



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/20/2145

Re: Property at 12 Stoneyflatt Road, Dumbarton, G82 3HN (“the Property”)

Parties:

Mr Gavin Bonner, 4 Erskine View, Old Kilpatrick, G60 5JF (“the Applicant”)

Mr Chris Jackson, Mrs Kelly Jackson, 12 Stoneyflatt Road, Dumbarton, G82 3HN (“the Respondents”)

Tribunal Members:

Jim Bauld (Legal Member) and John Blackwood (Ordinary Member)

Decision

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

Background

1. By application dated 8 October 2020 , the applicant sought an order under section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”) and in terms of rule 109 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. In this application the order sought was based on ground 4 of schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016, namely that the applicant intended to live in the property
2. On 12 January 2021 the application was accepted by the tribunal and referred for determination by the tribunal. On the same date the tribunal issued a Direction requiring the applicant to provide proof of the service of the Notice to Leave upon the respondents and also proof that the notice required under

section 11 of the Homelessness etc (Scotland) Act 2003 had been received by West Dunbartonshire Council

3. A Case Management Discussion (CMD) was set to take place on 26 February 2021 and appropriate intimation of that hearing was given to both parties

The Case Management Discussion

4. The Case Management Discussion (CMD) took place on 26 February 2021 via telephone case conference. The applicant took part in the telephone case conference and was also represented by his letting agent Stephen McGlone from Westgate Lettings 49 Byres Road Glasgow G11 5RG. Mrs Kelly Jackson the second named respondent took part but explained that her husband who is the first named respondent was not available. The tribunal accepted that Mrs Jackson was representing both respondents
5. The tribunal explained the purpose of the CMD and the powers available to the tribunal to determine matters

Findings in Fact

6. The Applicant and Respondents as respectively the landlord and tenants entered into a tenancy of the property which commenced on 16 May 2019
7. The tenancy was a private residential tenancy in terms of the 2016 Act
8. The agreed monthly rental was £750
9. The property is a four bedrooomed house
10. The property is currently occupied by the respondents and their three children, a son aged 24, a daughter aged 12 and a son aged 7.
11. On 30 June 2020 the applicant served upon the tenant a Notice to Leave as required by the 2016 Act. The Notice was served by email upon the respondents and became effective on 5 October 2020
12. The notice informed the respondent that the landlord wished to seek recovery of possession using the provisions of the 2016 Act

Summary of discussion and reasons for decision

13. In this application the landlord seeks an eviction order.

14. The tribunal required to decide on five separate issues

- Had the notice to leave been received by the tenants?
- Did the notice to leave comply with the requirements of the 2016 Act
- Was the landlord entitled to serve the notice to leave by means of electronic communications?
- Was the ground for eviction established?
- Was it reasonable to grant the eviction order ?

Had the notice to leave been received by the tenants?

15. When the case management discussion was fixed, a Direction was issued by the tribunal requiring the landlord to produce evidence that the notice to leave had been attached to the email which purported to serve it. During the course of the tribunal, the Respondent accepted and agreed that they had received the notice to leave by email. Accordingly the tribunal does not require to make any further determination on whether the notice to leave was actually received.

16. The tribunal also notes that the Direction required the applicant to produce proof that the notice required under section 11 of the Homelessness etc (Scotland) Act 2003 had been received by West Dunbartonshire Council. Although no such proof was produced, the tribunal accepts the evidence that was given by the applicant that the notice was sent to the council. The tribunal also noted during the CMD that the respondents have been in touch with the homelessness team at the council and accordingly the purpose of the notice has been served.

Did the notice to leave comply with the requirements of the 2016 Act

17. This issue was not raised in the direction issued to parties nor in any prior correspondence from the tribunal prior to the CMD. It was raised by the tribunal members.

18. It is a requirement of the 2016 Act that prior to seeking an eviction order from the tribunal that a landlord must serve A notice to leave upon the tenant.
19. Section 62 of the 2016 Act sets out the requirements which are needed to constitute a valid notice to leave. Its provisions are as follows

Section 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

20. The section accordingly creates four requirements for the notice to leave. The notice must be in writing, it must specify a date upon which the landlord expects to be able to make the application to the tribunal, it must state the eviction ground which is intended to be used and it must fulfil any other requirements which have been prescribed by the Scottish ministers in regulations.
21. In this case the notice to leave is in writing. It also specifies the date upon which the landlord intends to raise proceedings. It indicates the eviction ground to be used being ground 4 of schedule 3 of the Private Housing (Tenancies)(Scotland) Act 2016, namely that the applicant intended to live in the property.
22. The question which was raised by the tribunal was whether the notice fulfilled “any other requirements prescribed by the Scottish ministers in regulations”.
23. The form of notice to leave which is required to be used is set out in the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (“the 2017 Regulations”). Regulation 6 of the regulations states that the notice to leave “must be in the form set out in schedule 5” of the regulations.
24. The landlord has used the prescribed form of notice to leave.
25. Part 3 of the prescribed form is headed “details and evidence of the eviction ground”. In that section of the notice a landlord is asked to provide reasons to

explain why they are seeking eviction under the ground which is indicated earlier in part 2 of the notice.

26. The question which arises is whether the part of the form which indicates that the landlord should provide reasons for the eviction and should "*state particulars of how they believe the ground have arisen*" is something which is prescribed by the regulations. Further, part 3 of the notice to leave also indicates to the landlord that it is important that the tenant fully understands why the landlord is seeking to evict them and states that the provision of supporting evidence with the notice can help do that. The notice invites the landlord to attach evidence to support the eviction action
27. In this particular case the landlord has provided no information in part 3 which sets out the reasons why the order is being sought.
28. No evidence is attached to the notice to leave which provides any information to the tenant
29. The question which arises is whether the provision within the notice of reasons for the eviction and evidence supporting the requested eviction is compulsory or advisable. Are these matters which are "prescribed in regulations" and thus a requirement for a valid notice to leave.
30. The regulations themselves do not make any statement other than indicating that the form of notice to leave set out in the schedule to the regulations must be used. The Scottish Government have also issued guidance notes for landlords with regard to the completion of these notices. Paragraph 5 of those guidance notes indicates that the tribunal will require a landlord to provide evidence to support the eviction ground. The Guidance notes state "*it is advisable to include copies of any evidence along with this notice in order to satisfy your tenant that the eviction ground you are using is valid.*"
31. The tribunal notes that other tribunal decisions have been made where applications have been rejected because the landlord has failed to provide any reasons to support the ground. Those decisions have mainly been made in applications where eviction has been sought based on the existence of rent of years and where the notices failed to provide any specification in connection with the amount of arrears in question. In those cases, the tribunal has taken the view that the notice to leave has not complied with the provisions of the 2016 and the 2017 regulations. the tribunals have taken the view that the notices were wholly deficient in failing to provide the reason behind the ground being used.
32. In this case the tribunal takes the view that the Regulations do require landlords to provide reasons . The prescribed form says that the landlord must "state particulars" of "how the ground has arisen". That is a matter which is therefore "prescribed" in the regulations .
33. In this present case, the tribunal takes the view that the ground itself sets out the reasons and particulars of the ground being used . The ground being used

here is that the landlord intends to live in the let property. There is no requirement to provide any further information in respect of how the ground has arisen.

34. With regard to the part of the form which suggests the provision of evidence, the tribunal notes that the guidance notes issued by the government suggest that the intention here was that the giving of evidence along with a notice was not a requirement but was merely advisable. The wording in the prescribed form also supports that view. It states "*It is important that the Tenant fully understands why you are seeking to evict them and that the action you are taking is justified. The provision of supporting evidence with this notice can help do that*".
35. Accordingly it would appear to be optional to provide the supporting evidence at the stage of service of the notice and not compulsory.
36. Having considered the provisions of the 2016 Act and the 2017 Regulations, the tribunal therefore takes the view that the notice to leave does meet the requirements of section 62 in that it is in writing, it sets out a date, it indicates the ground which is intended to be used and it does not fail to fulfil any other requirement prescribed in the regulations

37. Was the landlord entitled to serve the notice to leave by means of electronic communications

38. This issue was also not raised in the Direction issued to parties nor in any prior correspondence from the tribunal before the CMD. It was raised by the tribunal members.
39. It is a requirement of the 2016 Act that prior to seeking an eviction order from the tribunal that a landlord must serve a notice to leave upon the tenant. The 2016 Act does not specify any method of service. Reference must therefore be made to the Interpretation and Legislative Reform (Scotland) Act 2010. ("the 2010 Act") Section 26 of the 2010 Act sets out the various methods by which documents may be served where an Act of the Scottish Parliament authorises or requires a document to be served on a person (whether the expression "serve", "give", "send" or any other expression is used)
40. Section 26 of the 2010 Act indicates that documents may be served by one of three different methods. Firstly, personal delivery is permitted. Secondly, documents may be served by sending them all by sending through registered or recorded delivery post.
41. The third method which is allowed is by using electronic communications or by the document being transmitted to the person electronically

42. The 2010 Act however indicates that such service can only be done with the parties have previously agreed in writing that this method can be used.
43. The tribunal accordingly made enquiries of the landlord's representative whether such agreement had been reached. His position was that the private residential tenancy agreement which had been signed by the parties in May 2019 allowed such service. The tribunal directed the representative to look at the private residential tenancy agreement which had been lodged.
44. On page 6 of the agreement there is a clause headed "Communication" which purports to set out the methods by which documents can be served. That clause contains two boxes which could be ticked. One indicated that notices would be sent by "hard copy by personal delivery or recorded delivery". The other said that they will be sent using "the email addresses set out in Clauses (2 or 3) and 1) "
45. Neither box is ticked in this agreement. The Scottish Government guidance and the Easy Read Notes (which must be given to the tenant) indicate that if parties wish to use electronic communications they should tick the appropriate box in the tenancy agreement to signify that they have agreed to this method.
46. The Notes also indicate to tenants that :-

"The tenant does not need to agree to receive notices under the Agreement by email. If the tenant agrees to receive notices by email this could include important messages. For example telling the tenant that the rent is to go up or that the Tenancy is being brought to an end. You should think about whether email would be the right way to receive important information"

47. The landlord's representative indicated that he had sent the tenancy agreement to the tenants for their signature. He had no discussions with them. He did not attempt to explain any of the conditions within the tenancy agreement. He did not advise the tenants to seek any independent legal advice on the terms of the document. He did not draw to their attention the clause by which service of formal documents by electronic means would be allowed. It was his position that the tenancy agreement allowed service by either delivery of the documents by post or personal service or by electronic communications. It was his position that by not ticking either box they both applied.
48. The tenant indicated that she and her husband had not taken advice on the terms of the agreement. They had simply been asked to sign it by the landlords representative. She could not recall receiving the Easy Read Notes.
49. It was agreed between the parties that the tenant had lived in this property for a number of years prior to the private residential tenancy agreement being completed. That private residential tenancy agreement was completed only when the landlord's representative was instructed to act as the letting agent for the property by the landlord. Prior to that date the landlord himself had provided the appropriate tenancy agreement. The tribunal assumes that the initial tenancy agreement between the parties which commenced in or around 2013

was either a short assured tenancy or an assured tenancy. Those agreements do not generally tend to include clauses which allow electronic service or formal documents.

50. The tribunal notes the applicant's position with regard to the terms of the tenancy agreement and its application to the use of electronic means of service of notices

51. The tribunal takes the view that it is for the applicant to demonstrate that there exists prior written agreement that service by electronic means was agreed between the parties. The failure of the applicant to tick the appropriate box in the tenancy agreement and the applicant's letting agent omission in drawing attention to this matter to the tenants are factors which lead the tribunal to the conclusion that no such prior agreement existed. The terms of the private residential tenancy agreement can be construed as ambiguous and it is the tribunal's view that in construing any matter in a contract which is ambiguous it should be construed "contra proferentem", in other words, in a manner which benefits the party who did not draft the contract

52. Accordingly, if the tribunal were required to decide this question as a determining matter in this case, the tribunal would conclude that there was no previous agreement for service by electronic means as required by the 2010 Act and the tribunal would hold that the notice to leave had not been served in a manner which meets the requirements of both the 2016 Act thus rendering the application incompetent. The tribunal would dismiss the application on this basis.

53. If the tribunal is wrong in this conclusion it also then proceeded to consider the questions relating to whether the ground itself is established and whether it is reasonable to grant the order.

54. Is the eviction ground established and if so is it reasonable to grant the order?

55. The ground for eviction under which this application was made is the ground contained in paragraph 12 of schedule 3 of the 2016 Act. The ground is that the landlord intends to live in the let property. When the 2016 Act was originally passed, that ground of eviction was mandatory. The tribunal was required by law to grant the eviction order if satisfied that the landlord intended to occupy the let property as the landlord's only or principal home for at least 3 months.

56. Since 7 April 2020, in terms of changes made by the Coronavirus (Scotland) Act 2020 an eviction order can only be granted the Tribunal is satisfied that the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months and that it is reasonable to issue an eviction order on account of that fact

57. The tribunal heard evidence directly from the landlord. He stated that he currently resides in a one bedroom property. He has a 14-year-old daughter who presently lives with her mother who is his former partner. He and his former partner had jointly bought the let property in March 2009. They had separated shortly thereafter and he became the sole owner. His former partner has now married and has two other children with her current spouse. He indicated that there is a formal court order which sets out the relative residence and contact provisions in respect of his daughter. No copy of this order was shown to the tribunal but the tribunal accepted that the current provisions with regard to the place of residence of the applicant's daughter are in favour of his former partner.
58. The applicant's daughter lives with her mother, her mother's spouse and her two siblings together in a property in Clydebank. That house has at least four bedrooms. The applicant conceded he had never been inside this house. His daughter has her own bedroom within it. The applicant has contact with his daughter each weekend and she stays with him in Old Kilpatrick at those times.
59. The landlord indicated that he wished to try to take steps to obtain a formal residence order whereby his daughter would live permanently with him. He indicated that no such action has yet been raised in court. No evidence was produced to the tribunal to indicate that he has even consulted a solicitor on this matter. No evidence was produced to the tribunal to indicate the likelihood of the success of any such application.
60. The basis for this proposed action was that the applicant indicated that his daughter had significant mental health problems. He indicated that social work were now involved. He provided no evidence that there is any suggestion that the social work department would support his daughter moving from her current place of permanent residence. He indicated he would not be able to obtain such an order for residence while he lived in his property in Old Kilpatrick which only has one bedroom. He indicated that if he was able to move back into the let property which is the subject of this application he would be able to obtain the court order. He indicated that he has not made any enquiries with the local council or local housing associations to ascertain if they would provide him with accommodation which would be sufficiently large to allow his daughter to reside with him.
61. The respondent indicated that she currently occupies the let property with her husband and their three children. Her oldest child is 24 years of age and has certain health issues. Her younger two children are aged 12 and 7 and both currently attend local schools. Since receiving the notice to leave she and her husband have been in touch with the local authority and with local housing associations in an attempt to obtain alternative accommodation. For reasons linked to her children's schooling she does not wish to move outwith the Dunbartonshire area which she described as ranging from Bowling to Balloch. She has been advised by a local housing association that she is on the waiting list and may be allocated a new build property in a development which is under construction in Dumbarton. There is no current completion date for that

development . There is no guarantee that the respondents will be allocated a property in this development. If the eviction order is granted and she is rendered homeless she would require to approach the local authority to seek emergency accommodation. She does not wish to do that as she does not believe that the accommodation which will be provided will be suitable for her family. She has also made enquiries with regard to the availability of accommodation in the private rented sector but cannot find any similar size property available to her at the rental level which she is currently paying the present landlord. It was conceded by the applicant's representative that the respondents are in all regards excellent tenants. He stated that he would have no difficulty in leasing another property to them. he agreed it would be difficult for their respondents to find alternative accommodation in the private sector at this time

62. The tribunal accepted that both the landlord and the tenant provided the evidence in an open and honest manner. The tribunal accepted that the landlord was honest and genuine in his statement that he intends to live in the property. Having done so , he would seek to obtain appropriate court orders which granted him the status as the parent who had residence rights in respect of his daughter. The tribunal is not able to make any determination in respect of such a matter. The tribunal however notes that no application has even been lodged with the court seeking such an order and the tribunal would generally take the view that the granting of such an order would take a period of several months.

63. The tribunal noted that the tenants occupy the property with three children. The tenant has no alternative accommodation available and although they have made appropriate enquiries with all relevant local authorities and other housing providers there is no accommodation currently available to them and their family within the general Dunbartonshire area. If the eviction order were to be granted she and her family would be rendered homeless. Such an order may have a significant impact on the education of the two younger children who may be required to move school.

64. In determining whether it is reasonable to grant the order, the tribunal is required to balance all the evidence which has been presented and to weigh the various factors which apply to the parties.

65. The Tribunal has a duty, in such cases, to consider the whole of the circumstances in which the application is made, it follows that anything that might dispose the tribunal to grant the order or decline to grant the order will be relevant. This is confirmed by one of the leading English cases, *Cumming v Danson*, ([1942] 2 All ER 653 at 655) in which Lord Greene MR said, in an oft-quoted passage:

“[I]n considering reasonableness ... it is, in my opinion, perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive,

but it is quite wrong for him to exclude from his consideration matters which he ought to take into account”.

66. In this case if an eviction order is granted a family who are currently occupying a property which is entirely suitable for the needs would be rendered homeless. The order would then allow a single person to occupy that property with no immediate prospect that any further court order would be granted in favour of that person to require his daughter to live with him. The balance of reasonableness in this case is heavily weighted towards the respondents. They have occupied this house for a number of years. They are settled there. The granting of an eviction order to remove them with its attendant upheaval would not be justified to allow the applicant to pursue a future and speculative court action where he seeks an order changing long standing residence arrangement in respect of his daughter. The prospects of success in such an action appears to the tribunal to be limited.

67. While the tribunal accept that the landlord has demonstrated his intention to live in the property, the tribunal does not find that it would be reasonable to grant the order on account of that fact.

68. The tribunal wishes to thank all parties who participated in the CMD for their candour and honesty. the tribunal notes that many matters raised during the CMD were personal in nature and related to persons who were not parties the CMD. The tribunal has refrained in this decision from disclosing certain details of the matters raised by parties

DECISION

In all the circumstances of this application, the tribunal refuses the application.

The application is founded on a notice to leave which has not been validly served and thus is incompetent.

If the tribunal has erred in this finding then the tribunal finds that the granting of the eviction order would not be reasonable and the tribunal refuses to grant same

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.

Jim Bauld

Legal Member/Chair

9 March 2021
Date