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

Chamber Ref: FTS/HPC/EV/20/0909

Re: Property at 4 West Chapelton Crescent, Hillcrest, Bearsden, Glasgow, G61 2DE ("the Property")

Parties:

Mr Mark Smedley, C/O Tay Letting LTD, 8 Eagle Street, Craighall Business Park, Glasgow, G4 9XA ("the Applicant")

Mr Alan Harty, 4 West Chapelton Crescent, Hillcrest, Bearsden, Glasgow, G61 2DE ("the Respondent")

Tribunal Members:

Petra Hennig-McFatridge (Legal Member) and Janine Green (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to refuse the application.

Background

1. On 10 March 2020 the Applicant's representative Ms Crawford made an application on behalf of the Applicant under Rule 109 of The First – tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the Rules) for an eviction order for the property in terms of S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act).

2. The following documents were lodged with the application:
   a) Private Residential Tenancy Agreement with a start date of 12 September 2019
   b) Notice to Leave dated 7 February 2020 with certificate of service by Sheriff Officers for service of the said notice on 7 February 2020 on the Respondent.

c) S 11 Notice with covering email to East Dunbartonshire Council of 10 March 2020

d) rent statement covering the period of 30 August 2019 to 1 March 2020.

3. A Case Management Discussion (CMD) was held on 7 August 2020. For the Applicant Mr Harper participated. Mr Harty the Respondent participated.

4. The Tribunal issued Directions to both parties which included the direction: "The Applicant/Respondent are required to 1. Address the Tribunal hearing on the relevance or otherwise of the Upper Tribunal case Majid v Gaffney and Britton, UTS/AP/19/0037" and the case was adjourned to a hearing.

5. The hearing was due to call on 30 September 2020 at 10:00 alongside the linked case CV/20/0904. A late postponement request was received from the Respondent by email on 29 September 2020.

6. Participants of the conference call were the Respondent and Ms Crawford as legal representative of the Applicant.

7. The postponement request by Mr Harty was opposed by Ms Crawford on the basis that he had had plenty of opportunity to lodge the documents, in particular the bank statements requested to evidence payments made by the Respondent to the Applicant Mr Harty stated he had made.

8. The relevant provision to such a request are stated in Rule 28 as follows: "Adjournment or postponement of a hearing 28.—(1) The First-tier Tribunal at its discretion may, on its own initiative or on an application by a party, at any time, adjourn or postpone a hearing.(2) Where a party applies for an adjournment or postponement of a hearing, that party must—(a)if practicable, notify all other parties of the application for an adjournment or postponement;(b)show good reason why an adjournment or postponement is necessary; and (c)at the direction of the First-tier Tribunal produce evidence of any fact or matter relied on in support of the application for an adjournment or postponement.(3) The First-tier Tribunal may only adjourn or postpone a hearing at the request of a party on cause shown. (4) If the reason for such an adjournment or postponement is to allow the party more time to produce evidence, the First-tier Tribunal may only adjourn or postpone the hearing if satisfied that—(a)the evidence relates to a matter in dispute;(b)it would be unjust to determine the case without permitting the party to produce the evidence; and (c)where the party has failed to comply with directions for the production of the evidence, the party has provided a satisfactory explanation for that failure."

9. The tribunal asked Mr Harty to submit evidence to show that there was a satisfactory explanation for the failure to produce the documents set out in the direction of 7 August 2020 so it could consider whether it would be unjust to determine the case without permitting the party to produce the evidence.

10. Mr Harty advised that he had sought to obtain the bank statements of his business account with Santander, from which he states the rent payments were made to Tay Lettings, the Applicant's agents. The account was now closed. He did not retain paper copies of the bank statements. He had spent some considerable time trying to get statements for the last year from Santander Business Centre but had been assured the documentation would

be sent and it still had not reached him. He then produced several emails from him to Santander requesting bank statements showing in particular the payee details for payments to Tay Lettings, a screenshot without date showing a £10,000 payment to a payee called Tay Lett and, after a further discussion and adjournment, he forwarded what appears to be an email from Santander to him confirming that he would receive the requested information within 7 days. The email is dated 29 October 2020 and the content of the email appears to be dated 11 October 2019.

11. Ms Crawford stated that she had not seen the screenshot indicating a £10,000 payment previously and still objected to the postponement of the hearing on the basis that the format of the emails forwarded was odd, as it did not include the usual details of when the messages were sent and only stated "date...at" rather than the word "sent". The tribunal further queried the dates on what purports to be the Santander reply. Mr Harty explained that he simply forwarded the email from his telephone to his other email account so it could be forwarded to the tribunal and did not have an explanation for the dates shown. This was the email he had received the day prior to the hearing date and thus he was asking for a further 7 days. The periods between the emails from him to Santander should be considered in light of the various telephone calls made in-between, which were the reason he had not emailed them more regularly.

12. Ultimately the tribunal considered that the evidence of the bank account statements showing payments from Mr Harty to Tay Letting would be the best evidence available to prove which payments were made and when and thus which arrears were in place at the relevant dates. It is frustrating for the tribunal and the Applicant that this information was not available on the day but, as Mr Harty pointed out, in this time of a changed working environment due to Covid -19 restrictions and home working it is a fact that various things that were relatively easy and quick now take considerably longer. The tribunal on balance found that the evidence of Mr Harty's emails to the Santander Business centre clearly showed that he had made ongoing requests and efforts to receive the back bank statements and that, given the importance of such statements to the case, the hearing should not proceed.

13. As previously discussed with the parties, the Tribunal thus converted the hearing to a further Case Management Discussion and invited both parties to make submissions on the case raised by the Tribunal in the Directions of 7 August 2020 and to state their position with regard to the matters which need to be resolved and matters with are agreed with regard to the eviction case.

14. The Case Management Discussion

15. In the course of the subsequent discussion the Respondent stated that his position was that there had been no arrears at all for the months December 2019, January 2020, February 2020 and March 2020 and that rent for those months at the agreed rate of £3,495 per calendar month in advance payable on the 1st day of the month had been paid to Tay Lettings, the Applicant's agents, in full and on time.

16. He further stated that he agreed that since the payment of £10,000 in or about June 2020 no further payments of rent had been made as he had identified that there appeared to be problems with the rent being received by the Applicant and he had suggested to the agents that he would make further rental payments to a bank account nominated by the Applicant. This had not been agreed by the Applicant or the agent.

17. The Respondent stated in regard to the issue of whether the Notice to Leave should be considered valid that he was disputing the arrears and that he did not think that the order should be granted. He made no detailed submissions in this regard.

18. Ms Crawford then proceeded to make the following submissions to the Tribunal:

19.

20. If the Notice to Leave was to be deemed valid, the eviction order should be granted at the CMD on the basis that the Respondent had admitted and agreed that at the date of the CMD rent arrears had been accruing for a period of 3 consecutive months since some time in June 2020 and that the arrears thus would also merit an eviction in terms of ground 12 of Schedule 3 of the 2016 Act, which states: *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.

21. She then addressed the Tribunal on the issue of the validity of the Notice to Leave and the relevance of the Upper Tribunal case of Majid v Gaffney and Britton, UTS/AP/19/0037 in the following terms.

22. Firstly she argued that the case is not in point because the case related to a decision of the tribunal at the pre-acceptance stage. It related to a rejection of an application in terms of Rule 8 of the Rules. In the case before this Tribunal the application had already been accepted by the acceptance letter of 16 April 2020 and thus the case was at a different procedural stage. The acceptance letter implied that the application was validly made. By virtue of the acceptance letter the tribunal had acknowledged that the document was valid.

23. Secondly, even if the Notice to Leave was deemed to have been issued prematurely if issued before the time when three months consecutive arrears

had accrued, this would only constitute a minor error and should still be considered valid in terms of the saving provision in S 73 of the Act.

24. The case was now 7 months down the line and since April no rent had been paid. There was no prejudice to the Respondent by the notice having been served prematurely. The Notice to Leave should be considered valid and the tribunal should proceed to issue an order for eviction now.

The following facts are agreed between the parties:

1. The parties entered into a Private Residential Tenancy Agreement for the property on 12 September 2019 (Clause 6).
2. Rent of £3495.00per calendar month was payable on the first day of the month for the month in advance (Clause 8).
3. On 30 November 2019 the Respondent was not in arrears of rent.
4. A Notice to Leave was served on the Respondent by Sheriff Officers on 7 February 2020 giving as the ground for eviction in part 2:"You are in rent arrears over three consecutive months" and as the details of the evidence in part 3 : "£3495.00 arrears for December 2019, January 2020 and February 2020 totalling "10,485."

Reasons for decision

Relevant legislation:

Rule 17 of the Rules of Procedure:
Case management discussion
17.—(1) The First-tier Tribunal may order a case management discussion to be held—
(a)in any place where a hearing may be held;
(b)by videoconference; or
(c)by conference call.
(2) The First-tier Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and any changes to the date, time and place of a case management discussion.
(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, including by—
(a)identifying the issues to be resolved;
(b)identifying what facts are agreed between the parties;
(c)raising with parties any issues it requires to be addressed;
(d)discussing what witnesses, documents and other evidence will be required;
(e)discussing whether or not a hearing is required; and
(f)discussing an application to recall a decision.
(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.

Power to determine the proceedings without a hearing
18.—(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

2016 Act
52Applications 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.

62Meaning 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.

73Minor errors in documents
(1)An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.
(2)This section applies to—
(a)a notice under section 14(3), 16(3)(c), 22(1) or 61(1),
(b)the document by which a referral is made to a rent officer under section 24(1),
(c)the document by which an application is made to a rent officer under section 42(1), and

(d)a notice to leave (as defined by section 62(1)).

Grounds under 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.

The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (the Regulations)
Regulation 6 Notice to leave
6. A notice to leave given by the landlord to the tenant under section 50(1)(a) (termination by notice to leave and tenant leaving) of the Act must be in the form set out in schedule 5.

Reasons:

1. The Tribunal took into account the representations by both parties at the CMD and the documentation lodged by both parties. All documents are referred to for their terms and held to be incorporated herein.

2. The Tribunal considers that in terms of Rule 18 at the CMD on 30 September 2020 it can make a decision as the facts necessary to determine the application are not in dispute and as the parties had been given ample prior notification by the tribunal that the case Majid v Gaffney and Britton, UTS/AP/19/0037 was considered relevant to the proceedings it could make a decision to find that the Notice to Leave was not valid and thus the application has to be refused.

3. Sheriff Fleming in the Upper Tribunal decision [2019] UT 59 Majit v Gaffney and Britton of 17 October 2019 set out what considerations have to be applied on whether ground 12 of Schedule 3 of the Act is met at the stage when a Notice to Leave is issued and what the consequences should be if that was not the case. The circumstances of that case are set out in paragraph **[9]** *"The First-tier Tribunal may only order eviction if one of the grounds specified in Schedule 3 to the 2016 Act applies. It is clear from the terms of the Notice to Leave that ground 12 is being relied upon; as at the date of the Notice to Leave the tenant must have been in rent arrears for three or more consecutive months. Therefore, if the tenant was first in arrears of rent as at 30 April 2019 then the expiry of the three month period would be 30 July 2019. As at 1 July 2019 the tenant was not in rent arrears for three or more consecutive months. The tenant must have been in arrears for the specified period of time, not simply owing rent. Ground 12 does not apply as at the date of service of the Notice to Leave. "*

4. Sheriff Fleming at paragraph [14] held: " *[14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord "expects to become entitled to make an application for an eviction order to the First-Tier Tribunal". It is clear that the word "expects" relates to the date on which the application will be made. That is entirely distinct from the eviction ground. The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid. If it is invalid decree for eviction should not be granted. The decision of the Firsttier Tribunal sets out the position with clarity. It could in my view it could never have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure that the 2016 Act*."

5. The rent arrears in the case before the Tribunal at the CMD could only have started to accrue on 1 December 2020 as the Applicant's own evidence is that there were no rent arrears on 30 November 2020 as set out in the rent statement lodged.

6. The Notice to Leave was served 2 months and 7 days later, on 7 February 2020.

7. The requirement for Ground 12 to apply is stated in Ground 12 (1) as " It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months."

8. As a matter of fact the Respondent could not have been in rent arrears for three or more consecutive months on 7 February 2020 if the arrears started to accrue on 1 December 2020.

9. The test is not whether or not on the date the Notice to Leave is served three or more payments had been missed or not been made on time but whether or not on the date the Notice to Leave was served the tenant had been in arrears for a specific period, namely three or more consecutive months. On 7 February 2020 the Respondent had been in arrears for a consecutive period of two months and 7 days only.

10. The Upper Tribunal decision quoted above clarified the issue for the ground of rent arrears explicitly and is binding on the First-tier Tribunal.

11. Ms Crawford argued that the case should not be considered to be in point as it dealt with a different procedural stage. The case before the Upper Tribunal had been an appeal against a rejection of an application under Rule 8 whereas the Tribunal at the CMD was considering an application which had been accepted by the Tribunal on 16 April 2020.

12. The Tribunal was not persuaded by this argument. The acceptance of an application for further processing and progression to the CMD stage cannot prevent the Tribunal assessing the validity or otherwise of documents lodged

with an application at a later stage. In many cases a document required to fulfil the lodging requirements in terms of the Rules of Procedure may appear on the face of it valid and a defect comes to light once the material issues of the case are considered.

13. The legal considerations to be applied regarding whether the Notice to Leave complies with the requirements of a valid Notice to Leave forming the basis of an eviction order had been clearly set out by Sheriff Fleming in the UT case Majit v Gaffney and Britton of 17 October 2019 and the case binds the First-tier Tribunal on that matter. The Tribunal must apply these criteria at any stage where the validity of the Notice to Leave is considered relevant and thus also at the stage of a CMD. On that issue alone the Tribunal does not consider the argument of Ms Crawford succeeds.

14. She further argued that the premature service of a Notice to Leave could be cured in terms of S 73 of the Act. S 73 is headed: "Minor errors in documents" and refers in S 73 (1) to "(1)An error in the completion of a document." The Tribunal does not consider that the provision can be used in the circumstances of this case. The Notice to Leave had been completed as intended. There was no error in the completion of the document. It was simply not a document which, completed on the date when it was signed, could form the basis of an eviction order. Regardless of the content of the entries, if Notice to Leave was served on 7 February 2020 before the ground of eviction existed, the Notice was premature.

15. If it is premature, then it is not valid. This is the essential consequence as held by Sheriff Fleming in paragraph [14] as stated above.

16. S 52 (2) and (3) of the Act set out that ultimately the question of whether or not a Notice to Leave is valid determines whether the Tribunal can entertain an application for eviction. The Tribunal can only consider an application for an eviction order if it is accompanied by a copy of a Notice to Leave (s 52 (3) of the Act).

17. For the reasons stated above the Tribunal finds that the Notice to Leave was not valid. The application made on 7 January 2020 was not a valid Notice to Leave in terms of s 52 (3) of the 2016 Act. In terms of S 52 (2) (a) of the 2016 Act the Tribunal cannot entertain such an application and it has to be dismissed.

18. The Tribunal considered that the deficiency of the Notice cannot be cured by any further evidence as there is no dispute about the facts concerning the date of the Notice to Leave and the ground on which the application is based. Thus the application has to be dismissed at this stage as the application cannot proceed on the basis of the Notice to Leave lodged.

Decision:
The Tribunal refuses the application as it does not fulfil the requirements of an application in terms of s 52 of the 2016 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.

30 September 2020

Legal Member/Chair **Date**