



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

Chamber Ref: FTS/HPC/EV/19/3052

Re: Property at 6 Union Street, Rosehearty, Fraserburgh, Aberdeen, AB43 7JQ (“the Property”)

Parties:

Talon Alba Ltd, 4 Burns Crescent, Fraserburgh, Aberdeen, AB43 7AG (“the Applicant”)

Miss Mirelle Lane, 6 Union Street, Rosehearty, Fraserburgh, Aberdeen, AB43 7JQ (“the Respondent”)

Tribunal Members:

Petra Hennig-McFtridge (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the eviction order should be granted.

Background:

The application for an eviction order under Ground 12 of Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 (the 2016 Act) was made to the First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) on 26 September 2019.

The documents lodged by the Applicant included: Private Residential Tenancy Agreement between the parties for the property for a tenancy commencing on 10 August 2018, Notice to Leave dated 13 August 2019 with the date in part 4 stated as 13 September 2019 and stating as the Ground of eviction "you are in rent arrears over three consecutive month", S 11 Notice to Aberdeenshire Council, rent statement to 10 September 2019 showing arrears of £7,453.12. The Applicant lodged an amended request on 22 November 2019 to amend the arrears amount to £9,703.12.

A first Case Management Discussion (CMD) took place on 19 December 2019. The Respondent and the Applicant had both been advised prior to the first CMD. The Respondent did not attend and had not made any representations. The application was amended to show outstanding arrears £9,703.12. The Tribunal raised 4 issues to be addressed by representations from the Applicant at a further CMD. The CMD note of 19 December 2019 is referred to for its terms and held to be incorporated herein. A further CMD was scheduled for 6 February 2020.

The questions asked by the Tribunal at the first CMD were:

1. Can the Tribunal ignore the actual evidence of the receipt of the Notice to Leave on 17th August and apply the deeming provision in section 62 (5) of the Act instead?
2. Does the deeming provision state a rebuttable presumption which in this case has been rebutted by the actual evidence of receipt provided by the Applicant's Representative?
3. Reference is made to Section 26 (2) (b) of the Interpretation and Legislative Reform (Scotland) Act 2010 which is mentioned in the explanatory notes to the 2016 Act in the Termination section. Section 26 (6) suggests that a document served by registered or recorded delivery post will be taken to be received 48 hours after it is sent unless the contrary is shown . Does this section apply to the Notices to Leave in this Application?
4. Is the Notice to Leave in this Application valid?

The Tribunal had asked for written submissions to be made prior to the CMD on 6 February 2020 on the issues raised. Submissions from T C Young, solicitors for the Applicant were received on 20 January 2020.

The Respondent was notified of the second CMD on 6 February 2020 by recorded delivery letter of 7 January 2020 and thus had been appropriately notified of the CMD.

The second Case Management Discussion:

Ms Mullen from T C Young solicitors took part via a telephone link. The Respondent did not attend. No representations had been received from the Respondent by the time of the second CMD. Ms Mullen moved the application with the explanation that the tenant appears to have vacated the property but has not returned the keys. She then spoke further to the written representations submitted on 20 January 2020 regarding the questions put by the Tribunal at the first CMD.

Based on the documents submitted and the evidence provided the Tribunal made the following findings in fact:

Findings in Fact

1. The parties entered into a Private Residential Tenancy Agreement for the property on 10 August 2018
2. Rent of £750 per calendar month was payable.
3. From 10 August 2018 to the date of the application payments had been made as per the rent statement submitted.
4. Rent arrears accumulated from August 2018 onwards and no payments were received after March 2019.
5. As at the date of the Notice to Leave the arrears outstanding were £6,703.12

6. At the date of the CMD a sum of £9,703.11 in rent arrears is due and outstanding
7. A Notice to Leave was sent recorded delivery to the Respondent on 13 August 2019 stating as the date proceedings could be raised 13 September 2019 and giving as the ground for eviction rent arrears since August 2018.
8. The Notice to Leave was signed for by the Respondent on 17 August 2019.
9. The Respondent has not handed back the keys.

The Tribunal had regard to the following legislative provisions relevant to the case:

Interpretation and Legislative Reform (Scotland) Act 2010 (the 2010 Act)

S1 Application of Part 1

This Part applies to—

(a) Acts of the Scottish Parliament the Bills for which receive Royal Assent on or after the day on which this Part comes into force.....

(2) This Part does not apply in so far as—

(a) the Act or instrument provides otherwise, or

(b) the context of the Act or instrument otherwise requires.

S 26 Service of documents

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used).

(2) The document may be served on the person—

(a) by being delivered personally to the person,

(b) by being sent to the proper address of the person—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c. 26)), or (ii) by a postal service which provides for the delivery of the document to be recorded, or (c) where subsection (3) applies, by being sent to the person using electronic communications....

(5) Where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

(6) Where a document is served as mentioned in subsection (2)(c) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

Private Housing (Tenancies) (Scotland) Act 2016 (the 2016 Act)

51 First-tier Tribunal’s power to issue an eviction order

(1) The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

(2) The provisions of schedule 3 stating the circumstances in which the Tribunal may or must find that an eviction ground applies are exhaustive of the circumstances in which the Tribunal is entitled to find that the ground in question applies.

(3) The Tribunal must state in an eviction order the eviction ground, or grounds, on the basis of which it is issuing the order.

(4) An eviction order brings a tenancy which is a private residential tenancy to an end on the day specified by the Tribunal in the order.

52 Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—(a) subsection (3), or (b) any of sections 54 to 56 (but see subsection (4)).

(3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which—(a) is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or (b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

54 Restriction on applying during the notice period

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies...,

(3) This subsection applies if—

(a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i) that the tenant is not occupying the let property as the tenant's home,

(ii) that the tenant has failed to comply with an obligation under the tenancy,

(iii) that the tenant has been in rent arrears for three or more consecutive months,

(iv) that the tenant has a relevant conviction,

(v) that the tenant has engaged in relevant anti-social behaviour,

(vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

62 Meaning of notice to leave and stated eviction ground

(1) References in this Part to a notice to leave are to a notice which—

(a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) 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.

Ground 12 of Schedule 3 of the 2016 Act

Rent arrears

12 (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months.

(2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if— (a) at the beginning of the day on which the Tribunal first considers the application for an eviction order on its merits, the tenant—

(i) is in arrears of rent by an amount equal to or greater than the amount which would be payable as one month's rent under the tenancy on that day, and

(ii) has been in arrears of rent (by any amount) for a continuous period, up to and including that day, of three or more consecutive months, and

(b) the Tribunal is satisfied that the tenant's being in arrears of rent over that period is not wholly or partly a consequence of a delay or failure in the payment of a relevant benefit....

Rule 18 of the First tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure (the Rules)

—(1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and

(b) must make a decision without a hearing where the decision relates to—

(i) correcting; or (ii) reviewing on a point of law, a decision made by the First-tier Tribunal.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties

Discussion of the questions raised at the first CMD:

The Applicant's position:

1. Question 1: Can the Tribunal ignore the actual evidence of the receipt of the Notice to Leave on 17th August and apply the deeming provision in section 62 (5) of the Act instead?

On behalf of the Applicant Ms Mullen argued that the Tribunal requires to ignore the evidence of receipt of the Notice to Leave on 17 August 2019. S 54 (1) and (2) set out when a Landlord may apply to the Tribunal for an eviction order. S 62 (4) provides for the date to be specified in the Notice to Leave. Reference is made to S 64 (5) "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." It is her position that the effect of S 65 (5) is "to create an irrebuttable presumption of the date of receipt of the notice to leave by the tenant. The interpretation of deeming provisions must be done in a manner which gives effect to parliamentary intention. Whilst S 62 (1) sets out technical requirements of a notice, the remaining subsections are intended to clarify said technical requirements. S 62(4) clarifies the technical requirement in S 62 (1) (b) with regard to the date to be specified in the notice to leave after which the landlord can make an application to the Tribunal.

2. Section 62 (5) commences with the words "for the purpose of subsection (4) " it is clear that this section was drafted solely for determining the date to be inserted into the notice to leave." In her submissions "the purpose of s 62(5) is to create an artificial date of receipt of a notice to leave for a tenant. This provision recognises the practical reality that a landlord can never anticipate the actual date of receipt of a notice to leave by a tenant unless delivered personally." She argues "in essence, the section creates an irrebuttable presumption of the date of receipt of the notice to leave. Where there is evidence to contradict that hypothetical state of affairs, said evidence requires to be ignored to as to give effect to the hypothetical situation envisioned by the statute. ... an alternative construction would produce an absurd result in that a landlord's action for eviction could be continuously thwarted on the basis that the true date of receipt by the tenant could never be anticipated by the landlord. It would result in the absurd situation that service be effected by personal delivery on each occasion so as to avoid the potential challenge of service."
3. Her argument was that for the presumption to be rebuttable Parliament could have provided for this by inserting the words "unless the contrary is shown" as can be found in Section 26 (2) of the Interpretation and Legislative Reform (Scotland) Act 2010. As this is omitted from S 62(5) the intention of Parliament was "to create an artificial state of affairs to ensure certainty in the date to be specified in the notices to leave served by landlords. Reference in this regard is further made to explanatory note 53 of the 2010 Act which provides that section 26 of the 2010 Act creates rebuttable presumptions "given the potential difficulties with postal service and problems which may arise with delivery by service providers / internet for email". If Parliament intended section 62 (5) of the 2016 Act to be rebuttable it would have inserted "unless the contrary is shown" or it would not have provided for section 62 (5) and instead would simply have relied upon the provision contained within S 26 as it does in sections 48 and 49 of the 2016 Act."
4. When asked about the relevance of the reference to the guidance notes to the Notice to Leave for landlords on the Scot Gov website which states under heading *How to give this notice* 8. "Section 26 of the Interpretation and

Legislative Reform (Scotland) Act 2010 applies, which means that unless a Sheriff Officer delivers it by hand, you must allow your Tenant 48 hours to receive this notice. This delivery time should be added on to the amount of notice you give your Tenant. Your Tenant can challenge this, but they must provide you with evidence which shows the exact date they receive this notice." Ms Mullen submitted that the guidance is just that, guidance, and is not binding. Guidance has been known to have been wrong.

5. She then referred the Tribunal to the Explanatory Notes to Sections 48 and 49 *"Termination by tenant 75. Sections 48 and 49 provide that a tenant can only bring the tenancy to an end by writing to the landlord to advise him or her of the date the tenancy will end. The tenant must give the landlord a minimum amount of notice (see discussion of section 49(3) below). Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out (rebuttable) presumptions as to when a document that has been served by post or electronically is deemed to be received. "* and asked the Tribunal to compare these with the Explanatory Notes for S 62 of the 2016 Act, which reads: *" Interpretation of Part 96. Section 62 sets out that the prescribed notice to leave issued by a landlord must: be in writing; specify the day on which the landlord expects to be entitled to make an application to the Tribunal for an eviction order; state the ground, or grounds, on which the landlord proposes to end the tenancy; and fulfil any other requirements set out in regulations made by the Scottish Ministers. The day specified in the notice to leave will be the day after the relevant notice period ends (see section 54)."* Her argument was that the Interpretation Notes clearly refer to S 26 (2) of the 2010 Act in regard to the periods in S 48 and 49 of the 2016 Act but not to S 62.
6. Question 2. Does the deeming provision state a rebuttable presumption which in this case has been rebutted by the actual evidence of receipt provided by the Applicant's Representative?
With regard to question 2 she argued that the answer to question 2 has to be that the deeming provision is irrebuttable for the reasons given to question 1.
7. Question 3. Reference is made to Section 26 (2) (b) of the Interpretation and Legislative Reform (Scotland) Act 2010 which is mentioned in the explanatory notes to the 2016 Act in the Termination section. Section 26 (6) suggests that a document served by registered or recorded delivery post will be taken to be received 48 hours after it is sent unless the contrary is shown. Does this section apply to the Notices to Leave in this Application?
With regard to question 3 she referred the Tribunal to S 1(2) of the 2010 Act which states "This Part does not apply in as far as-(a) The Act or instrument provides otherwise, or (b) the context of the Act or Instrument otherwise requires." Her argument was that there is an express provision in S 6(5) of the 2016 Act and thus the application of S 26 (b) of the 2010 cannot apply because of S 1 (2) of the 2010 Act.
8. Question 4. Is the Notice to Leave in this Application valid?
With regard to question 4 she relied on her argument in the written representations: " The notice to leave was sent by recorded delivery post on

13th August 2019. Section 62 (5) of the 2016 Act confirms that for the purposes of calculating the day to be specified in the notice, it is assumed that the tenant will receive the notice to leave 48 hours after it is sent. This means that the notice is deemed to have been received on 15th August 2019, irrespective of when the notice was signed for by the tenant. The Landlord relies on ground 12. Accordingly, the 28 day notice period applies in accordance with s 54 (2)(b) (i) of the 2016 act. S. 62 (4) provides that the day specified is the day falling after the day on which the notice period will expire. Therefore, the correct date is 13 September 2019." She argued that accordingly the Notice to Leave in this application is valid.

Reasons for Decision:

1. The Respondent has not made any representations and did not attend the CMD. There was no opposition to the order being granted. The Tribunal did not consider that there was any need for a hearing as the facts of the case were not disputed and the evidence was sufficient to make the relevant findings in fact to determine the case. No defence was lodged to the application. The Respondent was made aware that the Tribunal could consider the case on its merits and make a decision at the CMD in terms of Rule 18 of the Rules of Procedure.
2. In order to find that the application has been a valid application the Tribunal must first establish whether the application meets the requirements of S 52 of the 2016 Act. At the first CMD the Tribunal had queried the validity of the Notice to Leave in respect of the date the Notice to Leave was actually accepted as received by the Respondent. Having considered the arguments of the Applicant's representatives, the Tribunal concluded that the Notice to Leave was a valid Notice as required by S 52 of the 2016 Act. The Tribunal found the arguments put forward by the Applicant's representatives convincing. There was no counter argument made by the Respondent.
3. The Tribunal notes that S 62 (5) specifically applies for the purpose of S 62 (4), namely the calculation of the date to be inserted into a Notice to Leave in terms of S 62 (1) (b). This is the day on which the "*the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal*". The Tribunal accepts that at the time a landlord completes a Notice to Leave this date can only ever be an assumption. For any method of service the actual point of delivery can only be established with any certainty after the event and thus a reliable assumption must be made to enable the landlord to produce a valid Notice to Leave, which complies with all requirements of S 62. This assumption, namely that the tenant will receive the notice to leave 48 hours after it is sent, is stated in S 62 (5). S 62(5) does not include the words "unless the contrary is shown" or similar, which would indicate that the recipient can establish a different date by leading evidence to that effect.
4. The question is then whether another provision would create such an option for the recipient. The Tribunal found the arguments presented regarding the interplay between S 26 of the 2010 Act and S 62(5) of the 2016 Act convincing. S 1 of the 2010 Act clearly excludes the application of the part of

the 2010 Act including S 26 thereof where "(a)the Act or instrument provides otherwise." S 62 (5) of the 2016 Act makes a specific provision for the assumption of service for the purpose of the date to be inserted in the Notice to Leave in terms of S 62 (4) of the 2016 Act and thus must exclude the application of that part of the 2010 Act.

5. This is further reflected in the Explanatory Notes to the 2016 Act, which include a reference to S 26 of the 2010 Act for the time limits stated in S 48 but not in S 62 of the 2016 Act. The Tribunal accepts that the differing statements in the Explanatory Notes show that consideration had been specifically given to the application of S 26 of the 2010 Act and is then reflected in the Notes accordingly. It was specifically mentioned in regard to those provisions for which it was supposed to apply. It was not mentioned in the Explanatory Notes to S 62.
6. The Tribunal also agrees that the mention of S 26 of the 2010 Act in the guidance notes on how to give the notice cannot overcome the clear wording of S 1 of the 2010 Act and the omission of its application in the Explanatory Notes to S 62 of the 2016 Act. Guidance notes are not legislation but merely guidance and the guidance notes provide no explanation as to how the writer had arrived at the statement that S 26 of the 2010 Act applies to the provisions of S 62 (5). The legislation has a clear meaning which must be preferred to an expression in guidance notes.
7. From the conclusions as stated above the Tribunal concludes that S 62 (5) creates an irrebuttable presumption regarding the calculation of the date to be entered into the Notice to Leave in terms of S 62 (1) (b) as calculated in terms of S 62 (4) of the 2016 Act.
8. From this follows that the Notice to Leave itself has to be considered a valid Notice to Leave. As the ground for eviction stated in the application and the notice is Ground 12, the 28 day notice period applies in this case. The Notice to Leave meets all requirements of S 62 and in terms of S 62 (5) calculated the date in S 62 (4) correctly as 13 September 2019 based on the sending of the application on 13 August 2019 and the deemed receipt of it 48 hours later on 15 August 2019 and a notice period of 28 days. The Tribunal thus concluded that the application was a valid application.
9. It then has to consider further whether the Ground of appeal stated in the Notice to Leave and the application applies in this case. The Tribunal found that Ground 12 (1) and (2) of Schedule 3 of the 2016 Act applies in this case.
10. It is not disputed that the Respondent has been in arrears for more than 3 consecutive months at the time the Tribunal first considered the case on its merits. The application included a statement of arrears showing the arrears as at the date the Notice to Leave was issued. At the date of the Notice to Leave the Respondent had been in arrears of rent to varying amounts for 12 consecutive months. As of April 2019 no further payments were reported, The Tribunal on the basis of the payment printout and the oral evidence of the Applicants' Representative accepted that the arrears on the day the Tribunal

considers the application on its merits are in excess of one month's rent as the arrears are stated are £9,703.12 and the monthly rent is £750 and the Respondent had been in arrears of rent for more than a year. The Respondent has not provided any information that would indicate that the arrears of rent over the period is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit.

11. The Tribunal thus considered that in terms of Ground 12 (1) and (2) of Schedule 3 of the Act the Tribunal must find that the ground applies and thus in terms of S 51(1) must issue an order for eviction.

Decision

The Tribunal grants an order for eviction in terms of S 51 of the Act on Ground 12 (1) and (2) of Schedule 3 of the Act

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.

P Hennig-McFatrige

Legal Member/Chair

Date

April 9. 2. 2020