



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/19/1181

Re: Property at 20 Balgray Avenue, Kilmarnock, KA1 4QS (“the Property”)

Parties:

Mrs Jackie Clyde, 56 Drumcroon Road, Colerine, BT51 4ED (“the Applicant”)

Mrs Stacey McNair, 20 Balgray Avenue, Kilmarnock, KA1 4QS (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member)

Decision

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

Background

This is an application for an eviction order dated 8th April 2019 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.

The Applicant seeks an eviction order in relation to the Property against the Respondent, and provided with her application copies of the private residential tenancy agreement, notice to leave, and section 11 notice.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 13th June 2019, and I was provided with the execution of service.

Case Management Discussion

A Case Management Discussion was held on 18th July 2019 at North West Kilmarnock Area Centre, Western Road, Kilmarnock. The Applicant did not appear, but was represented by Mrs Park. The Respondent appeared, and was not represented.

I was invited by Mrs Park with reference to the application and papers to grant the order sought on ground 11 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act 2016*.

The notice to leave, which also advised the tenant that an eviction order would be sought on ground 11, was served by recorded delivery post on 30th January 2019.

The Respondent indicated that she accepted that she had not paid rent, but that this was because she was with-holding payment as a result of the landlord's failure to carry out repairs to leaks at the property which she had reported to the landlord's agents.

Mrs Park confirmed that she was aware of these complaints, but that the Respondent had refused to provide access to tradespeople to effect the necessary repairs.

Statement of Reasons

In terms of Section 51 of the *Private Housing (Tenancies) (Scotland) Act 2016* ("the Act"), 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.

Section 52(2),(3),(4) and (5) 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.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which –

(a) is stated in the notice to leave accompanying the landlord's application in accordance with sub-section (3), or

(b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought."

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.”

The notice to leave at Part 2, has marked ground 11 (you have breached a term(s) of your tenancy agreement) as that which would be relied upon by the landlord in eviction proceedings. Part 3 of the notice specifying the details and evidence of the eviction ground, states “Admitted spending rent twice no rent paid since November” and evidence as being “Break down of rent arrears”.

Ground 11 of Schedule 3 to the Act is in the following terms:

“11 Breach of tenancy agreement

(1) It is an eviction ground that the tenant has failed to comply with an obligation under the tenancy.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if -

(a) The tenant has failed to comply with a term of the tenancy, and

(b) The Tribunal considers it to be reasonable to issue an eviction order on account of that fact.

(3) The reference in sub-paragraph (2) to a term of the tenancy does not include the term under which the tenant is required to pay rent.”

The Applicant purports to rely on ground 11, where the alleged breach of the tenancy agreement is non-payment of rent. However, as may be seen from the relevant legislation, ground 11 does not include non-payment of rent under its provisions, and cannot be relied upon in relation to non-payment of rent.

Non-payment of rent is a ground which may be relied upon in seeking an eviction order, but it is ground 12 of Schedule 3 to the Act which deals with this situation, and not ground 11.

The Tribunal in its letter of 15th May 2019 to the Applicant’s representative pointed out that “The Notice to Leave does not seek to rely on rent arrears as a ground, as the box for same on page 2 has not been ticked. The Application must proceed on the basis of grounds which have been intimated to the tenant in the Notice to Leave”.

That letter also observed that the application purported at page 3, section 5, to use grounds relevant to tenancies under the *Housing (Scotland) Act 1988* rather than the *Private Housing (Tenancies) (Scotland) Act 2016*, and requested that the Applicant’s representative amend the application accordingly.

In response to that letter, the Applicant’s representative provided an amended page 3, section 5, which specified ground 11 as that being relied upon in respect of breach of the term of a tenancy agreement by not paying rent.

The Tribunal may not consider whether ground 12 applies in terms of section 52(5) of the Act, as it is not stated in the notice to leave accompanying the landlord's application, and has not been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

That being so, there are no valid grounds for eviction which the Tribunal is allowed to consider in this application, and accordingly the Tribunal may not issue an eviction order.

The Tribunal also noted that the copy of the private residential tenancy agreement provided by the Applicant's representative with the original application form, at page 2, section 4, "Communication", has ticked the box stating that the parties agree that the e-mail addresses set out in clauses [1 and 2] are to be used for all communications which may or must be made under the Act in relation to the agreement, including notices to be served by one party on the other in writing.

The box in that section stating that this may be done by hard copy by personal delivery or recorded delivery has not been ticked. A further copy of this page was later provided by the Applicant's representative in which that box was also ticked, apparently in response to the Tribunal's letter of 15th May 2019 referred to above, which noted in connection with seeking proof of service/delivery of the notice to leave that "In terms of the tenancy agreement this was to be done by e-mail".

It seems clear that someone has retrospectively ticked the box stating that service may be made by hard copy by personal delivery or recorded delivery. That, however, was clearly not the terms of the agreement which the parties signed.

As above-noted, service of the notice to leave was by recorded delivery post, rather than by the agreed method of service by e-mail, and accordingly the Tribunal concluded that service of the notice was also ineffective.

For the above reasons, the Tribunal cannot grant an eviction order as sought in this application.

Decision

In these circumstances, and for these reasons, the Tribunal dismissed the 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.



Legal Member/Chair

18/07/19

Date