



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 (“2016 Act”)**

**Chamber Ref:** FTS/HPC/EV/18/2216

**Re:** 7 Glen Orchy Road, Motherwell, ML1 5SA (“the Property”)

**Parties:**

**Mr Graham Hendry, c/o 45 Ross Crescent, Greenacres, Motherwell, ML1 5SA (“the Applicant”)**

**Mr Thomas J Wale, 26 West Drive, Petersburn, Airdrie, ML6 8BL (“the Respondent”)**

**Tribunal Member:**

**Pamela Woodman (Legal Member)**

**Present:**

The case management discussion in relation to case reference FTS/HPC/EV/18/2216 took place at 11.30am on Thursday 29 November 2018 in room 112, Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT (“the CMD”). The Applicant was present in person. The Respondent was not present nor was he represented at the CMD. The clerk to the Tribunal was Linda O’Neill.

**Decision (in absence of the Respondent)**

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

**Background**

1. The Applicant made an application to the Tribunal under section 51(1) of the 2016 Act and in terms of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“HPC Rules”) which are set out in the schedule to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended, (“2017 Regulations”). More specifically, the application was made in terms of rule 109 (*Application for an eviction order in relation to a private residential tenancy*) of the HPC Rules.

2. The order sought from the Tribunal was an eviction order against the Respondent in respect of the Property.
3. The registered proprietor of the Property is the Applicant.
4. The application form was accompanied by various documents.
5. A notice of acceptance of the application in respect of case reference FTS/HPC/EV/18/2216 was issued by the Tribunal dated 11 October 2018 ("**Notice of Acceptance**") under rule 9 of the HPC Rules.
6. Letters were sent by the Tribunal to each of the Applicant and the Respondent dated 9 November 2018 confirming that the application had been received, intimating the date of the CMD and noting that written representations from the Respondent must be received by 27 November 2018.
7. The Legal Member had been provided with the certificate of service from William Wright, sheriff officer, regarding service of the letter from the Tribunal (and accompanying documentation) on the Respondent on 12 November 2018. There were some technical errors in the certificate of service and covering letter but the Legal Member was satisfied, on the balance of probabilities, that the letter from the Tribunal (and accompanying documentation) had been served at the correct address.
8. The Respondent had not been in contact with the Tribunal regarding the CMD nor had he provided written representations.
9. This decision arises out of the CMD.

#### **Proceedings, namely the CMD**

10. The Applicant had provided a copy of the tenancy agreement between the Applicant and the Respondent dated 16 January 2018 ("**the Tenancy Agreement**"). It stated that the term of the tenancy was for a period of 2 years beginning on 15 February 2017. However, other documentation provided to the Tribunal suggested that the tenancy commenced on 15 February 2018. The Applicant confirmed that the tenancy had commenced on 15 February 2018, the reference to 2017 in the Tenancy Agreement being an error.
11. The Applicant confirmed that he was seeking an eviction order on the basis that:
  - a. the Respondent had failed to comply with an obligation under the Tenancy Agreement by failing to pay the tenancy deposit for over six months; and
  - b. the Respondent had been in arrears of rent for three or more consecutive months by persistently failing to pay his rent on time.

12. With regard to the arrears of rent, the Applicant confirmed that he was seeking to rely upon ground 12(3) of schedule 3 to the 2016 Act because “for three or more consecutive months the tenant had been in arrears of rent”. He confirmed that he was aware that this was a discretionary, rather than a mandatory, ground for an eviction order.
13. A copy of the notice to leave dated 18 February 2018 (“**Notice to Leave**”) addressed to the Respondent from the Applicant accompanied the application form. The Notice to Leave stated that an application would not be submitted to the Tribunal before 15 May 2018. It was accepted by the Applicant that the Applicant had miscalculated the relevant period and so the stipulated date was early (in terms of sections 52, 54 and 62 of the 2016 Act). However, the Applicant noted that the Notice to Leave had originally been intended to encourage the Respondent to comply with his obligations to pay the deposit and his rent. He also highlighted that, in fact, the application was not made to the Tribunal until 15 August 2018.
14. The Applicant confirmed that the Notice to Leave served on the Respondent was signed, the copy Notice to Leave provided to the Tribunal being his file copy (and so was unsigned).
15. The Applicant confirmed that he had served the Notice to Leave on the Respondent personally, that is he had handed it to him in person at the Property. He confirmed he did this on 18 April 2018 and played a video during the CMD (a link to which had previously been provided to the Tribunal) which he submitted supported this.
16. The Applicant confirmed that no payments had been made by the Respondent in terms of rent, other than those set out in the rent statement covering the period from 15 February 2018 to 15 August 2018 (“**Rent Statement**”), and that the Respondent had never paid the tenancy deposit. The Applicant highlighted that, as recorded in the Rent Statement, the Respondent had not paid the rent in full on the due date for payment (and so was in arrears) for a number of days every month since the commencement of the tenancy and had paid nothing at all since 9/10 August 2018.
17. The Applicant confirmed that the Respondent had now left the Property but that he had left a lot of rubbish behind, which the Applicant had now cleared. He stated that the Property had essentially been abandoned in October 2018 and submitted that text messages between him and the Respondent (and provided to the Tribunal) confirmed this.

### **Findings in fact**

18. Given that the Tenancy Agreement was dated 16 January 2018 and the commencement date of the tenancy was 15 February 2018, the tenancy was a private residential tenancy (notwithstanding that the Tenancy Agreement stated that it was an “assured tenancy agreement”). This was because it was not possible to create a new assured tenancy on or after 1 December 2017 as a result of section 12(1A) of the Housing (Scotland) Act 1988.

19. In making an application under rule 109 of the HPC Rules, the Applicant sought an eviction order in relation to a private residential tenancy (rather than an order for possession in relation to an assured tenancy). This was the correct approach in the circumstances.
20. Pursuant to rule 109 of the HPC Rules (under which the application had been made for an eviction order in terms of section 51(1) of the 2016 Act), the application form required to be accompanied by:
- a. evidence showing that the eviction ground(s) has/have been met;
  - b. a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act; and
  - c. a copy of the notice given to the local authority as required under section 56(1) of the 2016 Act, namely “notice of the landlord’s intention” to make an application to the Tribunal for an eviction order to “the local authority in whose area the let property is situated” (“**a section 11 notice**”).
21. Section 62(1) of the 2016 Act defines a “notice to leave” as “a notice which –
- a. is in writing;
  - b. specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal;
  - c. states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and
  - d. fulfils any other requirements prescribed by the Scottish Ministers in regulations.”
22. The Notice to Leave satisfied the requirements in sub-sections 62(1)(a), (b) and (d).
23. The eviction grounds stated in the Notice to Leave were ground 11 (*Breach of tenancy agreement*) and ground 12 (*Rent arrears*).
24. Section 62(4) of the 2016 Act provides that: “The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.”
25. In addition, section 62(5) of the 2016 Act provides that: “For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.”

26. In terms of section 52(2) of the 2016 Act, “The Tribunal is not to entertain an application for an eviction order if it is made in breach of –
- a. subsection (3), or
  - b. any of sections 54 to 56 (but see subsection (4)).”
27. Section 52(4) of the 2016 Act provides that “Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.”
28. Section 54 of the 2016 Act provides that a landlord is not entitled to make an application to the Tribunal for an eviction order “until the expiry of the relevant period in relation to that notice”. Section 54 then goes on to define the “relevant period” in different circumstances.
29. The date specified in the Notice to Leave for the purposes of section 62(1)(b) was incorrect because the “relevant period” (required in terms of section 54) expired after the date given in the Notice to Leave (i.e. 15 May 2018) and so an insufficient period of notice had been given. The Applicant had acknowledged this to the Tribunal prior to the issue of the Notice of Acceptance.
30. The Legal Member decided that, in the particular circumstances of this case and for the following reasons, it was reasonable for the Tribunal to entertain the application for the eviction order despite the breaches of sections 54(2) and 62(1)(b):
- a. the Notice of Acceptance had been issued, notwithstanding that it was known to the Tribunal, at the time of doing so, that the Notice to Leave did not comply with sections 54(2) and 62(1)(b) of the 2016 Act;
  - b. in terms of section 52(4) of the 2016 Act, it was anticipated that there might be circumstances where an application for an eviction order could proceed even where there was a breach of section 54. Section 52(4) does not limit this to section 54(1) and so it is sufficiently wide to cover a breach of section 54(2) regarding the determination of the “relevant period”. A breach of section 54(1), where an application is made to the Tribunal for an eviction order before the expiry of the “relevant period”, must be considered to be more serious than a breach of section 54(2) where there is no associated breach of section 54(1), as was the situation in this case;
  - c. as a matter of fact, the application was not made to the Tribunal for a number of months after both (a) 15 May 2018, the (incorrect) date specified in the Notice to Leave, and (b) the expiry of the “relevant period”; and
  - d. the Legal Member was satisfied, on the balance of probabilities, that the Respondent had (sometime in October 2018) left the Property and so was no longer occupying it as his home.

31. In terms of section 56(2) of the 2016 Act, a section 11 notice requires to be given in the “manner and form prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003”.
32. The prescribed form of a section 11 notice is as set out in The Notice to Local Authorities (Scotland) Regulations 2008, as amended by The Notice to Local Authorities (Scotland) Amendment Regulations 2017.
33. The Applicant had sent an e-mail to North Lanarkshire Council on 23 August 2018 which sought to fulfil the requirement for service of a section 11 notice but it was neither in the prescribed form nor did it contain all of the information required in the prescribed form. However, the Applicant had provided to the Tribunal a copy of an e-mail exchange which appeared to be with someone at North Lanarkshire Council who confirmed to the Applicant that the information provided was “fine” and the council could “just use the information” that the Applicant had provided.
34. Therefore, based on this confirmation, it was reasonable for the Applicant to assume that he had fulfilled the requirement to notify the local authority and had provided information equivalent to a section 11 notice. The Applicant noted that the Respondent told him that someone from, he believed, Citizens Advice Scotland, had been sent round to the Property by North Lanarkshire Council following the Applicant’s e-mail exchange with North Lanarkshire Council in this context.
35. In the particular circumstances of this case and notwithstanding that a section 11 notice had not been served in the prescribed form, the Legal Member was willing to accept that adequate notice had been provided to the local authority which fulfilled the policy objective which underpinned the requirement to notify under section 11(3) of the Homelessness etc. (Scotland) Act 2003 and had “given notice of the landlord’s intention to” make an application to the Tribunal for an eviction order.
36. After consideration of the evidence (including text messages and e-mails apparently between the Applicant and the Respondent), other information and submissions provided, the Legal Member was satisfied, on the balance of probabilities, that:
  - a. the Respondent had not paid the tenancy deposit to the Applicant, notwithstanding that the Tenancy Agreement expressly stated that it had been paid by the Respondent;
  - b. the Respondent had “for three or more consecutive months... been in arrears of rent”, as at all of (i) the date of the Notice to Leave, (ii) the date of the application to the Tribunal, and (iii) the date of the CMD;
  - c. the Notice to Leave had been served personally on the Respondent by the Applicant; and

- d. the Respondent had (sometime in October 2018) left the Property and so was no longer occupying it as his home.

### **Reasons for decision**

37. The requirements set out in rule 109 of the HPC Rules had been sufficiently met in order to allow the application to proceed and be entertained.
38. The Legal Member found that both of grounds 11 and 12 (as set out in schedule 3 to the 2016 Act) had been established and the Legal Member was satisfied that it was reasonable to issue an eviction order.

### **Decision**

39. Accordingly, the Tribunal granted an order against the Respondent for eviction from the Property under grounds 11 and 12 of schedule 3 to the 2016 Act.

### **Right of Appeal**

**In terms of Section 46 of the Tribunals (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.**

**Pamela Woodman**

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**Legal Member**

29.11.18

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**Date**