

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 23 of the Rent (Scotland) Act
1984**

Chamber Ref: FTS/HPC/EV/18/3099

**Re: Property at [REDACTED] Linwood, Renfrewshire, [REDACTED] ("the
Property")**

Parties:

**Linstone Housing Association LTD, 17 Bridge Street, Linwood, Renfrewshire,
PA3 3DB ("the Applicant")**

**Miss Georgina Lyons, [REDACTED], Linwood, Renfrewshire, [REDACTED] ("the
Respondent")**

Tribunal Members:

Susan Christie (Legal Member)

Decision

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

Background

1. This Application and a Paper Apart setting out the detail of the Application was lodged on 16 November 2018. It relates to [REDACTED] Linwood, [REDACTED] ('the Property').
2. It is made under Rule 79. The Application type selected on the Application form is -Tenancy began prior to 2 January 1989 (Application to evict an occupier upon termination of a tenancy). It was submitted on Form E and refers to 'the Property' designed above.
3. A Notice of Acceptance of the Application by the Tribunal made under Rule 9 of the First-tier Tribunal for Scotland (Housing and Property Chamber) Rules of Procedure 2017 as amended ("the Rules") is dated 8 January 2019.

4. The Paper Apart accompanying the Application states that the Applicant granted a Short Scottish Secure Tenancy Agreement in favour of the Respondent for another property address. A correction was allowed to amend that to describe the tenancy more accurately, as a Scottish Secure Tenancy (at the second CMD). The other property address given in the Application is not the subject of this action and is therefore referred to by me as 'the (principal) tenancy' in this Decision.
5. A Scottish Secure Tenancy is regulated by the Housing (Scotland) Act 2001.
6. The Application goes on to say that repair works were required to be carried out to the principal tenancy as a result of which the Respondent was moved to the Property, which is called the 'Temporary Accommodation' by the Applicant. It is effectively a decant.
7. The Application states that the Applicant and the Respondent entered into an occupancy agreement ('the Agreement') over the Property and a copy of the Agreement is produced.
8. In the Paper Apart, the Respondent is named as the 'Occupier'. Reference is made to clause 6 of the Agreement which states 'I agree to move from 35 Bridge Street Linwood on request and agree that if I fail to do so I will be occupying those premises without right or title to do so.' Under Clause 7, 'A weeks' notice will be given to return to (address of the principal property)..and keys for [REDACTED] are to be returned on this date'.
9. The Application relies on the Rent (Scotland) Act 1984 sections 23(1) and 23(2A). Section 23 states:

23.— *Prohibition of eviction without due process of law.*

(1) Where any premises have been let as a dwelling under a tenancy which is not a statutorily protected tenancy within the meaning of this Part of this Act or a right of a kind to which Part VII of this Act applies to use a dwelling-house has been granted before or after the commencement of this Act and—

(a) the tenancy or, as the case may be, the right to use (in this Part of this Act referred to as the former tenancy) has come to an end; but

(b) the occupier continues to reside in the premises or part of them;

[subject to section 23A,] 1 it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the [First-tier Tribunal] 2 , his right to recover possession of the premises.

(2) For the purposes of this Part of this Act a person who, under the terms of his employment, had exclusive possession of any premises otherwise than as a tenant shall be deemed to have been a tenant and the expressions "let" and "tenancy" shall be construed accordingly.

[

(2A) Subsections (1) and (2) above apply in relation to any premises occupied (whether exclusively or not) as a dwelling other than under a tenancy as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly."

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(3) In this Part of this Act "the owner", in relation to any premises, means the person who, as against the occupier, is entitled to possession thereof; and in

this section "the occupier", in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy.

(4) The preceding provisions of this section shall, with the necessary modifications, apply where the owner's right to recover possession arises on the death of the tenant under a statutory tenancy.

(5) Nothing in this section shall be taken to affect any rule of law prohibiting the securing of possession otherwise than by due process of law.

10. The Applicant states in the Paper Apart that, 'The exclusions listed in section 23A of the 1984 (Act) do not apply in this case.'

11. The Application further relies on part 79 of the First-tier Tribunal for Scotland Housing and Property Regulations 2017 as amended:

'Application to evict an occupier upon termination of a tenancy

79. Where an owner makes an application under section 23 (prohibition of eviction without due process of law) of the 1984 Act, the application must—

(a) state—

(i) the name, address and registration number (if any) of the owner;

(ii) the name, address and profession of any representative of the owner; and

(iii) the name and address of the occupier;

(b) be accompanied by—

(i) a copy of the tenancy agreement or, if this is not available, as much information about the tenancy as the owner can give; and

(ii) evidence that—

(aa) the tenancy has ended; or

(bb) the tenant has died; and

(c) be signed and dated by the owner or a representative of the owner.'

12. A Case Management Discussion (CMD) was scheduled to take place on 27 February 2019 at 2pm in Glasgow Tribunals Centre, Room 109, 20 York Street, Glasgow, G2 8GT. Intimation was made on both Parties.

The First Case Management Discussion

Summary of Discussion as detailed in the Note produced

- 1) The Application is made under Rule 79-Tenancy began prior to 2 January 1989-Application to evict an occupier upon termination of a tenancy. It was submitted on Form E on 16 November 2018 and refers to 'the Property' designed above.
- 2) A Notice of Acceptance was signed on 8 January 2019 by a legal member of the First-tier Tribunal with delegated powers of the Chamber President.

- 3) The Case Management Discussion took place today.
- 4) The Applicant is represented by Miss Brown of Addleshaw Goddard LLP, the Applicant's legal representative.
- 5) The Respondent was personally present and attended along with an Advocacy worker Mr Kidd from 'You First Advocacy' of Paisley and she also had a supporter present.
- 6) The Paper apart to the Application states that the Applicant is the landlord and the Respondent is the tenant under a Short Scottish Secure Tenancy (SSST) in respect of a separate Property which is not the subject of this Application ('the principal tenancy'). It is regulated by the Housing (Scotland) Act 2001. Repair works were required to be carried out to the principal tenancy as a result of which the Respondent in this Application was decanted to the Property.
- 7) The Application states that the Applicant and the Respondent entered into an occupancy agreement over the Property and a copy of that is produced. Reference is made by the Applicant specifically to clause 6 which states: 'I agree to move from [REDACTED] Linwood on request and agree that if I fail to do so I will be occupying those premises without right or title to do so.' Clause 7 is also referred to which states: 'A weeks' notice will be given to return to (address of the principal property) . . and keys for [REDACTED] [REDACTED] are to be returned on this date'.
- 8) The Application relies on the Rent (Scotland) Act 1984 sections 23(1) and 23(2A). Section 23 states:
 - a. Prohibition of eviction without due process of law.
 - (1) Where any premises have been let as a dwelling under a tenancy which is not a statutorily protected tenancy within the meaning of this Part of this Act or a right of a kind to which Part VII of this Act applies to use a dwelling-house has been granted before or after the commencement of this Act and—
 - (a) the tenancy or, as the case may be, the right to use (in this Part of this Act referred to as the former tenancy) has come to an end; but
 - (b) the occupier continues to reside in the premises or part of them;
 - b. [subject to section 23A,] 1 it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the [First-tier Tribunal] 2 , his right to recover possession of the premises.
 - c. (2) For the purposes of this Part of this Act a person who, under the terms of his employment, had exclusive possession of any premises otherwise than as a tenant shall be deemed to have been a tenant and the expressions "let" and "tenancy" shall be construed accordingly.
 - d. [
 - e. (2A) Subsections (1) and (2) above apply in relation to any premises occupied (whether exclusively or not) as a dwelling other than under a tenancy as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly."

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 - g. (3) In this Part of this Act “the owner”, in relation to any premises, means the person who, as against the occupier, is entitled to possession thereof; and in this section “the occupier”, in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy.
 - h. (4) The preceding provisions of this section shall, with the necessary modifications, apply where the owner's right to recover possession arises on the death of the tenant under a statutory tenancy.
 - i. (5) Nothing in this section shall be taken to affect any rule of law prohibiting the securing of possession otherwise than by due process of law.
- 9) The application relies on part 79 of the First-tier Tribunal for Scotland Housing and Property Regulations 2017 as amended:
- a. Application to evict an occupier upon termination of a tenancy
 - b. 79. Where an owner makes an application under section 23 (prohibition of eviction without due process of law) of the 1984 Act, the application must—
 - c. (a)state—
 - d. (i)the name, address and registration number (if any) of the owner;
 - e. (ii)the name, address and profession of any representative of the owner; and
 - f. (iii)the name and address of the occupier;
 - g. (b)be accompanied by—
 - h. (i)a copy of the tenancy agreement or, if this is not available, as much information about the tenancy as the owner can give; and
 - i. (ii)evidence that—
 - j. (aa)the tenancy has ended; or
 - k. (bb)the tenant has died; and
 - l. (c)be signed and dated by the owner or a representative of the owner.
- 10)The Applicant is a Registered Social Landlord (RSL), Registration number 299 in the Register of Social Landlords of the Scottish Housing Regulator (SHR) online. The SHR is the independent regulator of RSLs and local authority housing services in Scotland, established on 1 April 2011 under the Housing (Scotland) Act 2010.
- 11)The Website for this Tribunal in the ‘Apply to the Tribunal’ page states:
- a. “If the type of application you wish to make is not listed below, you may need to seek legal advice on whether your application should be made to the Tribunal or to the Sheriff Court. If the application relates to a private sector residential tenancy under any of these Acts:
 - b. Rent (Scotland) Act 1984 (link is external)
 - c. Housing (Scotland) Act 1988 (link is external)
 - d. Private Housing (Tenancies) (Scotland) Act 2016 (link is external)
 - e. you may need to make an application under the relevant civil proceedings rules- i.e. rule 70, 91 or 111, depending on the type of tenancy. You can find out more about this by reading the guide below.

- f. Please note that tenancy issues between social landlords (local authorities or Registered Social Landlords, including housing associations) and tenants are dealt with in the Sheriff Court, apart from appeals against rent assessments by the rent officer for tenants and landlords of Regulated Tenancies under the Rent (Scotland) Act 1984.”
- 12) From 1 December 2017, most types of legal applications about private sector tenancies are dealt with by the Housing and Property Chamber, rather than the Sheriff Court.
- 13) There is no dispute that the current occupation of the Property did not begin prior to 2 January 1989.
- 14) The Applicant states in its own document in clause 6 aforesaid that if the Respondent fails to move from the Property on request that she will be occupying those premises ‘without right or title to do so.’
- 15) Form E can only be used to apply to the First-tier Tribunal for Scotland (Housing and Property Chamber) by a private landlord who wishes to obtain vacant possession of a property which is being occupied under a tenancy agreement to which one of the three pieces of legislation mentioned on it applies. These are: Rent (Scotland) Act 1984 (Regulated tenancies and occupancy agreements entered into prior to 2 January 1989); Housing (Scotland) Act 1988 (Assured and Short Assured tenancies and occupancy agreements entered into from 2 January 1989-30 November 2017) and Private Housing (Tenancies) (Scotland) Act 2016 (New Private Residential Tenancies entered into on or after 1 December 2017). The Respondent’s occupancy of the Property to which this application relates falls under none of those.
- 16) The primary issue to be determined is therefore whether the Tribunal has jurisdiction to deal with this matter.
- 17) After discussions, the Applicant’s Representative sought to have the Application continued to a further CMD to enable further consideration to be given to the legislation. I was content to do that to allow Parties that opportunity. I will however make a Direction meantime.
 - a. Outcome-Adjourned (proceeding to further case management discussion).

The Direction

13. The following Direction was issued to the Parties, in terms of Section 16 of Schedule 1 to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, on 5 March 2019.

‘The Applicant is required to provide:

1. *A written outline submission, including reference to all relevant legislation relied upon including the sections of any Act and any authorities to be relied upon, showing or tending to show that the Tribunal has jurisdiction to deal with the current Application by the Applicant as a Registered Social Landlord.*

The said documentation should be lodged with the Chamber no later than close of business on 14 March 2019.

The Respondent is required to provide:

1. *A written response to the outline submission by the Applicant, should she wish to do so.*

The said documentation should be lodged with the Chamber no later than close of business on 28 March 2019.'

The Response to the Direction by the Applicant

1. Rent (Scotland) Act 1984 (the "1984 Act")

- 1.1 The Application for the recovery of [REDACTED] Linwood, Renfrewshire PA3 3DN (the "Property") is brought under s.23 of the Rent (Scotland) Act 1984 ("the 1984 Act"). It is therefore necessary to consider the 1984 Act as a whole.
- 1.2 Section 1 defines what a protected tenancy is. The occupancy agreement entered into between the parties on 25 July 2018 (the "Agreement") is not a protected tenancy as no rent is payable under the terms of the Agreement. Section 2(1)(a) provides that a tenancy is not a protected tenancy where no rent is payable.
- 1.3 Section 9 defines what a short tenancy is. In terms of s.9 (1), in order to fall within the definition of a short tenancy, the tenancy must first meet the requirements to constitute a protected tenancy. The Agreement is therefore not a short tenancy as it is not a protected tenancy.
- 1.4 Section 11 sets out the grounds for possession of certain dwelling houses. This section applies to actions for the recovery of dwelling houses that are subject to protected tenancies and statutory tenancies. The Agreement falls into neither category of tenancy and section 11 is therefore not applicable in these circumstances.
- 1.5 Section 23 contains a prohibition on eviction without due process of law where any premises have been let as a dwelling under a tenancy, which is not a statutorily protected tenancy or a right of a kind to which Part VII of the Act applies, and the tenancy has come to an end but the occupier continues to reside in the premises. Subsection 2A extends the prohibition of eviction without due process of law to premises which are occupied as a dwelling other than under a tenancy, namely under an occupancy agreement. As established above, the Agreement is not a statutorily protected tenancy.

Further, the Agreement is not a tenancy to which Part VII of the 1984 Act applies as this concerns dwelling-houses with a rateable value of less than £200 and £600. Moreover, the exclusions listed in section 23A of the 1984 Act do not apply in this case. The section 23 prohibition applies to a right to occupy which is granted before or after the commencement of the 1984 Act. Accordingly, the Application for possession, which is made pursuant to the termination of the Agreement, falls squarely within the provisions of section 23 of the 1984 Act and the Applicant is bound by its terms as regards seeking the eviction of the Respondent.

- 1.6 Section 23(1) was amended by virtue of Schedule 1, part 1, paragraph 7 to the Housing (Scotland) Act 2014. The amendment provides that it shall not be lawful for an owner to enforce against the occupier other than by raising proceedings in the First Tier Tribunal. The amendment which introduces a reference to the First Tier Tribunal came into effect on 1 December 2017 in terms of the Housing (Scotland) Act 2014 (Commencement No. 7 Amendment and Saving Provision) Order 2017/330.
- 1.7 There is no qualification in the 1984 Act to exclude from the operation of section 23 owners who are Registered Social Landlords. The Applicant is therefore bound by section 23 and must apply to the First-tier Tribunal for recovery of possession of the Property.

2. Housing (Scotland) Act 2001 (the "2001 Act")

- 2.1 The 2001 Act lends support to the proposition that the Agreement created is an occupancy agreement in terms of the types of agreement covered by section 23 of the 1984 Act, as opposed to a Scottish Secure Tenancy.
- 2.2 Section 11 of the 2001 Act provides that a tenancy of a house is a Scottish Secure Tenancy ("SST") if the house is let as a separate dwelling and the landlord is a Registered Social Landlord.
- 2.3 However, Schedule 1, paragraph 4 to the 2001 Act provides that a tenancy is not a SST if the house is occupied by the tenant whilst work is being carried out on the house which the tenant normally occupies as the tenant's home and the tenant is, by agreement, entitled to return there after the work has completed.
- 2.4 The Respondent decanted from [REDACTED] Johnstone, [REDACTED], which she normally occupies as her principal home, to allow repair works to be carried out. In terms of the Agreement, the Applicant consented to the Respondent occupying the Property whilst the works were ongoing with the intention that she would return to her principal home after the works were completed. In terms of Schedule 1, paragraph 4 to the 2001 Act, the Agreement did not therefore create a SST.

3. Housing (Scotland) Act 2014 (the "2014 Act")

- 3.1 Section 16 provides that the functions and jurisdiction of the Sheriff in relation to actions arising from the tenancies listed in Section 16(1)(a)-(c), are transferred to the First-tier Tribunal. Of the three types of tenancy listed in Section 16(1) (a)-(c), none apply to the Agreement.
- 3.2 However, section 16(3) states that Part I of Schedule 1 makes minor and consequential amendments. Schedule 1, Part 1, Paragraph 7 to the 2014 Act amends section 23 of the 1984 Act by allocating the jurisdiction of proceedings under s.23 of the 1984 Act to the Tribunal. As a result of this amendment, proceedings for possession in terms of s.23 of the 1984 Act must be brought to the First-tier Tribunal.

4. Private Housing (Tenancies) (Scotland) Act 2016 (the "2016 Act")

- 4.1 For completeness, the Agreement is not a private residential tenancy in terms of the 2016 Act.
- 4.2 Section 1 sets out the meaning of a private residential tenancy, namely a tenancy under which a property is let to an individual as a separate dwelling, and the tenant occupies the property as the tenant's only principal home, and the tenancy is not one which Schedule 1 states cannot be a private residential tenancy.
- 4.3 Schedule 1 to the 2016 Act provides at paragraph 14 that a tenancy cannot be a private residential tenancy if the landlord is a Registered Social Landlord within the definition given in section 165 of the Housing (Scotland) Act 2010. The Applicant is a Registered Social Landlord within said definition of the Housing (Scotland) Act 2010 and, accordingly, the Agreement is not a private residential tenancy.

5. The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (the "Regulations")

- 5.1 In terms of regulation 2(e) of the Regulations, the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, as set out in the schedule to the Regulations, apply to proceedings before the Tribunal which were transferred or allocated to it by the Rent (Scotland) Act 1984.
- 5.2 The Application for possession is made in terms of s.23 of the Rent (S) Act which allocates proceedings to the Tribunal. The Rules of Procedure 2017 Regulations, as set out in the schedule to the Regulations, accordingly apply.
- 5.3 Paragraph 79 of the schedule to the Regulations deals with an application to evict an occupier upon termination of a tenancy where that application is made in terms of s.23 of the 1984 Act. Paragraph 79 accordingly applies.

- 5.4 Further, in terms of regulation 2(i) of the 2017 Regulations, another function transferred to the Tribunal is the resolution of disputes between homeowners and property factors under the Property Factors (Scotland) Act 2011. The transfer to the Tribunal of functions such as the resolution of disputes between homeowners and property factors makes clear that the jurisdiction of the Tribunal is not restricted to arrangements which fall within the definition of a private residential tenancy in terms of Section 1 of the 2016 Act.

6. Form E and Form F

- 6.1 In terms of the application forms available for applications to the Tribunal, Forms E and F contain a narrative which states that it is to be used for proceedings under the 1984 Act where the application relates to an occupancy agreement entered into prior to 2 January 1989.
- 6.2 Consideration has been given to sections 42-46 of the Housing (Scotland) Act 1988 ("the 1988 Act") which relate to the phasing out of the 1984 Act. Section 42 of the 1988 Act provides that a tenancy which begins after the commencement of section 42 cannot be a protected tenancy unless the criteria set out in the section are met. The Agreement is not a protected tenancy as it does not fall within the definition in section 1 of the 1984 Act. Therefore, the Agreement does not fall within section 42 of the 1988 Act. Nor does it fall within sections 43-46 of the 1988 Act.
- 6.3 Accordingly, there is nothing in the 1988 Act which alters the effect of s.23 of the 1984 Act and the requirement to raise proceedings in the Tribunal for the eviction of an occupier where the relevant occupancy agreement has ended. In terms of s.23 of the 1984 Act, the requirement for due process of law applies where the agreement was entered into before *or after* the 1984 Act. This puts into question the reason for the narrative in Forms E and F which excludes applications relating to occupancy agreements entered into post 2 January 1989 to the Tribunal when the legislation requires it.

7. Chapter 30 of the Summary Cause Rules 2002

- 7.1 Rule 30.2 of the Summary Cause Rules 2002 makes provision for raising an action in the Sheriff Court against persons in possession of heritable property without right or title.
- 7.2 Rule 30.2(2) provides that rule 30.2 will not apply in respect of persons who has or had a title or other right to occupy the heritable property and who has been in continuous occupation since that title or right is alleged to have come to an end.
- 7.3 The Respondent had the right to occupy the Property pursuant to the terms of the Agreement. That right has now come to an end and the Applicant has

since been in continuous occupation of the Property. Accordingly, rule 30.2(2) applies and it is not competent to raise an action in the Sheriff Court on the basis of the Respondent never having had a right to occupy the Property. The Respondent did have such a right, however, it has now come to an end and the Respondent is currently occupying the Property without right or title. A distinction should be made between occupiers who have never had right or title to occupy premises and those who did have a right, but that right has now ended.

8. Conclusion

- 8.1 For the reasons outlined above, the Agreement falls squarely within section 23 of the 1984 Act.
- 8.2 Applications for recovery of possession under section 23 of the 1984 Act are required to be brought to the First-tier Tribunal.
- 8.3 In terms of regulation 2(e) of the Regulations, the Tribunal's Rules of Procedure outlined in the schedule to the Regulations apply to proceedings before the Tribunal which were transferred or allocated to it by the 1984 Act. Paragraph 79 of the schedule to the Regulations deals with an application to evict an occupier upon termination of a tenancy where that application is made in terms of s.23 of the 1984 Act.
- 8.4 The 1984 Act contains no exclusion in respect of applications being made by a particular type of landlord i.e. a Registered Social Landlord. Nor does it exclude occupancy agreements created before a certain date i.e. 2 January 1989.
- 8.5 Chapter 30 of the Summary Cause Rules 2002 does not apply in these circumstances as the Respondent did have a right to occupy the Property, albeit that right has now come to an end. Therefore, the Sheriff Court does not have jurisdiction to hear this type of Application for possession.
- 8.6 The jurisdiction of the First-tier Tribunal is not restricted to applications relating to private residential tenancies within the meaning of section 1 of the 2016 Act. This is evidenced by the transfer to the Tribunal of functions such as the resolution of disputes between homeowners and property factors in terms of regulation 2(i) of the Regulations.

- 8.7 The narrative outlined in the application Forms E and F which only allow applications in respect of occupancy agreements entered into prior to 2 January 1989 is an anomaly. The narrative outlined in the application forms does not take precedence over the provisions of the legislation referred to above which directs applications of this nature to the First-Tier Tribunal.

The Second Case Management Discussion

14. The Second CMD took place on 1 May 2019 at 10am in Glasgow Tribunals Centre, Room 107, 20 York Street, Glasgow, G2 8GT.
15. The Applicant was represented by Miss Brown of Addleshaw Goddard LLP, the Applicant's legal representative.
16. The Respondent was personally present and attended along with an Advocacy worker Mr Kidd from 'You First Advocacy' of Paisley and she also had a supporter present.
17. The Respondent had not lodged written Representations and had chosen not to lodge a written response to the outline submission by the Applicant. She had received a copy of the Applicant's outline submission.
18. The Applicant insists on her Application and seeks an order for eviction in accordance with sections 23(1) and 23(2A) of the 1984 Act. The repairs having been completed some time ago and there is 'reasonable and suitable accommodation available for the Occupier'.
19. Discussions firstly took place around the principal tenancy and the reasons why the Respondent had been decanted into the Property which is the subject of this Application.
20. It appeared from the discussions that there had been a sewage back up and spill in the tenancy following upon a plumber attending to fix a blocked toilet. The tenancy is a lower maisonette and it is suggested that its position in the block and the removal of the blockage in the pipework had some significance as the efforts to clear the toilet then caused sewage to spill into the tenancy.
21. The tenancy was uninhabitable for the Respondent and her three children. She was placed in two hotels by the Applicant as emergency accommodation and then sourced another hotel via her insurers for periods. She then relied on family to accommodate them temporarily. During this period there appears to have been differing views taken by each Party as to who was in the wrong about the issues that arose.
22. On 25 July 2018 the Respondent signed a 'Decant Agreement' over the Property.
23. It states that the Respondent acknowledges that she will occupy the Property on a temporary basis while remedial works are carried out at her principal tenancy. She accepted the offer of this temporary decant Property on conditions that are set out which include:
 - 'I will temporary occupy the property .. no later than Wednesday 1 August 2018'

- 'I acknowledge that my occupation of the Property. . will not constitute a separate tenancy from my (principal tenancy) and accept that I will be permitted to reside at (Property) on a temporary basis only'
 - 'I agree to move from (Property) on request and agree that if I fail to do so I will be occupying those premises without right or title to do so.'
 - 'A weeks' notice will be given to return to (principal property) and keys for (Property) are required to be returned on that date.'
24. It is not disputed that the Respondent has been asked to move out of the decant property and back to her principal tenancy. She had been given letters by different delivery modes from around 10 October 2018 to 5 November 2018 asking her to leave the Property.
 25. This proceeded on the premise that the principal tenancy was fit to return to the works having been completed. Whilst there was an issue about when the principal tenancy was actually in a habitable condition and whether it had been properly cleaned might have been an issue, the Respondent had not returned to inspect it, (and had not had her Consultant return) so was not in a position to dispute that it was habitable today for the purposes of this Application.
 26. The Respondent has applied for local authority housing and is said to be well placed with some degree of priority. She states she has had one formal offer which she rejected and is allowed 3 offers. The Applicant believed that there had been 2 offers made.
 27. Whilst the Respondent and her Advocacy Worker explained that she wished to remain in the Property until she secured alternative accommodation it was clear that the Applicant wished recovery of the decant Property and had not changed its stance.
 28. It seemed to me then that if I was satisfied that the Tribunal had jurisdiction to consider this Application (which is the preliminary issue to be addressed), then there was no real dispute about the facts of the decant only being temporary accommodation for the purpose of emergency repairs. This meant I could make a final decision today.
 29. The question of whether the Tribunal had jurisdiction was then discussed. The Applicant relies upon her well set out written submissions. The gist of those submissions, whilst in technical language, were conveyed to the Respondent in language that was more easily understood.
 30. I raised questions. The Applicant relies on ss(3) of Section 16 of the Housing(Scotland) Act 2014('the 2014 Act').The Applicant maintains her position that the 'occupancy agreement' over the Property is not an excluded 'tenancy or right of occupancy' under ss(4A) of section 23A.The Applicant considers that the Application falls squarely to be considered under section 23 of the 1984 Act.
 31. I advised the Parties that I would decide on the Application today.

Findings in Fact

- I. The Applicant Linstone Housing Association Limited and is the heritable proprietor of, *inter alia*, the Property.
- II. Linstone Housing Association Limited is a Registered Social Landlord.

- III. The Applicant granted a Scottish Secure Tenancy Agreement in favour of the Respondent for another property address in 2015, the tenancy.
- IV. The tenancy became uninhabitable for the Respondent and her three children following upon a sewage back up and spillage at the tenancy sometime around November 2017.
- V. The Applicant required to leave the tenancy on an emergency basis. She was thereafter placed in two hotels by the Applicant as emergency accommodation and then sourced another hotel via her insurers. She then relied on family to accommodate them temporarily until around 1 August 2018.
- VI. On 25 July 2018 the Respondent signed a 'Decant Agreement' over the Property. It states that the Respondent acknowledges that she will occupy the Property on a temporary basis while remedial works are carried out at her principal tenancy. She moved in there around 1 August 2018.
- VII. The Respondent has been asked to move out of the decant Property and back to her principal tenancy. She had been given letters by different delivery modes from around 10 October 2018 to 5 November 2018 asking her to leave the Property.
- VIII. The Respondent has applied for local authority housing and is said to be well placed with some degree of priority. She states she has had one formal offer which she rejected.
- IX. The Respondent continues to reside in the Property.
- X. The Tribunal does not have jurisdiction to consider this Application.
- XI. The right of occupancy given to the Respondent over the Property was granted as a temporary expedient and accordingly section 23 of the 1984 Act does not apply.
- XII. The Application is refused.

Reasons for Decision & Decision

1. This application to the First-tier Tribunal under the Rent (Scotland) Act 1984 is misconceived.
2. The Applicant Linstone Housing Association Limited as heritable proprietor of, *inter alia*, the Property is a Registered Social Landlord Registration number 299 recorded in the Register of Social Landlords of the Scottish Housing Regulator (SHR) online. The SHR is the independent Regulator of RSLs and local authority housing services in Scotland, established on 1 April 2011 under the Housing (Scotland) Act 2010.
3. Part 3 of the 2014 Act states:
'*PRIVATE RENTED HOUSING*
Transfer of sheriff's jurisdiction to First-tier Tribunal
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.'

4. Part 3 transfers responsibility for hearing civil cases relating to the private rented sector from the Scottish Courts to the Scottish Tribunals. It is clear to me that tenancy issues between social landlords (local authorities or Registered Social Landlords, including housing associations) and tenants are dealt with in the Sheriff Court, apart from appeals against rent assessments by the rent officer for tenants and landlords of Regulated Tenancies under the Rent (Scotland) Act 1984.
5. Section 16 of the 2014 Act makes it clear that 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))

The Applicant accepts that of the three types of tenancy listed, none apply to the Agreement over the decant Property.

6. Instead the Applicant relies on Part 1 of schedule 1 to the 2014 Act (which makes minor and consequential amendments to section 23 of the 1984 Act) by substituting the 'First-tier Tribunal' for the 'Court' in section 23(1)(b).'
7. However, section 23(1) (b) is subject to section 23A. Section 23A (3) of the 1984 Act is, to my mind, relevant to this Application. Nothing in section 23 of the Act applies to a tenancy or right of occupancy if it was *granted* as a *temporary expedient* to a person who entered the premises in question or any other premises without right or title (whether or not before the beginning of that tenancy or grant of that right another tenancy or right to occupy the premises or any other premises had been granted to him).
8. I consider the undisputed circumstances surrounding the decant being given to the Respondent and the conditions attached all fall within the definition of a 'temporary expedient'. It was given/*granted* because the principal tenancy was unfit to live in and it was only ever intended as a temporary stopgap. Rent was due to be paid only for the principal tenancy. The term is not defined. The temporary decant document says:
 - 'I agree to move from (Property) on request and agree that if I fail to do so I will be occupying those premises without right or title to do so.'
 - 'A weeks' notice will be given to return to (principal property) and keys for (Property) are required to be returned on that date.'
9. Therefore section 23 of the 1984 Act does not apply to this Property.
10. Rule 79 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (Application to evict an occupier upon termination of a tenancy) does not apply.



Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Legal Member/Chair

1 May 2019
Date