



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/20/0102

Re: Property at 19 Back Dykes, Auchtermuchty, Cupar, KY14 7AB (“the Property”)

Parties:

Mrs Yvonne Verrecchia, C/o Victoria Letting, 4 Chancellor Street, Glasgow, G11 5RQ (“the Applicant”)

Miss Phoebe Tang, Mr Edward Crawford, 19 Back Dykes, Auchtermuchty, Cupar, KY14 7AB (“the Respondent”)

Tribunal Members:

Petra Hennig-McFatridge (Legal Member)

Decision

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

Background

[1] The Applicant’s representative Ms Hanna from Victoria Lettings made an application on behalf of the Applicant dated 7 January 2020 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 2016 Act).

[2] The following documents have been lodged with the application:

1. Private Residential Tenancy Agreement with a start date of 1 February 2019
2. Notice to Leave dated 11 October 2019 with covering email sending said notice dated 11 October 2019
3. S 11 Notice with covering email to Fife Council dated 7 January 2020
4. rent statement covering 1 February 2019 to 1 January 2020

[3] On 15 January 2020 the representative provided authorisation from the Applicant to the Tribunal. On 29 January 2020 the Tribunal wrote to the Applicant's representative asking for further information in the following terms:

1. The title on the property appears to be held in the name of Yvonne Harley. The applicant is named as Yvonne Verrecchia. Please confirm that the said owner and said applicant are the same person and explain the change of name (i.e. marriage)
2. Part 3 of the Notice to Leave lodged has been left blank. No reasons are given in said Notice as to the basis upon which you seek to rely on the highlighted grounds, nor any evidence attached (i.e. rent statement, evidence of antisocial behaviour). Please provide written submissions as to why Part 3 has been left blank, and the basis upon which you consider that the Notice to Leave has given sufficient information to the tenant and should be deemed to be competent?
3. Please provide evidence to satisfy your reliance on ground 14 (that the tenant has engaged in antisocial behaviour)
4. Please provide proof of service on the Notice to Leave on the tenant.

[4] On 4 February 2020 Ms Hanna sent the following in answer to the Tribunal:

1. Yvonne Verrecchia is the legal owner of the property. Her maiden name is Harley. Yvonne was married last year.
2. Part 3 of the notice to leave was omitted in error however we have emails from the tenant showing he is aware of the reasons for the Notice to Leave (attached)
3. Attached
4. Attached

[5] Ms Hanna attached the following to this email:

1. text message chain between Yvonne Harley and tenants of 15 October 2019
2. email exchange property for the period 21 October 2019 and 29 October 2019 between the Respondent and Ms Hanna regarding repairs required at the property.
3. email from Ms Hanna to Respondents dated 11 October 2019 sending the Notice to Leave and stating: "Further to my previous email, please now find attached your notice to leave due to unpaid rent. This notice will be submitted to the first tier tribunal"

[6] A Case Management Discussion (CMD) was fixed for 2 April 2020 but had to be cancelled due to the Covid-19 lockdown. On 23 July 2020 a further CMD was scheduled by teleconference. The Respondents were notified of this by recorded delivery letter of 15 June 2020.

[7] The Tribunal is thus satisfied that the Respondents had due notice of the application, documentation and the notification of the CMD details. These included the statement that the tribunal may make a decision at a CMD.

[8] Ms Hanna for the Applicant and Mr Crawford for the Respondents took part in the teleconference CMD.

The Case Management Discussion

[9] The Legal Member explained the purpose of the CMD and advised that the first matter to be discussed would be whether or not the Notice to Leave can be considered valid.

[10] The Respondent stated that as far as he is aware there were no 3 consecutive months of arrears as at 11 October 2019 and that he had paid off one month's arrears the following month around that time. He also stated he was unaware of any antisocial behaviour issues, lives at the property with his son, there were no noise or other complaints from neighbours and he does not understand what this can relate to.

[11] Ms Hanna stated that the arrears had now gone up to £4,700 and that the evidence of antisocial behaviour was contained in the text messages and emails provided, which showed the Respondents had been harassing the Applicant and the agent in correspondence, which at times was threatening.

[12] The Legal Member pointed out to her that whilst the email of 4 February dealt with points 1 and 4, it did not provide sufficient information for points 2 and 3. All the evidence lodged in answer to the Tribunal's request for further information point 3, evidence regarding antisocial behaviour related to the period 15 October 2019 to 29 October 2019, which clearly postdates the Notice to Leave. If the emails and texts were said to be the antisocial behaviour these happened after the Notice to Leave was served. The rent statement did not show rent arrears for 3 consecutive months prior to the Notice to Leave having been served as it showed no arrears after 2 September 2019 until 1 November 2019. The Legal Member read to Ms Hanna extracts of the UT decision [2019] UT 59 by Sheriff Fleming in *Majit v Gaffney and Britton* of 17 October 2019 which dealt specifically with the question whether the ground of eviction has to be present at the time the Notice to Leave is served.

[13] Ms Hanna stated she had relied on advice received prior to that decision and she considered the Notice to Leave should be valid because there had been problems with rent payments before, there was one month arrears as at 11 October 2020 and she had sought advice from a landlord organisation which stated she could serve the Notice even although there were not 3 consecutive months arrears at the time as long as she then waited with lodging the application to the Tribunal until 3 months consecutive arrears were in place. As this advice and the Notice to Leave predate the Upper Tribunal decision the notice should be considered valid on the basis of the arrears. She stated that there may be other information regarding the antisocial behaviour as the reason the Applicant had instructed Victoria Lettings to manage the property had been that the Applicant just could not deal with the Respondents' any more. An up to date rent statement was available to the Tribunal. She had served further Notices to Leave on the Respondents in February 2020 for the same reasons.

[13] Findings in Fact

1. The parties entered into a Private Residential Tenancy Agreement for the property on 1 February 2019

2. Rent of £525 per calendar month was payable on the first day of the month for the month in advance (Clause 7).
3. Rent for 1 July 2019 was paid on 28 June 2019.
4. Arrears of £525 due on 1 August 2019 were paid off together with the September rent on 2 September 2019.
5. The rent account as of 2 September 2019 was clear until 1 October 2019.
6. The October rent was paid late on 11 October 2020, when the rent account was again cleared.
7. A Notice to Leave was served on the Respondents on 11 October 2019 stating as the date proceedings could be raised 1 December 2019 and giving as the ground for eviction "You are in rent arrears over three consecutive months" and "You have engaged in relevant antisocial behaviour".
8. Part 3 of the Notice to Leave only showed the heading of Part 3 but not the prescribed content of Part 3.
9. No description of the alleged antisocial behaviour was provided with the Notice to Leave.
10. No amount or period was included regarding specification of the rent arrears.
11. There were no other attachments sent with the Notice to Leave email
12. As at the 11 October 2019 the Respondents had not been in rent arrears for three or more consecutive months.
13. The evidenced of antisocial behaviour only relates to a period postdating the Notice to Leave.
14. A text message conversation took place on 15 October 2019 between the Applicant and the Respondent in which the Respondent is asking the Applicant to arrange various repairs and repeatedly asked her to contact him.
15. An email exchange took place between the Respondents and the Applicant's agent over the period from 21 to 29 October 2019 regarding repairs due to the property.

Reasons for decision

[14] 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

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.

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.

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.

Anti-social behaviour

14(1) It is an eviction ground that the tenant has engaged in relevant anti-social behaviour.

(2) The First-tier Tribunal may find that the ground named by sub-paragraph (1) applies if—

(a) the tenant has behaved in an anti-social manner in relation to another person,

(b) the anti-social behaviour is relevant anti-social behaviour, and

(c) either—

(i) the application for an eviction order that is before the Tribunal was made within 12 months of the anti-social behaviour occurring, or

(ii) the Tribunal is satisfied that the landlord has a reasonable excuse for not making the application within that period.

(3) For the purposes of this paragraph, a person is to be regarded as behaving in an anti-social manner in relation to another person by—

(a) doing something which causes or is likely to cause the other person alarm, distress, nuisance or annoyance,

(b) pursuing in relation to the other person a course of conduct which—

(i) causes or is likely to cause the other person alarm, distress, nuisance or annoyance, or

(ii) amounts to harassment of the other person.

(4) In sub-paragraph (3)—

“conduct” includes speech,

“course of conduct” means conduct on two or more occasions,

“harassment” is to be construed in accordance with section 8 of the Protection from Harassment Act 1997.

(5) Anti-social behaviour is relevant anti-social behaviour for the purpose of sub-paragraph (2)(b) if the Tribunal is satisfied that it is reasonable to issue an eviction order as a consequence of it, given the nature of the anti-social behaviour and—

(a) who it was in relation to, or

(b) where it occurred.

(6) In a case where two or more persons jointly are the tenant under a tenancy, the reference in sub-paragraph (2) to the tenant is to any one of those persons.

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:

[15] The Tribunal took into account the representations by both parties at the CMD and the documentation lodged by the Applicant's representative. All documents are referred to for their terms and held to be incorporated herein.

[16] 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). The requirements of a Notice to Leave are stated in s 62 of the Act. S 62 (1) (d) requires that such a notice "*fulfils any other requirements prescribed by the Scottish Ministers in Regulations.*" Scottish Ministers prescribed the form and content of the Notice to Leave in the Regulations. Unless the Notice to Leave meets the requirements set out in the Regulations it will not be valid.

[17] Regulation 6 of the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (the Regulations) states: "*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.*"

[18] A Notice to Leave is thus a statutory form and the prescribed form in Schedule 5 of the Regulations in part 3 reads: "*Details and Evidence of eviction ground(s) [I/We] also inform you that I/we are seeking eviction under the above grounds for the following reasons: [State particulars of how you believe the ground(s) have arisen-continue on additional sheets of paper if required. Please give as much detail as possible including relevant dates, and in cases of rent arrears insert the amount of arrears outstanding and the period over which it has built up.]...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. .. [I/We] attach the following evidence to support the eviction action:*"

[19] There is a clear requirement in terms of the Regulations that the Notice to Leave for the landlord to provide the information under Part 3 of the Notice to Leave. The Applicant's representative stated that Part 3 had been omitted in error. The issue of a lack of specification of the Notice to Leave Part 3 had been raised with the Applicant's representative prior to the CMD. The Applicant had been given the opportunity to address the matter in writing. The Applicant's position stated in the email of 4 February 2020 was that the information in Part 3 of the Notice to Leave had been omitted in error but that the correspondence attached to the email of 4 February 2020 would show that the Respondents had been aware of the reasons.

[20] As the texts and emails lodged with the emails of 4 February 2020 only cover text and email exchanges between the Respondents and the Applicant and her agent regarding repairs to the property and problems with the property from 15 October 2019 to 29 October 2019 and do not mention any complaints or warnings about previous or current antisocial behaviour there is no evidence in these texts and emails to suggest that the Respondents had been made aware of any issues regarding antisocial behaviour by either the Applicant or her agent prior to the Notice to Leave having been issued.

[21] If Ms Hanna argues that the antisocial behaviour was the sending of said text messages and emails submitted to the Tribunal, this cannot be evidence of antisocial behaviour prior to the date of 11 October 2019 as all the correspondence lodged postdates the date the Notice to Leave was served.

[22] With regard to ground 14 of schedule 3 of the 2016 Act the Tribunal does not consider the Notice to Leave is valid. There was inadequate information provided to the tenants in the Notice to Leave as part 3 of the Notice to Leave had been omitted completely and no other information detailing the alleged antisocial behaviour had been served with the Notice to Leave. The Notice or accompanying documents provided no evidence that antisocial behaviour had taken place prior to 11 October 2019. As the Notice to Leave gave no information at all about what the antisocial behaviour referred to may have been, the Respondents did not receive sufficient specification of the alleged behaviour in the Notice. No evidence of any such behaviour predating the date of the Notice was provided by the Applicant or her agent subsequently.

[23] With regard to the requirements of advising the Tenants of the reasons for ground 12, the covering email of 11 October 2019 advised the tenants that the Notice to Leave was issued due to unpaid rent. Neither the email nor the Notice to Leave gave any further specification of the amount of arrears or the period during which they had built up. No rent statement was attached to the Notice to Leave.

[24] On that basis alone the Notice to Leave would be held invalid for ground 12 for the same reasons as stated above with regard to ground 14. However, in this case the Notice to Leave served on 11 October 2019 could not be valid under ground 12 in any event because the ground had not been satisfied on the date when the Notice to Leave was served.

[25] Sheriff Fleming in the Upper Tribunal decision [2019] UT 59 Majit v Gaffney and Britton of 17 October 2019 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.*"

[26] The rent arrears of August 2019 had been paid off by the Respondents together with the September rent on 2 September 2019 in full. As of 2 September 2019 there were no rent arrears. On 1 October 2019 the next payment of rent of £525 was due in terms of Clause 7 of the tenancy agreement. This was paid on 11 October 2020. The rent statement lodged shows that the outstanding amounts at 2 September 2019 and at 11 October 2019 were £0. Therefore on 11 October 2019 the period of rent

arrears can at most have been 11 days if one accepts that the arrears for the October rent may have been paid after the email with the Notice to Leave was sent. If one assumes the payment for October was made on 11 October 2019 prior to the service of the Notice to Leave on the same day there would obviously not be any arrears at all as at the date of the Notice to Leave.

[27] As explained to the Applicant's representative at the CMD, the Upper Tribunal decision quoted above clarified this for the ground of rent arrears explicitly. The Upper Tribunal decision was made after the Notice to Leave was sent, however this is not relevant. The decision of the Upper Tribunal clarified the law in this regard and this does also apply to Notices served prior to the date of the Upper Tribunal decision. The Notice to Leave issued on ground 12 at a time when the Respondents had clearly not been in rent arrears for three or more consecutive months but only for a maximum of 11 days is not valid and thus an eviction application cannot be issued on the basis of such a Notice to Leave.

[28] The Tribunal finds in law the Notice to Leave is not a Notice to Leave fulfilling the requirements of s 62 (d) of the 2016 Act. For the reasons stated above the Tribunal finds that the Notice to Leave was not valid. The application made on 7 January 2020 was made in breach 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 refused.

[29] 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 actual content and form of the Notice to Quit. No hearing is required and in terms of Rule 18 of the Rules the application has to be refused 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 (2) (a) 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

A. Strain

P. H. M

23 July 2020

Legal Member/Chair

Date

