



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 50 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”)

Chamber Ref: FTS/HPC/EV/20/1436

Re: Property at 2F, 3 Glencairn Crescent, Edinburgh, EH12 5BS (“the Property”)

Parties:

Dr Nikhil Joshi, 1 St Albans Road, Bristol, BS6 7SF (“the Applicant”)

Mr Daniel Zaleskis, Ms Helena Sosnowski, 2F, 3 Glencairn Crescent, Edinburgh, EH12 5BS (“the Respondents”)

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to make an order for repossession against the Respondents

Background

- 1 By application dated 1 July 2020 the Applicant applied to the Tribunal for an order for repossession against the Respondent under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). In support of the application the Applicant provided the following documentation:-
 - (i) Notice to Leave dated 21 January 2020 stating that proceedings for possession will commence no earlier than 15 April 2020 and citing ground 1;
 - (ii) Copy Private Residential Tenancy Agreement between the parties dated 29 September 2018;

- (iii) Notice under section 11 of the Homelessness (Scotland) Act 2003 to Edinburgh City Council;
- (iv) Copy Property Report from Savills dated 27 January 2020;
- (v) Copy Property Report from Coulters dated 28 January 2020; and
- (vi) Copy correspondence from Rettie and Co.

2 The Tribunal was also in receipt of the Land Certificate for the property under Title Number MID163165 which confirmed the registered owners as Nikhil Joshi and Alka Joshi. In response to a request from the Tribunal, the Applicant's Representative subsequently provided proof of service of the Notice to Leave by email dated 21 January 2020 and confirmation from the joint owner Dr Alka Joshi that she consented to the proceedings.

3 By Notice of Acceptance of Application dated 18 August 2020 the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. At the same time, the Tribunal issued a Direction in the following terms:-

"The Applicant/Applicant's Representative is/are required to lodge with the Chamber no later than close of business on 1 September 2020:

1. A written submission, including any calculation, to support the date of 15 April 2020 in the Notice to Leave, as the day on which the Applicant expected to become entitled to make an application for an eviction order to the First-tier Tribunal, having regard to:

- a. Sections 54(2) and Section 62(4) and (5) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act");*
- b. The date of the Notice to Leave being 21 January 2020; and*
- c. Service being effected by email to the Respondent's email addresses on 21 January 2020 at 21.52.12h;*

With reference to any legal authorities relied upon and copies of any such authorities with any passages relied upon clearly highlighted.

2. If it is accepted that the day on which the Applicant expected to become entitled to make an application for an eviction order was incorrectly specified in the Notice to Leave, a written submission in support of the competency of the Application, with reference to the relevant sections of the 2016 Act and any other legal authorities relied upon; and copies of any such authorities with any passages relied upon clearly highlighted."

4 By emailed dated 1 September 2020 the Applicant's Representative submitted a response to the Direction on the Applicant's behalf. In summary, the

Applicant's Representative conceded that the date in the Notice to Leave had not been stated correctly, however the Applicant sought to rely upon a previous decision of the Tribunal under case reference EV/19/2296 in which the Tribunal had exercised discretion under section 52(4) to excuse a date error in the Notice to Leave. The Applicant's Representative stated that the same approach should be taken in these proceedings on the basis that the error was only one day, the Respondents had received prior verbal notice from the Applicant and had agreed to vacate the property and any further delay would be prejudicial to the Applicant, particularly in light of his personal circumstances and the increasing rent arrears. The Applicant's Representative submitted that in exercising its discretion under section 52(4) the Tribunal would be acting in pursuance of one of its overriding objectives to deal with the proceedings justly, including avoiding delay in so far as compatible with proper consideration of the rules.

- 5 A Case Management Discussion was therefore assigned for 30 September 2020. Due to the imposition of restrictions arising from the Covid-19 pandemic a direction was issued to the parties by the Chamber President confirming that the Case Management Discussion would take place by teleconference. A copy of the application paperwork together with notification of the date and time of the Case Management Discussion and instructions on how to join the teleconference was intimated to the Respondents by Sheriff Officers on 2nd September 2020.

Case Management Discussion

- 6 The Case Management Discussion took place by teleconference on 30 September 2020. Mr David Gray, Solicitor from BTO Solicitors LLP, appeared on behalf of the Applicant. Ms Sosnowski was present.
- 7 As a preliminary issue, Ms Sosnowski explained that Mr Zaleskis was no longer residing at the property. However, he was aware of the proceedings and aware that she was attending the Case Management Discussion. The Legal Member was therefore satisfied that she could proceed in his absence.
- 8 The Legal Member explained the purpose of the Case Management Discussion and the legal test that required to be satisfied. She then asked parties to address her on their respective positions.
- 9 Mr Gray explained that the Applicant sought recovery of the property. He now resides in Bristol, and to that end had served Notice to Leave on the Respondents in order to sell the property and purchase a home in that area. Mr Gray explained that plans to market the property had been overtaken by the restrictions imposed by the Covid-19 pandemic. However it was the Applicant's intention to proceed with the sale if the order was granted by the

Tribunal. Mr Gray made reference to the written submissions that the Applicant has put forward in response to the Direction and urged the Tribunal to exercise its discretion in order to entertain the application despite the defect in the Notice to Leave. He outlined the consequences for the Applicant in terms of further delay, particularly financial prejudice in the face of increasing rent arrears. He also highlighted that the proceedings had not been raised immediately on the expiry of the Notice to Leave in April, the Applicant had waited until July.

- 10 Ms Sosnowski explained that she understood the concern of the owner and the challenges he faced. It had been her intention to leave the property however she had been left in some difficulty through losing employment and suffering illness. Her elderly mother was also residing with her. This had all hindered her attempts in finding another property. Ms Sosnowski explained that she had spoken with her solicitor who had told her she would be in a position to obtain another property in around two months. She therefore needed a bit more time to vacate. Ms Sosnowski explained that she hoped to be starting new employment in October which would assist in obtaining alternative accommodation.

Relevant Legislation

- 11 The legislation the Tribunal must apply in its determination of the application are the following provisions of the Private Housing Tenancies (Scotland) Act 2016:-

1 - Meaning of private residential tenancy

1) A tenancy is a private residential tenancy where—

(a) the tenancy is one under which a property is let to an individual (“the tenant”) as a separate dwelling,

(b) the tenant occupies the property (or any part of it) as the tenant’s only or principal home, and

(c) the tenancy is not one which schedule 1 states cannot be a private residential tenancy.

(2) A tenancy which is a private residential tenancy does not cease to be one by reason only of the fact that subsection (1)(b) is no longer satisfied.

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,

(ii) 84 days after it begins if subsection (3) does not apply.

(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,

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.*

Schedule 3, Part 1

Landlord intends to sell

- 1(1) It is an eviction ground that the landlord intends to sell the let property.*
- (2) The First-tier Tribunal must find that the ground named by sub-paragraph (1) applies if the landlord—*
- (a) is entitled to sell the let property, and*
 - (b) intends to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it.*
- (3) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(b) includes (for example)—*
- (a) a letter of engagement from a solicitor or estate agent concerning the sale of the let property,*
 - (b) a recently prepared document that anyone responsible for marketing the let property would be required to possess under section 98 of the Housing (Scotland) Act 2006 were the property already on the market.*

- 12 For the avoidance of doubt, the amendments to the provisions of the 2016 Act arising from the Coronavirus (Scotland) Act 2020 do not apply to this matter, on the basis that the Notice to Leave was served prior to 7 April 2020.

Findings in Fact and Law

- 13 The parties entered into a Tenancy Agreement which commenced on 6 October 2018.
- 14 The tenancy between the parties was a private residential tenancy as defined by section 1 of the 2016 Act.
- 15 On 21 January 2020 the Applicant delivered a Notice to Leave to the Respondents by email. The Notice to Leave cited ground 1 of Schedule 3 of the 2016 Act and confirmed that proceedings would not be raised any earlier than 15 April 2020.
- 16 The Notice to Leave is in the format prescribed by the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017.
- 17 The Notice to Leave does not comply with Sections 54 and 62 of the 2016 Act in that the date specified under section 62(1)(b) is incorrect.
- 18 It is reasonable for the Tribunal to entertain the proceedings under section 52(4) of the 2016 Act despite the defect in the Notice to Leave.
- 19 The Applicant is a registered owner of the property, which is held in joint names with Dr Alka Joshi. Dr Alka Joshi consents to the application.
- 20 The Applicant therefore has title to sell the property.
- 21 The Applicant has sought quotes from three property agents to market the property for sale.
- 22 The Applicant requires to sell the property following a move to Bristol in order to purchase a home in that area.
- 23 The Applicant intends to sell the property within three months of the Respondents ceasing to occupy.
- 24 The provisions of ground 1 of Schedule 3 of the 2016 Act have been met.

Reasons for Decision

- 25 The Tribunal was satisfied at the Case Management Discussion that it had sufficient information upon which to make a decision and that to do so would not be prejudicial to the interests of the parties. The substantive matters between the parties were agreed therefore there were no issues that required

to be resolved by the Tribunal through the consideration of evidence at a future hearing.

- 26 The application before the Tribunal was accompanied by a Notice to Leave which confirmed the Applicant's intention to rely upon ground 1 of Schedule 3 of the 2016 Act. The Notice to Leave had been emailed to the Respondents on 21 January 2020 and confirmed that the earliest date on which proceedings would be raised would be 15 April 2020.
- 27 The relevant provisions regarding the required period of notice are contained within section 54 of the Act, as outlined above. The relevant period of notice in view of the ground relied upon and the length of the tenancy which exceeded six months would have begun on the date the notice was delivered to the Respondent and expired on the day falling 84 days after it began. However regard must also be had to the provisions of section 62 of the Act, in particular 62(4) and 62(5).
- 28 The Tribunal therefore accepted the Applicant's concession that the date in the Notice to Leave was incompliant with the provisions of the 2016 Act and considered whether to exercise the discretion under section 52(4) of that Act in order to entertain the application before it. The Tribunal accepted that the Respondent had been given prior notice of the Applicant's intentions, and was in the process of obtaining alternative accommodation, albeit this had been impeded by her personal and financial circumstances. The Tribunal also noted the lack of rent paid since February 2020 and the financial hardship the Applicant was experiencing as a result. Having regard to the circumstances of the application, the Tribunal concluded it would therefore be reasonable to exercise its discretion under section 52(4). The error was not material in the context of the application, and the Tribunal was satisfied that the Respondents had been given the fair notice they would require in order to remove from the property or challenge the matter. The Tribunal was also conscious that it was now some eight months since the Notice to Leave had been given to the Respondents. The Tribunal therefore considered it would be reasonable and proportionate to consider the application at this stage.
- 29 The Tribunal therefore had to consider whether the provisions of ground 1 had been met. The Applicant had submitted with his application correspondence from three property agents whom he had instructed to provide quotes for the sale of the property. He was now in a position due to his move to Bristol whereby he required to sell the property in order to purchase a home in that area. The Tribunal found the verbal submissions from the Applicant's Representative on this point to be credible and there was nothing put forward by the Respondents to directly contradict or challenge his position. Ms Sosnowski in her verbal submissions at the Case Management Discussion had accepted that the Applicant intends to sell.

- 30 Ground 1 is a mandatory ground if the Tribunal accepts that the landlord intends to market the property for sale within three months of the tenant vacating the property and has title to do so. Based on its findings in fact, the Tribunal considered the ground to be met. Accordingly the Tribunal was obliged to grant the order for repossession.
- 31 Given the time that had passed since the service of the Notice to Leave, and having regard to Ms Sosnowki's submissions, the Tribunal did not consider it necessary to extend the period for issuing the order. Having regard to the appeal period, and to the procedures that will require to be followed thereafter, the Applicant will not be in a position to enforce the order until mid-November which should allow the Respondents sufficient time to obtain alternative accommodation and vacate.
- 32 The Tribunal therefore made an order for repossession against the Respondents. For the avoidance of doubt, the order shall be made against both Respondents. Whilst Ms Sosnowski has indicated that Mr Zaleskis is no longer residing at the property, he does remain a named tenant on the agreement and therefore it is appropriate that the order is made against both Respondents in order to formally terminate the existing tenancy between the parties.

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.

Ruth O'Hare

Legal Member/Chair

30th September 2020
Date