



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

**Chamber Ref: FTS/HPC/EV/20/1802**

**Re: Property at Lochnagar, St Rognvald Street, Kirkwall, Orkney, KW15 1PR  
("the Property")**

**Parties:**

**Mrs Margaret Anne Burgher, Ness, Rapness, Westray, Orkney, KW17 2DE ("the  
Applicant")**

**Ms Lacey Sharpe, Lochnagar, St Rognvald Street, Kirkwall, Orkney, KW15 1PR  
("the Respondent")**

**Tribunal Members:**

**Richard Mill (Legal Member) and Helen Barclay (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the  
Tribunal") determined that the application is incompetent, and the Application  
is Dismissed. Further, and in any event, the Tribunal finds that it would be  
unreasonable to grant an Eviction Order against the Respondent during the  
relevant notice period.**

**Introduction**

1. This is an eviction application under Rule 109 of The First-tier Tribunal Housing and Property Chamber Rules of Procedure 2017 and Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016.
2. Service of the application and intimation of the hearing was effected upon the respondent by Sheriff Officers on 16 December 2020.
3. The hearing was listed for determination by a two member Tribunal on 27 January 2021 at 10.00 am.

4. The applicant did not join the teleconference hearing but was represented by Mr Edward Nicolson of Lows Orkney Limited, Solicitors. The respondent joined the teleconference hearing personally and represented her own interests. She was accompanied by her partner, Mr Stephen Reed, who is a co-tenant.
5. Neither party made any application for an adjournment. Both parties were keen for the Tribunal to determine the application as soon as possible. The Tribunal noted the respondent's initial response to the application. The Tribunal then made inquiry with the applicant's representative regarding the basis of application and the legalities and statutory requirements which must be met. Inquiry was then made with the applicant's representative and the respondent regarding the background and factual circumstances. Both the applicant's representative and the respondent were afforded the opportunity of making concluding submissions. Though not a party to the proceedings, Mr Reed was afforded the opportunity of addressing the Tribunal as he has a clear relevant interest. The Tribunal adjourned on two occasions so as to afford time to the parties and to enable the Tribunal Members to discuss themselves. The Tribunal reserved its decision.

#### Findings and Reasons

6. The property is Lochnagar, St Rognvald Street, Kirkwall, Orkney KW15 1PR. It is a three bedroomed older style detached property.
7. The applicant is Mrs Margaret Anne Burgher. She is the joint heritable proprietor of the property, along with her husband Mr Ian Ingram Burgher. They are both named as landlords in respect of the lease entered into with the respondent who is the tenant, Ms Lacey Sharpe. Mr Burgher has provided written consent to these proceedings.
8. The parties entered into a private residential tenancy in respect of the property which commenced on 1 August 2019. Mr Stephen Reed is also named as a tenant and he signed the lease. He has not been called as a Respondent in these proceedings. The applicant is a registered landlord. The rent was stipulated at £600 per calendar month. A copy of the written lease has been produced.
9. Mr Stephen Reed is the respondent's partner. The applicant knew of his existence and intention to take up occupation of the property with the respondent from the outset. For reasons which are unknown, his details were inserted into the lease late. His name is handwritten into the written lease at Clause 36. Both he and the respondent signed the lease on 24 July 2019. He has not been called as a respondent in these proceedings. The applicant's representative stated that he was unaware of Mr Reed's involvement at the time proceedings were raised. This is surprising given his

name and signature appears on the lease. The applicant's representative advised that, notwithstanding the fact that Mr Reed had not been called as a respondent, any Order should also be made against him as he clearly knows about the proceedings and had joined the conference call. He also advised that he believed the Tribunal had earlier agreed to amend the application to include Mr Reed as a respondent. This has never happened and no application to call Mr Reed as a respondent has ever been made to the Tribunal.

10. The lease specifies that a £600 deposit would be paid. No deposit has ever been paid. The respondent and Mr Reed applied to the local authority rent deposit scheme but were rejected as they did not meet the relevant criteria. No later demands for payment of the deposit have been made.
11. The respondent has fallen into arrears of rent. This is not disputed though the level of arrears is. She remains in possession of the property, together with her partner, Mr Stephen Reed, and their four children.
12. At the commencement of the oral hearing, the Appellant's solicitor advised that he was only proceeding to seek an eviction order on the grounds of rent arrears. Other complaints of the applicant previously raised in the history of the application in relation to other breaches of the lease were not insisted upon.
13. There is a long history to this eviction application and the Tribunal finds it necessary to set out that history as it explains why the situation as at the date of the hearing has come about.
14. The written application to the Tribunal by the applicant, which is dated 7 August 2020 refers to a wish to evict the respondent on the basis of ground 8 (rent is in arrears) and ground 13 (tenancy agreement breached). Such references appeared erroneous to the Tribunal upon the application being processed. The reference to such grounds are those contained within Schedule 5 of the Housing (Scotland) Act 1988. Such provisions and legislation would apply to an assured tenancy. The tenancy between the parties is a private residential tenancy under the 2016 Act. Further information and clarification was requested from the solicitor acting on behalf of the applicant regarding the grounds for eviction, and whether clear and adequate notice had been provided in the relevant Notice to Leave. Also, whilst the Notice to Leave had been produced with the applicant, no proof of service had.
15. Proof of service of the Notice to Leave upon the respondent was thereafter produced in the form of a Post Office posting receipt and relevant signed for proof of delivery. This evidences that the Notice to Leave was sent on

28 February 2020 and was delivered on 29 February 2020. It was sent only to the respondent, not Mr Reed.

16. The Notice to Leave served upon the respondent was dated 27 February 2020. The relevant ground for eviction, as set out in Schedule 3 of the 2016 Act, highlighted in the Notice to Leave, was in respect of the respondent's alleged breach of a term of the tenancy agreement. The box in respect of rent arrears over three consecutive months was not highlighted despite this being a significant factor in the intention to evict. Such Notice refers to ground 11 only.
17. Part 3 of the Notice to Leave, being the narrative of the details of the reasons for eviction to the respondent, referred to rent arrears, failure to pay a relevant deposit and in respect of her keeping animals at the property. The failure to specify grounds other than ground 11 was an error.
18. The service of the Notice to Leave in late February 2020 was prior to the coming into effect of the Coronavirus (Scotland) Act 2020. The relevant notice period in respect of ground 11 as at that time was a period of 28 days. Subsequent correspondence from the applicant's solicitor, making it clear that the main issue justifying the application for eviction was in relation to rent arrears, which is ground 12. The same notice period of 28 days would apply to any required notice on such ground. A Section 11 Notice under the Homelessness etc. (Scotland) Act 2003 was issued to Orkney Islands Council at this same time.
19. Subsequent clarification from the applicant's representative was required. His position was ultimately revealed in terms of a letter dated 23 October 2020. He stated a wish to proceed solely on ground 11 of Part 3 of Schedule 3 of the 2016 Act, namely that a breach of the tenancy agreement had taken place. This was notwithstanding the explanation that the eviction was fuelled mainly by the arrears of rent. A wish to formally amend in such terms was made – from the initial erroneous references to grounds in terms of the 1988 Act. Following such amendment request, additional evidence was requested from the applicant's solicitor in support of that ground, as required by the terms of Rule 109. It was also pointed out to the applicant's representative by the Tribunal that ground 11 relates to a breach of a tenancy agreement, but importantly excludes the tenancy terms which relate to payment of rent. This led to a further letter from the applicant's solicitor dated 4 November 2020 when a further attempt to rely upon the non-payment of rent was made and a further erroneous reference to ground 8 (presumably with reference to the 1988 Act) which, of course, had no relevance.
20. A further letter was issued to the applicant's solicitor dated 18 November 2020 seeking further clarification and seeking to try and assist him. The applicant's

solicitor had still failed to identify the correct ground under the 2016 Act which was sought to be relied upon in the Notice to Leave and still appeared unaware of the correct grounds contained within Schedule 3 of the 2016 Act. It was additionally brought to the applicant's solicitor's attention the errors in the Notice to Leave and how they may be remedied. It was pointed out that the Notice to Leave did not provide advice to the tenant in Part 2 that recovery is sought under the rent arrears ground even although it does advise the tenant that recovery is sought with reference to rent arrears in Part 3. Possible options to seek to remedy were set out in this correspondence to the applicant's representative. A request was also made at that stage for evidence of the rent arrears and any other evidence which was to be relied upon. An affidavit was thereafter produced from the applicant confirming the arrangements in respect of the lease, the fact that no deposit had been paid, that there were rent arrears in the sum of £7,200, and that one or two dogs and up to four cats were kept in the property in breach of the lease. An affidavit in similar terms was also received by the applicant's husband, Mr Ian Burgher. This is dated 30 November 2020. A statement of rent arrears was also produced at that time disclosing that as at 2 November 2020 the sum of £7,200 was outstanding.

21. In response to the Tribunal highlighting, by its letter of 18 November 2020 to the applicant's representative, the defects in the Notice to Leave, a further Notice to Leave was served upon the respondent on 24 November 2020. This also detailed the second tenant, for the first time, Mr Stephen Reed. This Notice to Leave correctly highlighted the respondent's breach of her tenancy agreement and the fact that she was in rent arrears over three consecutive months. Proof of posting on 24 November 2020 was produced. No track and trace signed for evidence has been produced. It appeared that the applicant's representative was abandoning reliance upon the Notice to Leave served upon the respondent in February 2020. There was no clarity in his communications with the Tribunal.
22. The Tribunal considered whether the first Notice to Leave was valid and can be relied upon. The first Notice to Leave, which is dated 27 February 2020, specifies that an application would not be submitted to the Tribunal for an Eviction Order before 2 April 2020. The relevant notice period at that time was 28 days. In terms of Section 62(5) of the 2016 Act, it is to be assumed that the respondent would receive the Notice to Leave 48 hours after it was sent. There is evidence that it was sent on 28 February 2020. 2020 is a leap year. In the circumstances, it is to be assumed that the respondent received the Notice to Leave on 1 March 2020. The 28 day period runs from then. The 28 day notice period would expire on 29 March 2020. In terms of Section 62(4) of the Act the day to be specified as being the date 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 should be the day after the notice period expires. The day specified ought to have been 30 March 2020. The day specified was 2 April 2020. The date specified is wrong.

23. The essential requirements of a Notice to Leave, which are prescribed by section 62(1) have not all been adhered to, because subsection (b) has not been met. This is because the specified day contained within the Notice to Leave, said to be the day on which the landlord expects to become entitled to make an application for an Eviction Order to the First-tier Tribunal, is one day early. There is no dispute that this is the case.
24. The Tribunal considered the potential operation of section 73 of the 2016 Act which deals with minor errors in documents. Such section applies to errors which do not make the document invalid. Some errors do make documents invalid. Section 73 does not apply to errors which materially affect the effect of the document. Section 105 of the 2016 Act contains an explanatory note to Section 73 which states that any errors in specified documents do not invalidate the document, if they are sufficiently minor that they do not materially alter the effect of the document. It is said that the purpose of section 73 is to ensure that a common-sense approach can be taken to meeting the requirements under the Act and that a party is not penalised for an obviously minor error. The protection applies equally to both landlords and tenants. Section 73(2)(d) makes specific reference to errors contained within Notices to Leave.
25. The fundamental requirements of a Notice to Leave are to provide information to the tenant as to why and when proceedings may be raised against them. The “why” element was flawed, all as aforementioned, but taken as a whole, may be seen as giving fair notice to the respondent as to why the applicant was to seek her eviction. The “when” part of the notice is also defective and the Tribunal finds that this is materially so. Properly calculated, the first day the applicant could have made application to the First-tier Tribunal was 30 March 2020. The Notice specified the wrong day – 2 April 2020. This was a later date but was wrong. In fact, the application was not submitted until August 2020 but that is immaterial and does not cure the defect.
26. The Tribunal has had regard to decisions of the First-tier Tribunal in other determined cases on similar points. Though not binding on the Tribunal, these are persuasive and in any legal jurisdiction it is important that the public have confidence in the impartial decision-making of Courts and Tribunals and that the public take comfort in knowing that they will be treated equally with other service users. The Tribunal has had specific regard to the decisions in FTS/HPC/EV/18/3231 and FTS/HPC/EV/19/3416. In the 3231 case the Notice to Leave specified the wrong date by 3 days. It was held to be invalid.

In the 3416 case the Notice specified the wrong date by 1 day only. It was held to be invalid.

27. The Notice to Leave served upon the respondent in February does not specify “the day” on which the applicant was entitled to make an application for an Eviction Order to the First-tier Tribunal. It follows that the notice relied upon in this application is not a Notice to Leave in terms of Section 62(1) of the Act. One of the fundamental requirements clearly set out in the legislation at section 62(1) has not been met. Other erroneous references, mistakes and omissions are capable of being overlooked, but the four fundamental requirements in section 62(1) must be met precisely.
28. The Tribunal refers to and relies upon the reasoning provided by the Tribunal in the cases ending in 3231 and 3416.
29. It is well established law in Scotland that notices to quit must comply strictly with common law and statute, and the Tribunal’s view is that the same approach should apply to the statutory notices to leave required to be served on tenants under the 2016 Act.
30. The Tribunal determined that the Notice to Leave served upon the respondent in February 2020 is not valid. The error within the Notice is a fundamental one. It is not a minor error. Accordingly, it cannot be a Notice to Leave which qualifies for the purposes of Section 52(2) and (3) of the Act. This requires the Tribunal to have before it in an application for an Eviction Order, a Notice to Leave. The first Notice to Leave is not valid and cannot be relied upon. The applicant’s solicitor did not seek to rely upon it.
31. The applicant’s solicitor’s service of the second Notice to Leave was a fall-back position in the event that the Tribunal was to find that the first Notice to Leave was not valid and, as such, could not be relied upon in the eviction application.
32. The second Notice to Leave served upon the respondent and Mr Reed, in November 2020, required to take into account the effect of the Coronavirus (Scotland) Act 2020 and the amended notice periods in place as a consequence of the Covid-19 pandemic. As at the time that this second Notice to Leave was served upon the respondent, the relevant notice periods in respect of the grounds highlighted in the Notice to Leave – breach of tenancy agreement – ground 11, and rent arrears over 3-6 months – ground 12, were both 6 month notice periods. There is evidence that this Notice to Leave was served on the respondent on 24 November 2020. There is a posting receipt from Royal Mail to this effect. In terms of Section 62(5) of the 2016 Act it is to be assumed that the respondent would receive the notice 48 hours after it is sent. It is to be assumed therefore that the respondent received the notice on 26 November 2020. The relevant 6 month notice

period runs from then. The expiry of the 6 month notice period would therefore be 25 May 2021. On the application of Section 62(4) the date to be specified as 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 is the day after ie 26 May 2021. The day specified in this second Notice to Leave is 27 May 2021, which is incorrect.

33. The Tribunal proceeded to consider the validity of the second Notice to Leave. As set out it also contained an error in the dates. It requires to be evaluated differently from the first Notice to Leave due to the amendments brought about by the Coronavirus (Scotland) Act 2020. Paragraph 10 of Schedule 1 to the 2020 Act is in the following terms:

10. Errors in notices

1. Where a notice to which this paragraph applies is completed without taking proper account of paragraphs 1 to 9 –
  - (a) the notice is not invalid by reason of that error, but
  - (b) it may not be relied upon by the landlord for the purpose of seeking an order for possession (however described) until the date on which it could have been relied upon had it been properly completed.

34. In these circumstances the second Notice to Leave which was completed incorrectly, due to the specification of the wrong date by which the landlord would have expected to be in a position to apply to the First-tier Tribunal, is not invalid. There is however a clear direction that it may not be relied upon by a landlord until the date in which it could have been relied upon had it been correctly completed. In this case that would be 26 May 2021. Given the clear direction in terms of Paragraph 10 of Schedule 1 of the 2020 Act, the Tribunal concluded that it would not be competent to rely upon the Notice to Leave at this stage. On that basis, the Tribunal determined that the application should be dismissed. The Tribunal rejected the applicant's solicitor's submission that there has been no prejudice to the respondent.

35. For the sake of completion, the Tribunal continued to consider the application as if the second Notice of Leave was valid. The Tribunal did so at the request of the applicant's solicitor who submitted that the Tribunal should consider the eviction application, relying upon the second Notice to Leave, despite the application having been made during the relevant notice period. Section 54 of the Act sets out a restriction in applying to the First-tier Tribunal for an



Eviction Order until the expiry of the relevant period in relation to that Notice. This second Notice to Leave was served on 24 November 2020.

36. Section 54 of the 2016 Act was amended by the Coronavirus (Scotland) Act 2020 and by subsequent Scottish Statutory Instrument (SSI) (with effect from 3 October 2020). The relevant notice period, as specified previously, was one of 6 months. The 6 month period has not expired and the applicant invites the Tribunal under and in terms of Section 52(4) of the Act to consider the application which is in breach of Section 54 (because the 6 months has not yet expired) on the basis that it is reasonable to do so.
37. Since 7 April 2020 all eviction grounds are now discretionary due to the provisions of the Coronavirus (Scotland) Act 2020. There are no longer any mandatory grounds for eviction. The Tribunal therefore required to consider the reasonableness of considering the eviction application throughout the relevant notice period ie before its expiry, and the reasonableness of the Order itself.
38. The only named respondent in the written application made to the Tribunal is Ms Lacey Sharpe. It is apparent however from the lease and subsequent documents submitted on behalf of the applicant that she is not the only tenant. The originating lease, signed on 24 July 2019 at Section 36, has the name "Stephen Reed" added in addition to Lacey Sharpe. In the same section, the lease is signed by both Mr Reed and Ms Sharpe. There is no doubt that the property was leased to both Ms Sharpe and Mr Reed. The Tribunal has regard to the affidavits of both the applicant and her husband which have been lodged. In paragraph 2 of both Affidavits there are statements which read "The property was leased to Lacey Sharpe and Stephen Reed ...". At some later date the applicant's solicitor appears to have identified the issue with Mr Stephen Reed also being a tenant. The Tribunal notes that the second Notice to Leave and relevant documents were issued to both Ms Sharpe and Mr Reed. However, the current application only seeks an order against Ms Sharpe.
39. The effect of the applicant's agent's failure to call both tenants as respondents in the Tribunal proceedings means that only an Eviction Order can be made against Ms Sharpe. Even in the event of being successful in obtaining an Eviction Order against Ms Sharpe, the Tribunal cannot make an Eviction Order against Mr Reed. The applicant's representative at the hearing advised that he believed that the application had been amended so as to call Mr Reed as a respondent. No application has ever been made by him to do so.
40. In considering reasonableness, the Tribunal requires to take into account all relevant circumstances as they exist as at the date of the hearing. A

balancing exercise must be undertaken in respect of the competing factors and regard has to be had to the proportionality of the Order sought.

41. The direction, as specified above, contained within Paragraph 10 of Schedule 1 to the 2020 Act which specifies that an incorrectly completed Notice to Leave cannot be relied upon until the date on which it could have been relied upon had it been correctly completed is a relevant and initiating factor.
42. Letter reports prepared by Paul Turner, Development and Infrastructure, Orkney Islands Council, are contained within the bundle. These highlight that there is evidence of condensation throughout the property as most, if not all, windows are running with water and black mould staining to the window reveals, walls and areas of ceiling (in particular near external walls). It was noted that a number of personal possessions such as bags, clothes, papers, etc were affected by damp/mould growth. It was additionally identified that there was apparent missing documentation, and in particular no Electrical Inspection Condition Report (EICR) or a valid Energy Performance Certificate (EPC). It was noted that the fire detection system was not to the current required standard. A query was raised regarding the electrics to the now disused doorbell. It was noted that there was loose/insecure flooring in the living room under the window. It was noted that the mechanical extraction ventilation fan in the bathroom fitted into the ceiling was defective in removing wet air due to the poor lay of the flexible pipe in the loft, causing the condensation collected to run back down through the ceiling vent and/or restrict air flow. It was noted that there was additional dampness noted in the loft. Both front and rear eaves rainwater gutters were blocked due to vegetation/leaves and were overflowing. On the rear elevation there was a build-up of waste materials which may enhance the likelihood of problems with damp to that elevation. It is specifically recommended that properly functioning mechanical extract ventilation is provided in high moisture rooms, such as a bathroom or kitchen. A clear conclusion was formed by Mr Turner that there were breaches of the requirements of the Repairing Standard as defined by the Housing (Scotland) Act 2006.
43. The Tribunal was updated in respect of the condition of the property. Electrical work was undertaken in early December 2020. The electrical issues referred to within Mr Turner's Report have been resolved. The respondent supported this assertion. In particular, hardwired smoke alarms and a heat alarm have been installed. No EICR Report has yet been produced however. The applicant's representative advised that the relevant work has been undertaken but the Certificate not produced. This is surprising given the number of weeks which has elapsed. Other than the electrical work, the impression formed by the Tribunal was that no further substantial elements of work have been undertaken and in particular the problems with water ingress

and dampness at the property continue. It seemed to the Tribunal that the withholding of rent was reasonable given the vouched condition of the property. The reports of Mr Turner highlight that some moisture levels recorded were in excess of 40%, which is very high indeed.

44. The applicant's main reason for seeking an Eviction Order at this stage is in relation to arrears of rent. The request that the Tribunal consider the Eviction Order prior to expiry of the relevant notice period, is said to be due to the continued loss of rent being received and the impact upon the applicant.
45. The applicant and her husband own the property jointly. They are farmers. There is a mortgage over the property though the applicant's representative could not advise as to the extent of this, nor the ongoing monthly mortgage payments which require to be paid. There is no suggestion that the continued existence of the mortgage is in jeopardy due to their ability to meet the mortgage payments. No relevant submissions were made regarding their means or financial circumstances. The Tribunal ultimately concluded that the lack of rent payments received in respect of the property are not a significant nor material part of the applicant and her husband's financial arrangements. The effects upon them is not unduly harsh.
46. The respondent lives in the property with Mr Stephen Reed who is her long-term partner. Also resident there are their four children who are aged 15, 11, 6 and 18 months. The respondent is unemployed. Mr Reed is employed but since in or about April 2020 has not been working, but receives income through the Coronavirus Job Retention Scheme (furlough). They have a joint claim for Universal Credit which is in payment. Part of the Universal Credit payments include the housing element which part contributes to the rent obligations to the extent of £54 per week. If evicted the whole family is in a very vulnerable position.
47. The precise level of arrears of rent is disputed. The applicant states that the current level of outstanding rent is in the region of £8,400. The respondent accepted that it is approximately £7,200. No clear up to date rent statement is before the Tribunal. The respondent has retained rent due to the condition of the property. The issues as set out above, which are referenced within the report of Paul Turner, Orkney Highlands Council refers. In particular the respondent has withheld rent due to the damp and mouldy conditions in the property. She, Mr Reed, and their youngest child are sleeping in the living room of the property due to the conditions in the bedroom which they previously occupied. Items of furnishings have been destroyed due to mould. The respondent and Mr Reed have deposited a share of the rent which would be due to the applicant in terms of the lease into a separate ring fenced account pending their complaints about the condition of the property being resolved. No vouching has been produced in respect of these sums, but the

respondent stated that she has approximately £4,000 kept to one side on this basis. If and when paid, and the dispute between the parties about the condition of the property is resolved, then the arrears would fall to some £3,000. Moving forward, around £200 per month is being received in terms of the housing element of the Universal Credit payments, and these, together with some further funds, are being added to the rent fund which the respondent and Mr Reed retain.

48. The Tribunal weighed up all relevant factors in coming to a determination as to whether or not it is reasonable at this point to make an Eviction Order prior to the expiry of the relevant period of notice.
49. The Tribunal reminded itself that the expiry of the relevant period of notice is, or ought to have been, 26 May 2021. That is a further 4 month period.
50. The Tribunal had regard to the fact that the situation which the applicant finds herself in is significantly due to the repeated failures of her legal representative in preparing the necessary documents to be served upon the respondent and his failure to accurately prepare the necessary application to the First-tier Tribunal. The failures of the applicant's representative and the delay caused by that, is not a factor which weighs favourably in the reasonableness balancing exercise in favour of the applicant.
51. Under Part 2 of Schedule 1 to the Coronavirus (Scotland) No 2 Act 2020, Scottish Ministers were given the power to make Regulations setting out pre-action requirements for landlords in relation to certain cases. The Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 were subsequently brought into force and apply in respect of any application made to the Tribunal on or after 6 October 2020. Whilst the origins of this application involve an application being made to the Tribunal in August 2020, the Notice to Leave relied upon by the applicant was not issued until November 2020. The applicant's solicitor advised that the pre-action requirements have not been adhered to. In fact he had never heard of them and an opportunity was afforded to him in the hearing to explore them and other relevant statutory provisions which are applicable. His ultimate submission was that the requirements didn't really affect this action as the respondent and Mr Reed knew of all the relevant factors anyway. The Tribunal found no merit in this suggestion. The failure of the applicant to adhere to the pre-action requirements is a factor which weighs against the reasonableness of the Tribunal considering the application during the notice period or of an eviction order being granted.
52. The respondent advised that she has no desire to remain in the property. She wishes to leave. So does Mr Reed. Neither however consent to the eviction application, understanding that the circumstances are complex. A significant

factor in them wishing to leave is the condition of the property, which they say is substandard, and this is substantially supported by the reports of Mr Turner of Orkney Islands Council. The respondent and Mr Reed have been unable to source any other alternative accommodation. They have been advised by the Council that in the event of an Eviction Order being granted that she will be offered alternative accommodation. Given ongoing coronavirus restrictions such alternative accommodation may not be offered imminently. In order to make an Eviction Order the Tribunal must be satisfied that all of the legalities have been adhered to. The fact that the respondent wants to move from the property is one relevant factor in the reasonableness assessment, but does not cure errors in the legal process.

53. The property is situated within a designated level 3 area for the purposes of Covid-19 restrictions imposed by the Scottish Government. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 12) Regulations 2021 apply. Regulation 5 which came into force on 22 January 2021 prevents in a level 3 area, except in specified circumstances, attendance at a dwelling house for the purpose of serving a charge for removing or executing a Decree for removing from heritable property (giving notice of or carrying out an Eviction Order in relation to a residential tenancy of a dwelling house). The specified circumstances, amounting to an exception are where possession of the dwelling house is sought on the basis of nuisance, annoyance or conviction for using or allowing the dwelling house to be used for immoral or illegal purposes, antisocial behaviour, certain convictions or association with a person who has relevant convictions or a person who has engaged in relevant antisocial behaviour. None of the specified circumstances apply. As things stand, any Eviction Order cannot be implemented in respect of the property. It is currently unknown as to when those restrictions will no longer apply. The fact that, as at the date of the hearing, no eviction can be carried out is a relevant factor.
54. As referred to earlier in this Decision, the applicant's solicitor's failure to call Mr Reed as a respondent means that any order against Ms Sharpe does not have the practical effect which the applicant seeks – namely to obtain vacant possession of the property.
55. Weighing up all relevant factors, the Tribunal concluded that it is not reasonable, for the purposes of Section 52(4) of the Act, to entertain this application for an Eviction Order in breach of Section 54, namely that the relevant notice period has not expired. If the notice period had expired, and all documents and the application were properly prepared, then the Tribunal would have found it reasonable to make the order sought, subject to vouching from the Council being produced evidencing that alternative accommodation would be made available to the respondent and her family.

56. The Tribunal anticipates that the applicant will take steps to remedy the condition of the property in early course and await expiry of the Notice to Leave served in November 2020 before making any fresh application to the Tribunal. The pre-action requirements should be adhered to.

### **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.**

**Richard Mill**

**28 January 2021**

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**Legal Member/Chair**

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**Date**