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 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/19/2518

Re: Property at 9 Connor Court, Girvan, KA26 9DR ("the Property")

Parties:

Mr Christopher Barnes, 46 Maxwell Street, Girvan, KA26 9EJ ("the Applicant")

Mr William Martin, Mrs Suzie Martin, 9 Connor Court, Girvan, KA26 9DR ("the Respondents")

Tribunal Members:

Neil Kinnear (Legal Member) and Gerard Darroch (Ordinary Member)

Decision

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

Background

[1] This was an application dated 9th August 2019 brought in terms of Rule 65 (Application for order for possession in relation to assured tenancies) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

[2] The Applicant sought an eviction order and provided with his application copies of a letter to the local authority confirming the details of an alleged verbal tenancy agreement, notice to quit, section 19 notice (form AT6), Section 11 notice, form AT2, rent arrears statement, and relevant executions of service.

[3] The forms AT6 intimated to the tenants that the landlord intended to raise proceedings for possession of the house on grounds 8, 11 and 12 of Schedule 5 to the *Housing (Scotland) Act 1988*.

[4] All of the documents and forms produced had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied, apart from, arguably, the Form AT2.

[5] The Respondents had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 4th December 2019, and the Tribunal was provided with the executions of service.

[6] A Case Management Discussion was held on 7th January 2020 at Russell House, King Street, Ayr. The Applicant did not appear, but was represented by Miss Cannibal, solicitor. The Second Respondent, Mrs Suzie Martin, appeared, and was supported by her daughter, Miss Karen Martin. The First Respondent did not appear, but was represented by the Second Respondent.

[7] The Tribunal confirmed with the parties that there were a number of important factual matters in dispute between the parties, which are more fully identified and set out in the Case Management Discussion note prepared by the Tribunal of 7th January 2020. In consequence, the Tribunal set a Hearing. It was not subsequently suggested by either party, who each received a copy of the Tribunal's Case Management Discussion note, that there were any inaccuracies in what it recorded.

[8] Some of the issues which the Tribunal noted in relation to the parties' respective positions on the factual background at the Case Management Discussion are of particular importance, and were noted by the Legal Member as follows.

[9] "2. There was some discussion around the date of commencement of the tenancy. It was accepted that there was no formal tenancy agreement but it was suggested by Miss Martin that had been a number of letters sent to South Ayrshire Council in 2011 with different proposals for the tenancy of the property and not just the one that had been lodged by the Applicant's solicitors with the application. There was no agreement that the tenancy actually commenced on 25th September 2011. It was suggested by Miss Martin that her parents may have moved into the property before 25 September 2011.

3. It was accepted by Ms Cannibal that in order for the Tribunal to grant an order under any of grounds 8,11 or 12 of Schedule 5 of the Housing (Scotland) Act 1988 it was necessary for the contractual tenancy to have been brought to an end and a statutory tenancy created. She submitted that this had been done by service of the Notice to Quit terminating the tenancy on 25 September 2018 as that was the ish date being the anniversary of the date of commencement. She did not think that there was any relevance in the date that rent was said to be due being the 21st of each month. It was accepted that although the level of rent prior to 21 January 2019 may not have been agreed as being £320.00 per month that was the amount that had been paid by the Respondents to the Applicant since they moved into the property in 2011. It was also agreed that the Applicant was not claiming any arrears prior to 21 January 2019.

4. It was accepted that the Applicant's solicitors had served an AT2 dated 20 July 2019 on the Respondents by recorded delivery and that this was delivered on 23 July 2019.

It was accepted by the Respondents that they did not take any steps to legally challenge the proposed increase in rent to £600.00 but they submitted that the Respondent's daughter Miss Karen Martin had reached an informal agreement with the Applicant that in exchange for the Applicant not paying Child maintenance to her for their son the rent would not be increased. Mrs Martin also said there had been correspondence for the Applicant's solicitor offering a new rental agreement at a rent of £350.00 per month and then at £450.00 per month. Ms Cannibal confirmed there had been correspondence to that effect but that the Respondents had not replied to either letter. She disputed there had been any agreement between the Applicant and Miss Martin to restrict the rent.

5. Miss Martin made reference to the documents submitted on the Respondents behalf by Mathie Morton, Solicitors which she said confirmed that it had previously been agreed that the Applicant would not increase the Respondents rent. She also referred to the Minute of Agreement between herself and the Applicant and in particular Section 6. Miss Cannibal submitted that the Minute of Agreement had no relevance to the issues between her client and the Respondents.

6. It appeared to the Tribunal that there were issues of personal bar being raised that would require evidence to be led at a hearing."

[10] The supporting documents lodged with the application form included a rent arrears statement and the form AT2 with proof of service. The rent arrears statement refers to seven months, being noted as 21 January 2019, 21 February 2019, 21 March 2019, 21 April 2019, 21 May 2019, 21 June 2019 and 21 July 2019. It notes rent due for each month of £600.00, the amount and date of payments made, the deficit in payment for each month, and the total arrears as at each month.

[11] The Hearing date set was allocated to a differently constituted Tribunal, which continued to deal with this application thereafter. The Tribunal noted in advance of the Hearing, that there appeared to it to be a potential issue regarding the legal validity of the form AT2. Unfortunately, this issue had not previously been identified or drawn to the attention of the parties.

[12] The form AT2 is dated 20th July 2018. The Applicant served the document by recorded delivery post, and provided proof of delivery on 23rd July 2018. The form AT2 states that the new rent proposed by the Applicant of £600.00 per month is to take effect from 21st January 2019.

[13] Section 24 of the *Housing (Scotland) Act 1988* provides *for* a minimum notice period of six months for a notice where the duration of the lease is 6 months or more, as is the case here.

[14] On the face of it, the form AT2 does not comply with section 24, as the notice period is 2 days short of the 6 month minimum notice period. If that is the case, then the notice is arguably invalid, and the Applicant cannot rely upon it.

[15] The Tribunal e-mailed the Applicant's representatives to alert them to this issue, and invited them to provide their response to it. They duly did so by e-mail of 11th

February 2020, in which they indicated that they sought to rectify the form AT2 to change the date of 21st January 2019 to 25th January 2019.

[16] The basis upon which they sought to do so is that they asserted that the date in each month when payment of rent was due was the 25th. They relied upon section 8 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985*.

[17] The Tribunal immediately posted out the Applicant's representatives' response to the Respondents on 11th February, but appreciated that the Respondents were unlikely to receive this before the Hearing the following day.

[18] A Hearing was held on 12th February 2020 at Russell House, King Street, Ayr. The Applicant did not appear, but was represented by Miss Grosvenor, solicitor. The Second Respondent, Mrs Suzie Martin, appeared, and was represented by her daughter, Miss Karen Martin. The First Respondent did not appear, but was represented by the Second Respondent and Miss Martin.

[19] The Tribunal had a helpful discussion with the parties concerning the potential issue of the validity of the form AT2. The Respondents confirmed that they had not received the Tribunal's letter enclosing the Applicant's representatives' response.

[20] The Tribunal explained the nature of the issue, the Applicant's response to it, and the effect of what the Applicant was seeking to do. It then rose to allow the Respondents a few minutes to consider the matter.

[21] Upon resuming, the Respondents indicated that they wished an opportunity to seek legal advice on the issues raised by the Tribunal, and on Miss Grosvenor's response to it.

[22] The Tribunal considered, and Miss Grosvenor very fairly accepted, that there was good reason why an adjournment was necessary, in circumstances where complex legal issues had only been raised for the first time in relation to the form AT2, which the Respondents required legal advice upon. The Tribunal adjourned the Hearing to a further date.

[23] The Tribunal then had a further discussion with those present concerning further procedure in this case. Miss Martin raised another new issue at this point, asserting that the letter to the local authority confirming the details of the verbal tenancy agreement, and which bore to be signed by the parties, bore signatures said to be of the Respondents which were not theirs. The Tribunal suggested to her that the Respondents might benefit from obtaining legal advice upon that issue also, and upon what the Respondents' position might be as a result of that.

[24] It appeared to the Tribunal that the question of the validity of the form AT2 was fundamental to this application. If the Tribunal, after hearing submissions, concluded that the form AT2 was invalid and ineffectual, then it might have to dismiss this application.

[25] Miss Grosvenor accepted that possibility, but noted that in that event, the Tribunal might permit the Applicant to amend his application to add earlier arrears of rent which he has not so far relied upon in the current application.

[26] The Tribunal and the parties agreed that it would be sensible to continue the Hearing to another date, at which no evidence would be led, and at which parties would make legal submissions regarding the question of the validity of the form AT2. Once the Tribunal had reached a view on that question, the parties might then address the Tribunal on further procedure, which might very much depend on the Tribunal's view of the validity of the form AT2.

[27] The Tribunal also issued a direction to the parties for them to each lodge a list of the legal authorities upon which they intend to rely in their submissions on the validity of the form AT2 no later than seven days in advance of the continued Hearing to be set.

[28] A further Hearing was set for 6th April 2020. That Hearing had to be cancelled as a result of the coronavirus pandemic, and the lockdown imposed in the United Kingdom as a consequence thereof. The Parties and the Applicant's representative were subsequently notified with the details of a Tele-Conference set for 7th August 2020 and provided with dial-in details.

[29] Miss Grosvenor provided the Tribunal on 30th July 2020 with extensive, detailed and lengthy authorities in support of the Applicant's legal position.

[30] The Tribunal was contacted by Miss Martin shortly before the continued Hearing to advise that her father was very ill and in hospital, and that her mother was also extremely unwell. Neither would be fit enough to participate in the Hearing, and she sought a postponement which the Tribunal granted in those circumstances.

[31] Thereafter, a further Hearing was set, and the Parties and the Applicant's representative were subsequently notified with the details of a Tele-Conference and provided with dial-in details.

[32] A further Hearing was held at 10.00 on 2nd September 2020 by Tele-Conference. The Applicant did not participate, but was again represented by Miss Grosvenor, solicitor. Neither Respondent participated, but both were again represented by their daughter, Miss Karen Martin.

[33] In preliminary discussions, Miss Martin indicated that she was unaware of, and had not received, copies of Miss Grosvenor's e-mail of 30th July 2020 with her legal authorities. She explained that she attended her parent's house each day, and collected and looked through all their mail, and she had definitely not seen this material.

[34] The Tribunal clerk made enquiries, which revealed that unfortunately through administrative error on the part of the Tribunal this important material had not been copied to the Respondents, as it should have been.

[35] Miss Martin considered that she would be unfairly prejudiced if the Hearing proceeded today, as she had not had an opportunity to see the material the Applicant relied upon, nor to seek legal advice upon it.

[36] Miss Martin explained that she had spoken with a solicitor about the issues in this application, but that because she had not received the legal authorities relied upon by Miss Grosvenor, she had not had an opportunity to seek advice on the legal arguments Miss Grosvenor might make about those authorities.

[37] Miss Martin noted that she had no legal training or knowledge, and would be greatly prejudiced if the matter proceeded today in these circumstances.

[38] Miss Grosvenor recognised that it would be unjust to expect Miss Martin to respond to her arguments today, but in an effort to make good use of the Tribunal's time, suggested that she might make her submissions today, after which the Tribunal might adjourn to allow Miss Martin to seek advice and respond at a continued Hearing.

[39] Miss Grosvenor helpfully e-mailed the Tribunal a copy of detailed written submission on the authorities which she had prepared, and the Tribunal records its gratitude to her for doing so.

[40] The Tribunal rose to consider Miss Martin's application to adjourn.

[41] Upon resuming, the Tribunal granted the adjournment. The Tribunal regretted the administrative error made, and recognised the frustration that caused to Miss Grosvenor and the Applicant. However, the legal arguments which Miss Grosvenor sought to make were relatively complex, and it seemed to the Tribunal that it would be unjust for Miss Martin to hear those without the opportunity to consider the authorities in advance and take legal advice upon them.

[42] For that reason, and with reference again to Rules 2 and 28 above-mentioned, the Tribunal adjourned the Hearing and set a continued Hearing at which no evidence would be led, and at which parties would make legal submissions regarding the question of the validity of the form AT2.

[43] A further continued Hearing was held at 10.00 on 28th October 2020 by Tele-Conference. The Applicant did not participate, but was again represented by Miss Grosvenor, solicitor. Neither Respondent participated, but both were again represented by their daughter, Miss Karen Martin.

[44] Miss Grosvenor made detailed and lengthy legal submissions upon the issues of firstly, whether the Tribunal has jurisdiction to consider an application for rectification of the Form AT2 in terms of section 8 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985*, and secondly, if it does, whether the Form AT2 falls within the category of documents which might be rectified in terms of that Act.

[45] Miss Grosvenor invited the Tribunal, upon the basis that it answered both these questions in the affirmative, to allow the Applicant to lodge a written amendment to

introduce an application for rectification of the Form AT2 in these proceedings within seven days of today's date.

[46] Miss Grosvenor submitted that the Tribunal would require to hear evidence upon this issue before it would be in a position to decide whether the Applicant's application to rectify should be granted or not.

[47] Miss Martin confirmed to the Tribunal that she had managed to obtain legal advice from a solicitor on the various issues raised.

[48] After the Tribunal explained the procedure to her, Miss Martin accepted that the Tribunal has jurisdiction to consider an application to rectify, and that in principle section 8 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985* might apply to a document such as the Form AT2.

[49] However, she made very clear that she would be arguing that upon the evidence to be heard the Tribunal should refuse any application to amend the Form AT2.

[50] Miss Martin also gave notice to the Tribunal and to Miss Grosvenor that she would argue that the Applicant was personally barred from bringing this application as a result of the provisions contained in Clause 6 of a Minute of Agreement between her and the Applicant dated 8th and 12th November 2013 and registered in the Books of Council and Session on 20th February 2014, which had already been lodged with the Tribunal.

[51] The Tribunal rose to consider the parties' submissions.

[52] Upon resuming, for the reasons set out later in this decision, the Tribunal accepted Miss Grosvenor's submissions that it has jurisdiction to entertain an application to rectify the Form AT2, and that the Form AT2 falls within the category of documents which might be rectified. The Tribunal also accepted her submission that the Tribunal would require to hear evidence in order to decide upon whether rectification should be allowed or not.

[53] That being so, the Tribunal consented to the Applicant's application to amend in terms of Rule 14 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, and allowed him seven days to provide a written amendment. The Respondents were given an opportunity to make written representations in response to the amendment, if they so wished, by 25th November 2020.

[54] Both parties invited the Tribunal to conduct a Hearing of all the evidence in this matter by video-conference, and the Tribunal agreed that standing the factual disputes involved in this matter that this was appropriate and desirable.

[55] The Tribunal set a Hearing to be conducted by video-conference for it to hear evidence and legal submissions upon all the matters in dispute between the parties.

Continued Hearing

[56] The Hearing was continued and evidence was heard over 23rd February, 6th April, 14th June 2021, and 6th July by Tele-Conference. The Applicant participated on the first day, and was again represented by Miss Grosvenor, solicitor. Neither Respondent participated, but both were again represented by their daughter, Miss Karen Martin.

[57] The Tribunal heard evidence from the Applicant, from Ms Fiona Simpson, and from Miss Martin. Though they differed on certain elements of detail, there was little dispute about the facts in this matter. The real dispute between them concerned the legal effect of those facts.

Findings in fact

[58] After hearing all the evidence led by both parties on the issues in dispute between them and upon which the Tribunal requires to reach a decision, the Tribunal found in fact:

1) That the Applicant and the Respondents' daughter, Miss Karen Martin, had been in a personal relationship, and cohabited until they separated on 23rd October 2013.
2) That the Applicant purchased the Property as an investment, and let it to the Respondents from on or about 25th September 2011.
3) That the monthly rent for the Property was £320.00 paid every four weeks.
4) That the Applicant served a form AT2 purporting to increase the rent to £600.00 per month with effect from 21st January 2019.
5) That the form AT2 was dated 20th July 2018, and was served on the Respondents by recorded delivery post on 23rd July 2018.
6) That the Respondents after service of the form AT2 have continued to pay rent of £320.00 every four weeks, and have not paid rent at the increased rate of £600.00 per month upon the basis that the form AT2 is ineffective.
7) That the Applicant sought repossession of the Property on grounds 8, 11 and 12 of Schedule 5 of the *Housing (Scotland) Act 1988*, upon the basis that the Respondents were in arrears of rent as a result of their continuing to pay rent at £320.00 every four weeks from 21st January 2019 instead of the increased rental of £600.00 per month from that date.
8) That the Applicant sought an order in terms of section 8(1)(b) of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985* to amend the form AT2 to specify that the rent would increase with effect from 25th January 2019.
9) That section 24 of the *Housing (Scotland) Act 1988* provides for a minimum notice period of six months for a notice where the duration of the lease is 6 months or more, as is the case here.
10) That the form AT2 does not comply with section 24, as the notice period is 2 days short of the 6 month minimum notice period.
11) That the Applicant served a notice to quit, form AT6, and section 11 notice timeously prior to presenting this application.
12) That the form AT2 accurately expressed the intention of the Applicant as granter of the document at the date when it was executed.

13) That if the form AT2 is invalid, then the Respondents are not in arrears of rent.

Finding in law

[59] The Tribunal found in law:

1) That the form AT2 is invalid, as it failed to provide the minimum period of notice of 6 months required in terms of section 24 of the *Housing (Scotland) Act 1988.*
2) That as the Tribunal is not satisfied that the form AT2 failed to express accurately the intention of the Applicant as granter of the document at the date when it was executed, it will refuse to grant an order in terms of section 8(1)(b) of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985*.
3) That the Respondents are not in arrears of rent, and accordingly grounds 8, 11 and 12 of Schedule 5 of the *Housing (Scotland) Act 1988* are not met.

The Evidence

[60] The evidence concerning the background to the tenancy of the Property, and the history of matters thereafter, was largely not contentious. The critical issue in dispute between the parties was the validity or otherwise of the form AT2. To that end, much of the contentious evidence related to the intention of the Applicant when the form AT2 was executed, and whether the form AT2 failed to express accurately that intention.

[61] Miss Grosvenor properly accepted that if the form AT2 was invalid and the attempt to increase the rent with the service of the form AT2 was ineffective, then there are no arrears and this application must fail. She also properly conceded that as insufficient notice had been given in terms of section 24 of the *Housing (Scotland) Act 1988*, the form required to be rectified if it was to be effective.

[62] The Tribunal heard evidence from the Applicant. The Tribunal found his evidence to be generally credible, but unreliable with respect to the crucial issue of the circumstances in which the form AT2 was executed.

[63] The Applicant explained that he had been in a relationship with the Respondents' daughter, Miss Martin. He purchased the Property as an investment, and leased the Property to the Respondents who received housing benefit payments towards the rental.

[64] The dates when payment of rent was due had changed over time. Initially, rent was to be paid on the 25th day of each month as the lease commenced on the 25th September 2011, but that quickly changed to payment of £320.00 every four weeks.

[65] Matters continued as before after the Applicant and Miss Martin separated, until changes in taxation for landlords and an increase in his mortgage payments for the Property caused him to seek to increase the level of rent. Rent levels had also increased in the locality around that time.

[66] The Applicant explained that his intention when he asked his legal representatives to draft and serve a form AT2 to increase the rent was that it should take effect on the 25th January 2019, and not on the 21st January 2019. The reason he wished the rent increase to take effect on the 25th January 2019, was that he considered that that the 25th day of each month was the day when the rent was due to be paid. The date in the form when the increase of rent was to take effect of 21st January 2019 was an error. It was always his intention that the increase should take effect on the 25th January 2019.

[67] The Respondents did not respond to the form AT2, and continued to pay £320.00 every four weeks as before. The Applicant's position was that they should have paid £600.00 per month from the 25th January 2019. As a result of not doing so, they were now in substantial arrears of rent.

[68] It was put to the Applicant that in his application form to the Tribunal dated 9th August 2019, in section 5 concerning additional information regarding eviction grounds it is stated that "Rent was increased by way of Form AT2 dated 20 July 2018 to £600 per month, which took effect from 21 January 2019". The Applicant responded that this statement repeated the error in the form AT2 regarding the date of 21st January 2019.

[69] In his application form, at section 6, is listed various documents lodged with the application. Item 4 includes a rent statement. That statement lists the dates when rent was due in the period January to July 2019 as being 21st January 2019, 21st February 2019, 21st March 2019, 21st April 2019, 21st May 2019, 21st June 2019 and 21st July 2019. The Applicant accepted that he had prepared that document.

[70] Item 3 at section 6 of the application form lists the form AT6 served on the Respondents. Part 3 of that document states that "Rent was increased by way of Form AT2 dated 20 July 2018 to £600 per month, which took effect from 21 January 2019".

[71] Thereafter, on 29th January 2020, the Applicant's representatives lodged an inventory of productions for the Applicant which included as item 26 an updated rent arrears statement for the period January 2019 to January 2020. That statement lists the dates when rent was due in that period as being the 21st day of each month. That inventory also included as item 22, a letter sent by the Applicant's legal representatives to the Respondents dated 3rd July 2019 which states *inter alia* "We refer to the Form AT2 dated 20th July 2018 intimating that the rent of the Property would increase to £600.00 per month from 21 January 2019". Item 20 is another letter sent by the Applicant's legal representatives to the Respondents dated 5th July 2018 which states *inter alia* "You will have received notice in form AT2 that the rent for the Property will increase to £600.00 per month with effect from 30 December 2018". A copy of the earlier form AT2 referred to is not produced. Item 19 is a further letter sent by the Applicant's legal representatives to the Respondents dated 14th June 2018 which states *inter alia* "We refer to the Notice to Quit and form AT2 dated 5 June 2018, which this letter should have been enclosed with. Should you be agreeable to the increase in rent to the market value rent of the Property of £600.00 per month, as intimated in the Form AT2, your current tenancy will continue and the new rental charge of £600.00 per month will take effect on 5th November 2018".

[72] As earlier explained, the Tribunal noted in advance of the Hearing set for 12th February 2020, that there appeared to it to be a potential issue regarding the legal validity of the form AT2. Unfortunately, this issue had not previously been identified or drawn to the attention of the parties. By e-mail to the Applicant's representatives dated 10th February 2020, the Tribunal drew the Applicant's representatives' attention to that potential issue. In response, the Applicant intimated on 11th February 2020 a motion to amend the application to seek an order under section 8(1)(b) of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985* to amend the form AT2 to specify that the rent would increase with effect from 25 January 2019.

[73] In response, the Applicant stated that all of the items lodged by him which either referred to the date when payment of rent was due as being the 21st day of each month, or referred to three different dates when a rent increase in terms of two different forms AT2 would take effect, being 5th November 2018, 30th December 2018 and 21st January 2019, were simply further errors.

[74] The Tribunal next heard evidence on behalf of the Applicant from Ms Fiona Simpson. The Tribunal found her evidence to be credible and reliable. She impressed the Tribunal with her candour in response to questions.

[75] Ms Simpson confirmed that she was the Applicant's partner, and had cohabited with him for four years. She was aware of the history between the parties, and was aware of the background to this application.

[76] Ms Simpson stated that she had attended the Applicant's meetings with his legal representatives. In particular, she had attended the Applicant's meeting with his legal representatives where he had passed them papers and instructed them to prepare a form AT2 to increase the rent in respect of the property.

[77] Ms Simpson gave evidence that the Applicant asked his legal representatives if the date when the rent increase took effect needed to be the 25th day of the month. Ms Simpson's evidence was that neither the Applicant nor her told the Applicant's legal representatives that the rent increase was to take effect from the 25th day of the month, as she and the Applicant would not tell his legal representatives how to do their job.

[78] Finally, the Tribunal heard evidence on behalf of the Respondents from Miss Karen Martin. The Tribunal found her evidence to be credible and reliable. She impressed the Tribunal with her candour in response to questions.

[79] Miss Martin gave a detailed history of her and her parents' relationship with the Applicant, and her and their dealings with him in relation to the Property, much of which does not need to be repeated in this decision in detail as it does not bear on the critical issues in dispute between the parties.

[80] She gave evidence and spoke to the separation agreement between her and the Applicant (item 2 of the inventory of productions for the Applicant), which included a provision at clause 6 where it was agreed that her parents "will continue to reside in the Connor Court Property provided that they continue to pay a rental" to the Applicant. She relied on that provision as being an agreement by the Applicant that he would not

seek to remove her parents from the Property if they continued to pay a rental, which they had continued to do.

Submission on behalf of the Applicant

[81] Miss Grosvenor helpfully provided full and detailed written submissions to the Tribunal, and the Tribunal records its gratitude to her for doing so. The Tribunal will not repeat those submissions in detail, but instead will summarise the issues which she raised in them.

[82] The Applicant accepted that if the rent had not been validly increased by him in terms of the form AT2, then the Respondents were not in arrears, and accordingly the ground he relied upon in seeking the order sought would not be made out.

[83] The Applicant also accepted that the form AT2 did not comply with section 24 of the *Housing (Scotland) Act 1988*, as the notice period was 2 days short of the 6 month minimum notice period. However, the Applicant sought to rely upon section 8(1)(b) of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985*. It was his position that the form AT2 failed to express accurately the intention of the Applicant as granter of the document at the date when it was executed, and for that reason the Tribunal should rectify it by altering the date of 21st January 2019 (the date from which the rent increase was to take effect) to the date of 25th January 2019 (which the Applicant stated had been the date he intended the form AT2 to take effect from).

[84] Miss Grosvenor submitted that the Tribunal should be satisfied from the evidence that the form AT2 failed to express accurately the intention of the Applicant as granter of the document at the date when it was executed. She submitted that the Tribunal had jurisdiction to make an order for rectification in terms of section 8(1)(b), and that the form AT2 falls within the category of documents which might be rectified in terms of that section.

[85] If the Tribunal rectified the form AT2, then the rent would have been validly increased with effect from 25th January 2019, and in that event the ground for eviction relied upon would be made out.

Submission on behalf of the Respondents

[86] Miss Martin accepted that the Tribunal had jurisdiction to rectify the form AT2 in terms of section 8(1)(b), but submitted that it should not do so. She argued that the evidence did not establish that the form AT2 failed to express accurately the intention of the Applicant as granter of the document at the date when it was executed. She submitted that all of the surrounding contemporaneous documentation and the evidence of Ms Simpson contradicted the Applicant‘s position.

[87] Further, Miss Martin relied upon the separation agreement between her and the Applicant, which included a provision at clause 6 where it was agreed that her parents “will continue to reside in the Connor Court Property provided that they continue to pay

a rental" to the Applicant. She relied on that provision as being an agreement by the Applicant that he would not seek to remove her parents from the Property if they continued to pay a rental, which they had continued to do. She argued that the Applicant was personally barred from seeking to remove the Respondents from the Property as a result of the separation agreement.

Statement of Reasons

[88] In terms of Section 18(4) of the *Housing (Scotland) Act 1988* as amended ("the 1988 Act"), if the Tribunal is satisfied that any of the grounds in Part I or Part II of Schedule 5 to the 1988 Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

[89] Both parties accepted that as the Applicant relied upon grounds 8, 11 and 12 of schedule 5 to the 1988 Act, it is an essential pre-requisite that the Respondents are in arrears of rent. Both parties also accepted that if the Applicant did not effectively increase the rent by virtue of the form AT2, then the Respondents have no rent arrears, in which event this application must be dismissed.

[90] Miss Grosvenor accepted that the form AT2 did not comply with section 24 of the 1988 Act, as the notice period was 2 days short of the 6 month minimum notice period. She accepted that the form AT2 would be ineffective if it was not rectified by the Tribunal in terms of section 8(1)(b) of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985* (the 1985 Act"), as the Applicant invited the Tribunal to do.

[91] Accordingly, the key question for the Tribunal to decide in this application was whether to order that the form AT2 be rectified in the manner sought by the Applicant.

(a) Jurisdiction

[92] Both parties submitted that the Tribunal has jurisdiction to rectify a document in terms of section 8(1) of the 1985 Act. With that submission the Tribunal agrees.

[93] Section 16 of the *Housing (Scotland) Act 2014* provides as follows:

"16. Regulated and assured tenancies etc.
(1) The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal -

(a) a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

(b) a Part VII contract (within the meaning of section 63 of that Act),

(c) an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

(2)But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.

(3)Part 1 of schedule 1 makes minor and consequential amendments."

[94] The Upper Tribunal considered the extent of the jurisdiction of this Tribunal in relation to Private Residential Tenancies in the *Appeal of Kenneth Anderson* [2019] UT 48. The principals involved are very similar to those in relation to leases under the 1988 Act. In paragraph [8] and [14] of its judgement, the Upper Tribunal observed:

"[8] It is noteworthy that the starting point is to award to the FtT the whole of the powers of a sheriff, and then to limit these by reference to those "arising from" a PRT. The tenor is that the FtT is given such powers as is necessary for the purposes of dealing with a particular subject area and, just as significantly, the sheriff court is deprived of those powers. It appears that the traditional narrow approach taken by the courts, in considering exclusion of their own jurisdiction, would in this instance be somewhat at odds with the intention of the legislature.

[14] Second, the natural and ordinary effect of the words "arising from" is unrestricted and imprecise, and invites a wide, inclusive approach. It is quite the opposite of a defined award. It tends to show that the legislature intended the FtT to deal with all PRT-related events, to the exclusion of the sheriff court, and not just the core lease".

[95] The Inner House of the Court of Session took a similar view of the wide interpretation to be applied to the jurisdiction of this Tribunal when considering section 16 of the *Housing (Scotland) Act 2014* in *SW v Chesnutt Skeoch Ltd* 2021 SLT 276. In the opinion of the Court delivered by Lord Doherty, it stated at paragraph 29:

"…Part of the context for introducing s.16 was a widely held view that the existing system for resolving private rented housing disputes in the sheriff court was unsatisfactory. It was slow, overly adversarial, weighted against tenants, non-specialist, and prone to inconsistency of decision making between sheriff courts. These were all matters which it was considered would be improved by transferring the disputes to a specialist tribunal. Those existing problems were the mischief which s.16 was intended to remedy. The purpose of transfer of these disputes to the tribunal was to improve those matters for both landlords and tenants (but in particular for tenants). It was no part of that purpose that the grounds for raising an action, or the issues to be taken into account when deciding a case, should change. As the matter was put at para.125 of the stage 1 report on the Bill in the Scottish Parliament: "The grounds which allow someone to raise an action, and the issues to be taken into account when deciding a case, will not change; but decisions will be taken by a tribunal rather than a sheriff …".".

[96] The Tribunal considers that the application seeking an order to rectify the form AT2 is just such an issue to be taken into account when deciding a case, and forms part of the functions and jurisdiction of the sheriff in relation to actions arising from tenancies under the 1988 Act which are transferred to this Tribunal.

(b) Application for Rectification of the Form AT2

[97] Section 8(1) and (2) of the 1985 Act provides:

"8.- Rectification of defectively expressed documents.

(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—

(a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made; or

(b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,

it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.

(2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral.".

[98] The Applicant seeks to rectify the form AT2 by changing the date from which the rent is increased from 21st January 2019 to 25th January 2019. He relies upon section 8(1)(b) of the 1985 Act and submits that the Tribunal should be satisfied that the form AT2 failed to express accurately his intention at the date when it was executed, being the 20th July 2018.

[99] The effect of rectifying the form AT2 would be to render it legally effective, as the period from when it was served on the Respondents (23rd July 2018) to the date when the increase in rent would commence (25th January 2019), would be more than the 6 month minimum period of notice provided for in section 24 of the 1988 Act.

[100] After considering all the relevant written and oral evidence, the Tribunal was not satisfied that the form AT2 failed to express accurately the Applicant's intention at the date when it was executed for the following reasons.

[101] The Applicant gave clear oral evidence that his intention when he asked his legal representatives to draft and serve a form AT2 to increase the rent was that it should take effect on the 25th January 2019, and not on the 21st January 2019. The date in the form when the increase of rent was to take effect of 21st January 2019 was an error. It was always his intention that the increase should take effect on the 25th January 2019. However, all of the written evidence and the oral evidence of Miss Simpson contradicted this assertion.

[102] In the Applicant's application form to the Tribunal dated 9th August 2019, in section 5 concerning additional information regarding eviction grounds it is stated that "Rent was increased by way of Form AT2 dated 20 July 2018 to £600 per month, which took effect from 21 January 2019". At section 6 are listed various documents lodged with the application. Item 3 at section 6 of the application form lists the form AT6 dated 24th July 2019 which was served on the Respondents. Part 3 of that document states

that “Rent was increased by way of Form AT2 dated 20 July 2018 to £600 per month, which took effect from 21 January 2019”. Item 4 includes a rent statement. That statement lists the dates when rent was due in the period January to July 2019 as being 21st January 2019, 21st February 2019, 21st March 2019, 21st April 2019, 21st May 2019, 21st June 2019 and 21st July 2019. The Applicant accepted that he had himself prepared that document. It had not been prepared by his representatives on his behalf.

[103] On 29th January 2020, the Applicant’s representatives lodged an inventory of productions for the Applicant which included as item 26 an updated rent arrears statement for the period January 2019 to January 2020. That statement lists the dates when rent was due in that period as being the 21st day of each month. That inventory also included as item 22, a letter sent by the Applicant’s legal representatives to the Respondents dated 3rd July 2019 which states *inter alia* “We refer to the Form AT2 dated 20th July 2018 intimating that the rent of the Property would increase to £600.00 per month from 21 January 2019”.

[104] It may be seen that all of the documentation produced and relied upon by the Applicant in this application is consistent in stating that the rental of the Property was to increase with effect from 21st January 2019, and not from 25th January 2019.

[105] At the first Case Management Discussion on 7th January 2020, the Applicant’s representative submitted to the Tribunal that she did not think that there was any relevance in the date that rent was said to be due being the 21st of each month. It was accepted that although the level of rent prior to 21 January 2019 may not have been agreed as being £320.00 per month that was the amount that had been paid by the Respondents to the Applicant since they moved into the property in 2011. It was also agreed that the Applicant was not claiming any arrears prior to 21 January 2019.

[106] Again, it may be seen that prior to the issue of the inadequate notice period from service of the form AT2 being raised by the Tribunal, the Applicant’s representatives were consistent in submitting that rent was said to be due on the 21st day of each month, and not the 25th day.

[107] The inventory of productions for the Applicant lodged on 29th January 2021 included item 20, which is apparently another earlier letter sent by the Applicant’s legal representatives to the Respondents dated 5th July 2018 which states *inter alia* “You will have received notice in form AT2 that the rent for the Property will increase to £600.00 per month with effect from 30 December 2018”. A copy of the earlier form AT2 referred to is not produced, but it is clear that the date from when the proposed rent increase was to take effect was not the 25th day of the month.

[108] Item 19 of that inventory is yet another letter apparently sent by the Applicant’s legal representatives to the Respondents dated 14th June 2018 which states *inter alia* “We refer to the Notice to Quit and form AT2 dated 5 June 2018, which this letter should have been enclosed with. Should you be agreeable to the increase in rent to the market value rent of the Property of £600.00 per month, as intimated in the Form AT2, your current tenancy will continue and the new rental charge of £600.00 per month will take effect on 5th November 2018”. Again, a copy of the earlier form AT2

referred to is not produced, but again it is clear that the date from when the proposed rent increase was to take effect was not the 25th day of the month.

[109] All of these documents show that a number of different dates were advanced in different statutory forms for the date when proposed rent increases would take effect. In none of these is there any indication that significance was attached to the 25th day of each month in connection with the date when rental payments might have fallen due.

[110] Finally, the oral evidence of Ms Simpson, a witness led on behalf of the Applicant, also undermines the Applicant's assertion of his intention at the time the form AT2 was executed. She confirmed that she was the Applicant's partner, and had cohabited with him for four years.

[111] It was her evidence that she had attended the Applicant's meetings with his legal representatives. In particular, she had attended the Applicant's meeting with his legal representatives where he had passed them papers and instructed them to prepare the form AT2 to increase the rent in respect of the property.

[112] Ms Simpson gave evidence that the Applicant asked his legal representatives if the date when the rent increase took effect needed to be the 25th day of the month. Ms Simpson's evidence was that neither the Applicant nor her told the Applicant's legal representatives that the rent increase was to take effect from the 25th day of the month, as she and the Applicant would not tell his legal representatives how to do their job.

[113] Three conclusions flow from Ms Simpson's evidence. Firstly, the fact that the Applicant asked his legal representatives if the date when the rent increase took effect needed to be the 25th day of the month indicates that it was not his intention at that time that the date required to be the 25th. If it had been his intention that the 25th day of the month should be selected, he would not have asked the question that he did, and would instead have simply instructed his representatives to select the 25th day of the month as the effective date. Secondly, although no evidence was led regarding what answer the Applicant's legal representatives gave to the Applicant's question, it demonstrates that the issue of what day of the month should be selected for the proposed rent increase had been identified as an issue for them to consider. Thirdly, Ms Simpson's evidence was that the Applicant did not instruct his representatives as to what day of the month should be selected for the proposed rent increase.

[114] All of the evidence indicated that neither the Applicant nor his representatives attached any significance to the day of the month from which any of the proposed rent increases might take effect. It was only after the potential difficulty regarding the inadequate period of notice of the form AT2 was raised by the Tribunal in February 2021 that it seemed to have acquired any such significance.

[115] Finally, the Tribunal noted that the difficulty of the inadequate notice period for the form AT2 in terms of section 24 of the 1988 Act was as a result of the fact that it was not served on the Respondents until 23rd July 2018, rather than because the form itself gave insufficient notice. Had the form AT2 been served on the Respondents on

the day it was executed, or even on the following day, then the period of notice would have been sufficient.

[116] The Tribunal further noted that in reaching its decision that it was not satisfied by the evidence that the form AT2 failed to express accurately the intention of the Applicant at the date when it was executed, that it did not form the impression that the Applicant had attempted to deliberately mislead or deceive the Tribunal. It is self-evident that no-one who executes a document for their own benefit would intentionally do so in a way that rendered it invalid. The Applicant clearly intended that the form AT2 should be legally effective in imposing a rent increase upon the Respondents.

[117] Miss Grosvenor drew the attention of the Tribunal to the opinion of Lord Turnbull, sitting in the Outer House of the Court of Session, in the case of *Nickson v Commissioners for Her Majesty's Revenue and Customs* 2017 SC 50, as authority for the proposition that the relevant intention of the granter of a document concerned the right which they intended to create by the document executed. Lord Turnbull at paragraph 47 of his opinion cited with approval the comments made by Lord Macfadyen in the case of *Governor and Company of the Bank of Ireland v Bass Brewers Ltd and ors* (CSOH, Lord Macfadyen, 1 June 2000, unreported) where he stated that the scope of section 8(1)(b) was wide enough to cover cases where the language used was precisely the language that the grantor intended to use, but that language did not bring about the legal result that the grantor intended to achieve thereby. Lord Turnbull went on to observe that when Lord Macfadyen identified the need for the court to ask if the legal effect of the language actually used in the deed to express the grantor's intention achieved the result that the grantor intended to bring about, the legal result he had in mind was the intended creation, transfer etc of a particular right, rather than some associated or consequential legal right beyond that to be effected by the document.

[118] Miss Grosvenor submitted that the Applicant had intended to achieve the legal result of increasing the rent for the Property when executing the form AT2. The legal effect of the language used in the form AT2 to express the Applicant's intention did not achieve the result he intended to bring about, being the variation of his right to be paid rent in terms of the lease agreement.

[119] The Tribunal, however, considered that there is a difficulty with this argument in relation to documents which are the creation of statute. The form AT2, along with a number of other statutory forms created by the 1988 Act, is a document with prescribed content and which is subject to rules concerning a minimum period of notice which must be given to a tenant to render it legally effective.

[120] If the comments of Lord Turnbull in his opinion were intended by him to apply to such statutory forms, then the Tribunal considers that the important protection which the 1988 Act sought to provide to tenants would be substantially deprived of effect. It is self-evident that no granter of a statutory form prepared and served in terms of the 1988 Act would intentionally use language which would render it invalid. That being so, any such document which was rendered ineffective as a result of non-compliance with the terms of the 1988 Act could, and should, be rectified by the Tribunal to make it legally effective if the granter makes application for that to be done upon the basis

that the language actually used in the deed to express the grantor's intention did not achieve the legal result that the grantor intended to bring about.

[121] If that were the correct analysis, then the statutory protections for tenants which the 1988 Act sought to impose would be rendered entirely ineffective, as any landlord could, in theory, simply ignore the statutory provisions, and then rectify any such document in subsequent proceedings before the Tribunal to render it legally effective. For that reason the Tribunal did not consider that Lord Turnbull and Lord Macfadyen could have intended their respective comments to apply to statutory forms and procedures such as those enacted in the 1988 Act, and considered that rectification of such forms and procedures might only be appropriate where the language used did not represent the granter's intention, rather than where the language used was as the granter intended but did not achieve the legal result intended due to non-compliance with statutory procedures.

[122] Section 8(1)(b) provides that if the Tribunal is satisfied that a document fails to express accurately the intention of the grantor of the document at the date when it was executed, it may order rectification. The power is therefore permissive, rather than directive. In those circumstances, and for the reasons set out in the preceding paragraph, the Tribunal was not persuaded that it should order rectification of the form AT2, even if the conditions set out in section 8(1)(b) were satisfied.

[123] Accordingly, for these reasons, the Tribunal was not satisfied by the evidence that the form AT2 failed to express accurately the intention of the Applicant at the date when it was executed, and refused to order the document to be rectified.

[124] The consequence of the Tribunal's refusal to order rectification, is that the form AT2 is legally ineffective in increasing the rent payable by the Respondents. As a result, in those circumstances it was accepted by the parties that there are no rent arrears, and therefore grounds 8, 11 and 12 of schedule 5 of the 1988 Act were not made out and the order sought was refused.

(c) The separation agreement and personal bar

[125] Miss Martin gave evidence and spoke to the separation agreement between her and the Applicant, which included a provision at clause 6 where it was agreed that her parents "will continue to reside in the Connor Court Property provided that they continue to pay a rental" to the Applicant. She relied on that provision as being an agreement by the Applicant that he would not seek to remove her parents from the Property if they continued to pay a rental, which they had continued to do, and submitted that the Applicant was personally barred from seeking the order sought.

[126] As a result of the Tribunal's decision on the application for rectification of the form AT2, it was unnecessary for the Tribunal to address this argument, and accordingly it did not do so.

Decision

[127] For the above reasons, the Tribunal refused the application for rectification of the form AT2, refused to make an order for possession of the house let on the tenancy, and dismissed 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.

Neil Kinnear

24 August 2021

Legal Member/Chair **Date**