor represented the Applicant. Mr Lang also participated.

### **Case Management Discussion**

4. The Tribunal noted that most of the paperwork lodged with the application appears to be in order. However, there is an issue with the Notice to Leave. It is dated 12 December 2023 and was sent by recorded delivery post to both Respondents on that date. The date specified in Part 4 is 7 March 2024, which appears to be incorrect. As a result, the Notice to Leave may not comply with Section 62(1)(b) of the 2016 Act.
5. Ms Wismach said that she was aware of the potential issue with the Notice. She said that there had been problems in the past with recorded delivery mail being sent to the Respondents and this might be the reason for the error. She confirmed that she is aware of the FTT decision in the case of Holleran v McAllister (EV/18/3231). However, she invited the Tribunal to make a decision on the application and conclude that an eviction order can still be granted. She pointed out that the Respondents have had a significant amount of notice of the plan to sell the property.
6. Mr Lang advised the Tribunal that the application is not opposed. He said that they are planning to purchase a property and had offered to purchase this property. A price had been verbally agreed and he had arranged a survey. However, when the written offer had been submitted it had not been accepted. Ms Wisbach told the Tribunal that the parties had discussed a sale in September 2023. A purchase price of £190, 000 had been discussed but the Respondents only offered £180, 000. The Applicant was unable to accept this as she has had to purchase a bungalow to meet her current care needs and had to borrow from a family member to do this. She owes £195,000 and in addition has a mortgage over the let property of £75,000 to repay. She has to secure the best price for the property and therefore decided to place it on the open market.
7. In response to questions from the Tribunal, Mr Lang said that he and his wife have no significant health issues and are aged 61 and 60. They have spoken to the homeless options team of the Local Authority about their situation and understand that they should be offered temporary accommodation if they are unable to purchase a property or obtain another private let. They are actively looking for a property to purchase and have a mortgage arranged.

### **Findings in Fact**

8. The Applicant is the owner and Landlord of the property.

9. The Respondents are the tenants of the property in terms of a private residential tenancy agreement.
10. The Applicant served a Notice to leave on the Respondent on 12 December 2023. The Notice states that the earliest date that tribunal proceedings can start is 7 March 2024.
11. The Applicant is entitled to sell the property and intends to do so. She requires to sell the property due to serious health issues.
12. The Respondents previously made an offer to purchase the property which was not accepted. They hope to purchase a property in the near future.

## Reasons for Decision

### The Notice to leave

13. The application to the Tribunal was submitted with a Notice to Leave dated 12 December 2023, together with evidence that the Notice was sent by recorded delivery post to both Respondents on that date. It was delivered on 13 December 2023. The Notice to leave states that an application to the Tribunal is to be made on ground 1, landlord intends to sell the let property. Part 4 of the notice indicates that the earliest date that an application to the Tribunal can be made is 7 March 2024. The application to the Tribunal was made after the expiry of the notice period. The relevant sections of the 2016 Act are as follows;

#### **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.**

(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.

#### **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
  - (ii) 84 days after it begins if subsection (3) does not apply

(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 purposes 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))

14. 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).

15. It is not in dispute that the ground 1 is not one of the grounds specified in Section 54(3). As a result, the notice period is 84 days and not 28 days. The Tribunal is also satisfied that, as the Notice was sent by recorded delivery post, Section 62(5) is applicable, and the Applicant had to allow an additional 48 hours when calculating the date to be inserted in Part 4 of the Notice. However, the date specified in Part 4 of the Notice is 7 March 2024. This is clearly incorrect. In terms of section 62(4) of the 2016 Act, the Notice must state a date being **“the day falling after the day on which the notice period defined in section 54(2) will expire.”** As the 84-day notice period started on 14 December 2023 (48 hours after it was sent), the date in Part 4 should be 8 March 2024.
16. Having determined that the date specified in Part 4 of the Notice is incorrect, the Tribunal proceeded to consider the implications of the error for the application. The Tribunal had regard to the decision of the Tribunal in the case of Holleran v McAllister (HPC/EV/18/3231). As it is a decision at first instance, it is not binding on the Tribunal. However, the Tribunal is satisfied that the reasons for the decision in that case were correct, in factual circumstances similar to the present case. In Holleran, an application was submitted to the Tribunal with a Notice to leave which was dated 1 August 2018. The Applicant lodged evidence that it had been sent to the tenant by recorded delivery post on the same date. The date specified in Part 4 was 29 August 2018. As 48 hours had to be allowed for sending the notice by post, the Tribunal determined that the date ought to have been 1 September 2018. The application was refused on the grounds that it was incompetent as the Notice was not a “notice to leave” in terms of section 62. This meant that the Tribunal could not entertain the application in terms of section 52(2)(a).
17. As the Tribunal points out in the decision with statement of reasons in the Holleran case, the opening words of Section 62 indicate that a Notice to Leave has to fulfil the four requirements specified in Sections (a) to (d) of that section. It follows that a Notice to Leave which does not fulfil these requirements is not a “Notice to leave” in terms of the 2016 Act. The Notice submitted with the present application does not fulfil the requirement specified in Section 62(b), as the Notice wrongly indicates that the Applicant expected to be able to make an application to the Tribunal on 7 March 2024. As a result, the Notice which has been submitted is not a “Notice to leave” in terms of Section 62. This calls into question the competency of the application. As the application to the Tribunal has to be accompanied by a “Notice to Leave”, the Applicant has failed to comply with Section 52(3) of the 2016 Act and the Tribunal cannot entertain the application.

18. Although not specifically raised by the Applicant, the Tribunal considered Section 73 of the 2016 Act, which states that a minor error will not invalidate a Notice to leave.
19. In terms of Section 73, an error does not invalidate the notice unless it “materially affects the effect” of the notice. As the Tribunal points out in the Holleran case, this means that where an error does “materially affect the effect” the notice is invalid. The explanatory note to Section 73 in the 2016 Act says, “Any errors ...do not invalidate the document if they are sufficiently minor that they do not materially alter the effect of the document...” The word “effect” appears to refer to the effect the notice is supposed to have if there had been no error. Section 62 defines a Notice to leave. It stipulates the information that the landlord must give to the tenant when giving notice. This includes (Section 62(b)) the day on which the landlord expects to be able to make an application for an eviction order. When a landlord uses the prescribed form, this date is specified in Part 4. In the present case, the Respondent has not been given that information because the date inserted is earlier than the date upon which the Applicant would become entitled to make the application. As such, the error **does** affect the effect of the notice because if there had been no error, the date specified would have been the 17 December.
20. The question which then arises is whether the effect is “materially” affected. In the Holleran case, the Tribunal rejected the argument that there was no prejudice to the tenant as the application was not made until some time after the correct date had passed. The Tribunal’s reasoning (which is endorsed by this Tribunal) is that the validity of a notice cannot be determined and defects in the notice cannot be cured by events which have occurred after the notice is served. Either the notice was valid or invalid when it was given to the tenant. Section 73 is clearly designed to protect landlord from minor errors which may be made when completing a notice to leave such as spelling mistakes in names and addresses or using the wrong version of the notice. However, an error in relation to a fundamental aspect of the notice as defined by Section 62 cannot be regarded as minor. It is perhaps arguable that if a later date had been inserted, the Notice would have been valid. This is because Part 4 of the prescribed form states that the date must be “**at least the day after**” the expiry of the notice period. However, that was not the situation with the Notice served on the Respondent in this case.
21. For the reasons outlined, the Tribunal refuses the application on the ground that it is incompetent as the application has not been accompanied by a valid Notice to leave.

### **The eviction grounds and reasonableness**

22. Both parties provided the Tribunal with information in relation to the eviction ground and the issue of reasonableness, prior to and during the CMD. The Tribunal notes that the application is not opposed in principle, although the Respondents indicate that they require more time to find a new home. The

Tribunal is also satisfied that the Applicant intends to sell the property and that she has purchased a new home, more suitable to her present care needs. The Applicant's refusal to accept the Respondent's offer is not significant. They offered less than she was hoping to achieve, and she wants to take her chances on the open market. The Tribunal is satisfied that, if the application was not being refused for the reasons already stated, ground 1 would have been established and that it would have been reasonable to grant the order. The Tribunal would also have been minded to order a delay in execution of the eviction order in term of Rule 16A of the Procedure Rules, to allow the Respondents more time to purchase or rent a property. However, although the Applicant provided medical evidence, she did not submit any documentary evidence of financial hardship. In the absence of this evidence, and as ground 1A was not specified in the Notice to leave, the Tribunal would not have been persuaded that the eviction should be granted on this ground.

## **Decision**

**23.** The Tribunal determines that the application should be 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.**

**Josephine Bonnar**

**Josephine Bonnar, Legal Member**

**23 October 2024**