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 the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/20/1365

Re: 131 Victoria Road, Ground Floor Right, Torry, Aberdeen, AB11 9LY ("the property")

Parties:

Mr Forbes Fleming McLennan, 1 Craibstone Street, Aberdeen, AB11 6YQ ("the applicant")

Mr Marek Zurynski, 131 Victoria Road, Ground Floor Right, Torry, Aberdeen, AB11 9LY ("the respondent")

Tribunal Member:

Adrian Stalker (Legal Member)

Decision (in absence of the respondent):

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') decided that the notice to leave, a copy of which accompanied the application:
(a) was not given to the respondent, for the purposes of section 52(3) of Private Housing (Tenancies) (Scotland) Act 2016, because the stipulated mode of communication between the parties, in terms of clause 4 of the tenancy agreement, was not adopted; and
(b) was in any event invalid;
therefore the application cannot be entertained by the Tribunal, and it is refused.

Background

1. On or about 24 July 2019, the applicant let the property to the respondent, under a private residential tenancy ("PRT") in terms of the Private Housing (Tenancies)

(Scotland) Act 2016 ("the Act"). The parties entered into a written tenancy agreement, based on the Scottish Government's Model Agreement.

2. By an application dated 17 June 2020, the applicant sought an eviction order under section 51 of the 2016 Act on the ground of rent arrears, being ground 12 in schedule 3 of the Act. In the application, it was said that the applicant was in arrears of £2,268, and had not made any payments at all since March 2020. The application was accordingly made under rule 109 of the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Procedure Rules").

3. Before the application was accepted, correspondence took place between a casework officer of the Tribunal, and the applicant. The officer's letter of 30 June raised two issues as to the competency of the application:

> (1) the copy notice to leave accompanying the application gave the wrong period of notice (84 days instead of 28 days) under sections 54 and 62 of the Act.
> (2) the notice was undated.

4. By letter dated 8 July 2020, Messrs James and George Collie, Solicitors, responded on the applicant's behalf. The submissions made in the letter are described below.

5, On 5 August 2020, notice of acceptance was granted by a legal member. A Case Management Discussion ("CMD") was fixed for 11:30am on 17 September 2020, to take place by teleconference call. I was the legal member of the Tribunal at the CMD, and I raised two further issues, as to the competency of the application:

> (3) the notice to leave was personally delivered, whereas at clause 4 of the parties' tenancy agreement it was agreed that communication between the parties (including notices) was to be by email;
> (4) the covering letter attached to the notice misinformed the respondent as to the notice's effect.

The applicant sought an adjournment to consider those points, which was granted. I issued a note of the CMD, which listed, and summarised, the four outstanding points.

6. A further CMD was fixed for 29 October, which was again adjourned, because intimation of the CMD, on the respondent, had not been successful.

7. A further CMD was fixed for 25 November at 10.00am, by teleconference call. In advance of that hearing, a further letter was sent by Messrs James and George Collie, Solicitors, dated 20 November, which addressed points (3) and (4) above.

The CMD on 25 November 2020

8. The second adjourned CMD duly took place, by teleconference call, on 25 November at 10.00am. The applicant was personally present. He is a solicitor, and a partner in the firm of James and George Collie, Aberdeen.

9. As at 10.10am, neither the respondent, nor any person appearing on his behalf, had entered the teleconference. Accordingly, the respondent did not appear, and was not represented, at the CMD. I had sight of a certificate of service by sheriff officers, confirming that notice of the date and time of the CMD was given to the applicant on 2 November. The respondent has not, at any time, played any active role in the proceedings relating to this application, and has not appeared at any of the CMDs. He made no representations to the Tribunal, in advance of any of the appointed CMDs.

10. Under rule 17(4) of the Procedure Rules, the Tribunal may do anything at a CMD which it may do at a hearing, including: hearing the case in the absence of one of the parties (rule 29), and making a decision. In the circumstances, I was satisfied, under rule 29, that it was appropriate to proceed with the CMD, in the respondent's absence.

11. The applicant moved the Tribunal to grant an eviction order under section 51 of the 2016 Act, ground 12 of schedule 5 (rent arrears) being established. As to the competency of the application, he adopted the arguments made in the letters from Messrs James and George Collie, dated 8 July and 20 November, and reiterated the points made therein.

12. I indicated that I would take time to consider whether the application is competent, having regard the points raised by the Tribunal, and the arguments made for the applicant in the letters of 8 July and 20 November.

Notice to leave

13. All four of the points summarised in paragraphs 3 and 5 above relate, in some way, to the notice to leave, and it is appropriate to say something about the status of that document, and the effect of errors in the notice to leave.

14. In this case, the notice bore to have been served on 20 January. Accordingly, the relevant statutory provisions are those which were in effect at that time, before the changes made by schedule 1 of the Coronavirus (Scotland) Act 2020 came into force, in April 2020.

15. The following sections of the Act are relevant:

> **52 Applications for eviction orders and consideration of them**
> …

(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.

…

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, or

(b) the only eviction ground, or grounds, stated in the notice to leave is…

…

(iii) that the tenant has been in rent arrears for three or more consecutive months [ground 12 of schedule 5]

…

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

55 Restriction on applying 6 months after the notice period expires

(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 more than six months after the day on which the relevant period in relation to that notice expired.

(2) In subsection (1), "the relevant period" has the meaning given in section 54(2).

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

16. It is important, for present purposes, to recognise that: "the relevant period"; the expiry of that period; and the end of the 6 month period under section 55, are all fixed by reference to the date of receipt of the notice by the tenant. This is the effect, in particular, of section 54(2)(a). These dates are not determined by reference to the date

that the landlord states in the notice. This may be contrasted with the provisions applicable to the notice of proceedings under section 14 of the Housing (Scotland) Act 2001, by which the six month period runs from the date stated by the landlord in the notice (section 14(5) of the 2001 Act).

17. As the notice to leave was said to have been served on 20 January, less than six months after the commencement of the tenancy (24 July 2019), and the sole ground for eviction was the rent arrears ground, both section 54(3)(a) and (3)(b)(iii) applied. Therefore, the "relevant period" for the purposes of section 54(2) was 28 days, not 84 days.

18. Sections 62 and 73 state:

> **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.
> …
> (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.
>
> **73 Minor 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—
> …
> (d) a notice to leave (as defined by section 62(1)).

19. It follows from section 73(1) and (2)(d) that where an error in the completion of a notice to leave *does* materially affect the effect of the notice, then that error makes it "invalid"; i.e. it is not a "notice to leave" for the purposes of the Act. In my view, it also follows from section 73 that the "materially affects the effect" test is the only basis on which the Tribunal may conclude that a notice to leave is valid, even though there has been an error in its completion. That is the test that has been set by the legislature; it is not for the Tribunal to apply some other test.

20. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 ("the Notices Regulations"), paragraph 6 of which states:

> **6. Notice to leave**
> 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.

21. Part 4 of the form set out in schedule 5 is as follows:

> **Part 4 THE END OF THE NOTICE PERIOD**
> An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).
> Signed: (Landlord(s) or Agent):
> _____
> Dated:
> _____

22. In *Panpher v McDonald* [2019] UT 18, no date had been entered in the blank space before "(insert date)". The application was rejected at the sift, and the applicant appealed to the Upper Tribunal. Refusing the appeal, Sheriff Deutsch said:

> [1] The appellant…advances a number of cogent reasons why, if it had a discretion to do so, the tribunal might allow the application for an eviction order to proceed, notwithstanding the defect identified in the notice to leave upon which the appellant relies. Unfortunately no such discretion exists. The tribunal can only operate within the terms of the…2016 Act and subordinate legislation in the form of regulations made by the Scottish Ministers. In terms of that legislation the tribunal is prohibited from entertaining an application for an eviction which is not accompanied by a valid notice.
> …
> [8]…If no date is inserted then there has not been compliance with regulation 6. If regulation 6 has not been complied with then the notice is not compliant with section 62(1)(d) and accordingly it is not a notice to leave within the meaning of the 2016 Act. The Tribunal cannot overlook that fact…It is not for the Tribunal to pass comment on whether the form is well-designed or otherwise.

23. Also relevant, as part of the statutory background, is section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which states:

> **26 Service of documents**

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression "serve", "give", "send" or any other expression is used).
(2) The document may be served on the person—
(a) by being delivered personally to the person,
(b) by being sent to the proper address of the person—
(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000 (c.26)), or
(ii) by a postal service which provides for the delivery of the document to be recorded, or
(c) where subsection (3) applies, by being sent to the person using electronic communications.
(3) This subsection applies where, before the document is served, the person authorised or required to serve the document and the person on whom it is to be served agree in writing that the document may be sent to the person by being transmitted to an electronic address and in an electronic form specified by the person for the purpose.
…

Relevant documents

24. In this case, in seeking to comply with section 52(3) of the Act, the applicants submitted a copy of a notice to leave, which was said to have been served on the respondent, along with the application.

25. The date entered in part 4 of the statutory form notice to leave, after the words "eviction order before" is "15 April". The notice is signed "J&G Collie", but nothing is entered under the word "Dated". Otherwise, the correct statutory form has been used, and completed in compliance with section 62.

26. As well as the notice, the respondent was provided with the Scottish Government's "Guidance Notes for Tenants on the Notice to Leave". Paragraph 19 of the Guidance notes states:

> The date given in Part 4 of this notice is the earliest date that your Landlord can start eviction action at the Tribunal. From that date, your Landlord can start Tribunal action at any time during the following six months. If your Landlord does not start Tribunal action in that six-month period they would have to serve another notice to leave on you before they could start eviction action at the Tribunal.

27. The notice was also accompanied by a covering letter from Messrs James and George Collie dated 20 January 2020, which stated:

> Dear Mr M Zurynski,
> **Lease of GFR 131 Victoria Road, Torry, Aberdeen**

> We enclose Notice to Leave with relative Guidance Notes. The Notice to Leave is being served on the grounds of your rent being in arrears over three consecutive months. Please note that the termination date is **15th April, 2020** and you will be required to have vacated the property on or before this date.

28. Also provided to the Tribunal, as part of the application, was a single page document, unheaded, which stated:

> I, Marek Zurynski, residing at 131 Victoria Road, Ground Floor Right, Torry, Aberdeen, AB11 9LY, acknowledge receipt of a Notice to Leave from James & George Collie, Solicitors, 30 Bon Accord Street, Aberdeen, AB11 6EL as Agents for the Landlords.
>
> ……..
> Mr Marek Zurynski
> 20 January 2020
> Date

29. The respondent's signature appears on the dotted line. Under the word "Date", there appears, in handwriting: "14.50. Signed letter Arthur G Ingram". At the CMD on 17 September, the applicant confirmed that Mr Ingram was an employee of James & George Collie, who carried out certain tasks, including the personal delivery of documents.

30. Service of the notice to leave by personal delivery is competent under section 26(1) and (2)(a) of the 2010 Act, quoted at paragraph 23 above. However, in this case the parties entered into a written tenancy agreement, using the Scottish Government's Model Agreement. It was executed by both parties on 24 July 2019. Clause 4 of the model agreement is headed ("Communication"). It begins:

> The Landlord and Tenant agree that all communications which may or must be made under the Act…including notices to be served by one party on the other will be made in writing using…

31. There follow two boxes, next to which the following options are stated:

> Hard copy by personal delivery or recorded delivery; or
> The email addresses set out in clauses 2 and 1

32. There follows the statement:

> For communication by email it is essential that the Landlord(s) and Tenant(s) consider carefully whether this option is suitable for them. It should be noted that all notices will be sent by email, which includes important documents such as a rent-increase notice and a notice to leave the Let Property.

33. In the parties' agreement, a cross was entered in the box for the email option, but not for the "Hard copy" option. Clause 1 of the agreement gives the respondent's email address.

Point (1) – the notice to leave gave the wrong period

34. On this issue, the following points were made by the applicant, in the letter from Messrs James and George Collie of 8 July, and during the course of the CMD on 25 November:

(a) The notice period of 84 days, rather than 28 days, was used in error.
(b) The application was not made until 17 June, after the date stated in the notice.
(c) Accordingly, the respondent was not prejudiced by the error, as he may have been if, for example, the landlord had made the application sometime between the period between 28 and 84 days after the notice was delivered.
(d) Therefore, the error did not materially affect the effect of the notice, for the purposes of section 73.
(e) Reliance was placed on the decision in *Mitchell v Kruger* FTS/HPC/EV/19/3921, in which the Tribunal decided that a notice giving 84 days, rather 28 days, was nevertheless valid, applying section 73.

35. Assuming, for the purposes of this issue, that service of the notice to leave was properly effected by personal delivery on 20 January, "the relevant period", for the purposes of section 54, began on that date, and expired on 17 February 2020. This means that, for the purposes of section 55, the six month period during which the applicant was entitled to make an application ran till 17 August 2020. As already described, those dates follow from sections 52 and 55 of the Act, irrespective of the date stated in the notice, by the applicant.

36. The date that ought to have been stated on the notice was 18 February (being the day after expiry of the relevant period, as is required by section 62(4)). The date actually stated, 15 April, was 57 days later.

37. Under section 73(1) and (2)(d), an error in the completion of a document (including a notice to leave) does not make it "invalid" unless the error "materially affects the effect" of the document. What does it mean to say that an error "materially affects the effect" of a document?

38. The explanatory note to section 73 of the 2016 Act states:

> 105. Section 73 provides that any errors in specified documents do not invalidate the document if they are sufficiently minor that they do not materially alter the effect of the document. Of necessity, there are a number of documents which the Act requires the use of at certain

> times. This section ensures that a common sense approach can be taken to meeting these requirements, and a party is not penalised for an obviously minor error. The protection applies equally to landlords and tenants.

39. In my view, the word "effect" in section 73 (and in the explanatory note) denotes the effect that the notice will have, if it is completed without error. The Tribunal considers that in that case, the principal effect of the notice is to provide the tenant with information. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will tell the tenant, in particular:

- 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 FTT, which, under section 62(4), must be the day after the expiry of the notice period under section 54;
- the eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is done by ticking the appropriate box in part 3 of the prescribed form;
- details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form – in terms of the notice, the provision of "evidence" appears to be optional);
- the name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form).

These are all the parts of the form that require to be completed by the landlord or his agent.

40. I consider that an error in completion, "affects the effect" of the notice to leave if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly "affects the effect" of the notice to leave, because a correctly completed notice would have informed him of the date (18 February) on or after which an application to the Tribunal could be submitted (being the day after expiry of the notice period). That was not done.

41. Is the effect of the notice thereby *materially* affected? In this case, the applicant argued that this was not so, because the tenant was afforded extra time by the applicant's error, and the application was not made until after the date stated in the notice.

42. The Tribunal is not persuaded by that argument. Section 73 requires the Tribunal to consider how the error materially affects "the effect *of the document*". Thus, the application of section 73 requires considering the difference between the effect of the document as it was erroneously completed, and as it would have been, if correct. I do not see how actions taken (or not taken) by the landlord after service have any

relevance to that exercise. If that were so, it would not be possible for a tenant, or his advisers, to judge whether the notice was invalid or invalid when it was served, without waiting to see how the landlord acted upon it. That cannot be correct.

43. In assessing the materiality of the error in this case, I derive assistance from two considerations. First, as is indicated in the explanatory note to section 73, a landlord should not be penalised for "an obviously minor error" in a notice. Second, the information expressly required by the primary legislation, in section 62(1)(b) and (c), may be regarded as fundamental to the notice to leave. The notice should, at the very least, inform the tenant of the "why" (the statutory ground) and the "when" of the proceedings that the landlord anticipates raising.

44. To state a date which is 57 days later than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not "an obviously minor error". When taken together with the information contained in the Guidance Notes for Tenants, the notice is apt to be seriously misleading. Reading the notice and paragraph 19 of the Guidance (quoted at paragraph 26 above), the tenant would be led to believe that the landlord was precluded from making an application until 15 April, and that the application could be made at any time until 15 October. That would be wrong, and significantly so, given the gap in time between the correct date, and the date actually stated in the notice.

45. Whilst there are cases, such as *Mitchell v Kruger*, in which the Tribunal has considered the validity of notices in which the date stated in a notice to leave is later (rather than earlier) than the correct date, I did not find any earlier decision to be of assistance.

46. There are several cases in which the Tribunal has found such notices to be invalid, but without considering the application of section 73. These are of no assistance to the application of section 73 in this case.

47. In *Mitchell v Kruger* the Tribunal found that section 73 applied, observing that the notice "gave more than the period of notice required by law." I respectfully disagree with that view. As already described, the period of notice is fixed by the Act. It is not within the power of the landlord to give a longer period. Where the notice states a date which is too late, the effect is not to give the tenant a longer period, but to misinform him, as to the date from which proceedings may be raised.

48. In a notice in which the date stated is late by a matter of days, the case for regarding the error as minor would be stronger. In that event, the Tribunal might have in mind that, where the notice date is later than the correct date under section 62(4), the Tribunal could reject an application made on or after the correct date, but before the stated notice date, under rule 8(1)(c) of the Procedure Rules, on the basis that it would not be appropriate to accept it. That limits the effect of the tenant being

misinformed. However, in this case, the period of 57 days is too long, in my view, to be regarded as "minor".

49. For these reasons, I conclude that, in terms of section 73, the error of stating "15 April" at part 4 of the notice to leave, rather than "18 February", does materially affect the effect of the notice. It is accordingly invalid. It is not a "notice to leave" under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), "a copy of a notice to leave", and, given section 52(2)(a), the Tribunal cannot entertain the application.

Point (2) – the notice is undated

50. In terms of section 62(1)(d), the notice served by the landlord must fulfil the requirements prescribed by the Scottish Ministers in regulations. Paragraph 6 of the Notices Regulations requires that the notice "must be in the form set out in schedule 5". The schedule 5 form is in four parts. The Scottish Government has issued Guidance Notes for Landlords, on the completion of the notice. These include the following statements:

> 4. As Landlord you should complete Parts 1 to 4 of this notice.
> …
> 7. After you sign and date this notice to leave form you must take steps to ensure your Tenant receives it as soon as possible.

51. As the statutory form notice has not been dated, it has not been completed, and therefore does not "fulfil the requirements prescribed by the Scottish Ministers in regulations".

52. At the CMD on 25 November, the applicant's submission on this matter was:

(a) The failure to complete the date at part 4 of the form was an error.
(b) For the purposes section 73, that error did not materially affect the effect of the notice, because it was accompanied by a covering letter, which was dated. Therefore, the respondent could reasonably take the date of the notice to be the date of the attached covering letter.
(c) Therefore, the notice was not invalid.

53. I accept that argument. In my view, in assessing whether an error materially affects the effect of a notice, the Tribunal may take into account the information contained in any covering letter which was attached to the document. That is consistent with the approach adopted by the Court of Appeal in England, in relation to notices under the statutory regime for assured tenancies (*York v Casey* (1998) 31 HLR 209, *Pease v Carter* [2020] 1 WLR 1459). Insofar as the omission of the date "affects the effect" of

the notice, I consider that the affect is not material, because the recipient would reasonably assume that the date of the notice was the date of attached letter.

54. For that reason, I would not have found the notice to be invalid, by reason of its being undated.

Point (3): the notice was hand delivered, rather than sent by email

55. On this matter, the applicant's submission was as follows:

(a) It was accepted that service did not take place as specified in the parties' Private Residential Tenancy Agreement, but instead personally on the respondent.
(b) The applicant had decided not to effect service by email because, during the course of the tenancy, the applicant: "had not received one single email from the Tenant and he has not acknowledged any of our email communications to him."
(c) Accordingly, the applicant took the view that it was preferable for personal service to take place rather than send an email "into the ether".
(d) The mode of communication was less important than the need to ensure that the communication had taken place.
(e) In any event, the respondent had, by signing the acknowledgement, indicated that he had, in fact, received the notice, and had waived his right to rely on contractual provision stipulating service by email.

56. There is a fairly substantial body of case law on contractual provisions imposing requirements as to giving notice. Many of these cases concern clauses that require notices to be in writing, or stipulate a mode of service (such as recorded delivery), or a place of service (such as one party's registered office). Where it is apparent that service has not been effected in the manner described in the clause, the court or tribunal may have to decide whether the clause is to be regarded as mandatory, or merely directory (i.e. permitting a mode of service, rather than requiring it). See, for example: *Yates Building Co Ltd v RJ Pulleyn & Sons (York) Ltd* (1975) 237 EG 183 and *Capital Land Holdings Ltd v Secretary of State for the Environment* 1997 SC 109 for contrasting outcomes.

57. However, parties will be held to the precise terms of their agreement, if those terms are clear (*Capital Land Holdings Ltd*, at p114A-C). Thus, the starting point is the interpretation of the relevant clause, read in context.

58. In this case, the parties elected to use the model Private Residential Tenancy Agreement. The relevant clause is clause 4 ("Communication"), which was completed in the manner described at paragraphs 30-33 above.

59. The drafting of clause 4 in the standard form is perhaps misleading, in that it could be read as requiring a choice to be made between the "hard copy" option or the email option. However, both modes of service are competent under section 26 of the 2010 Act. In my view, there is no reason why parties could not retain the option of doing either, or both, in which case, a cross could be entered in both of the boxes. In that case, the parties would have agreed to make the "or" (after "Hard copy by personal delivery or recorded delivery") conjunctive, rather than disjunctive.

60. Here, however, by crossing the second box, but not the first box, the parties have agreed that they will communicate by email, and they will not communicate by a hard copy which is delivered personally or sent by recorded delivery. In my view, it is clear that this is the meaning of parties having completed the standard form in this manner. It was not suggested, by the applicant, that there was any other way of interpreting the clause.

61. The opening lines of the clause state that this is: "including notices to be served by one party on the other…" Therefore, by serving a notice to leave by personal delivery of a hard copy, the landlords opted for a mode of service that parties had expressly agreed would not be used. That being so, one is driven to the conclusion that the attempt to serve the notice by personal delivery was ineffective.

62. In order to escape that conclusion, the applicant argued that service had been attempted in this manner, because the respondent never communicated by email, and did not acknowledge emails that were sent to him. That, in my opinion, is irrelevant. Given clause 4, and section 26 of the 2010 Act, sending the notice by email would amount to competent service, whether the applicant acknowledged it or not.

63. I appreciate that there are circumstances in which sending an email to a particular address may not be possible. But that was not suggested here. If it were not possible to use the email address stated in the parties' agreement, the applicant could have asked the respondent to provide another email address. If the respondent did not respond to that request, or refused to provide another email address, then he could be taken to have waived his right to insist on service by email, in terms of the clause. In that case, the other modes of service specified in section 26 of the 2010 Act would then be competent. However, in this case, there was no attempt to serve the notice to leave by email, and no apparent basis on which to regard the requirement for email service as no longer being applicable.

64. The applicant also founded upon the acknowledgement of receipt of the notice, signed by the respondent, on 20 January, as showing that service had, in fact, occurred, and as indicating that the respondent had waived his right to insist on email service. However, I do not think that the acknowledgment assists the applicant.

65. The fact that the notice has, in fact, been received by a party, does not prevent him from insisting on the contractual stipulation of another mode of service. Thus, in *Muir Construction Ltd v Hambly Ltd* 1990 SLT 830, the Court accepted the defenders' argument that service of a notice by hand delivery was ineffective, given the contractual requirement for service by recorded delivery, even though it was clear that the defenders had received the notice. It follows that confirmation by the respondent that he has received the notice does not, in itself, amount to a waiver of his right to insist on the stipulation requiring some other mode of service.

66. For these reasons, I conclude that purported service of the notice by personal delivery on the respondent was ineffective; that the notice was not "given" to the tenant, for the purposes of section 52(3) of the 2016 Act; and the Tribunal cannot entertain the application.

Point (4): the covering letter is misleading

67. The covering letter addressed to the respondent, and dated 20 January, which is attached to the Notice to Leave, states:

> Please note that the termination date is 15 April 2020 and you will be required to have vacated the property on or before this date.

68. Sections 44, 50 and 51(4) of the 2016 Act state:

> **44 No termination by parties except in accordance with this Part**
> A tenancy which is a private residential tenancy may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part.
>
> **50 Termination by notice to leave and tenant leaving**
> (1) A tenancy which is a private residential tenancy comes to an end if—
> (a) the tenant has received a notice to leave from the landlord, and
> (b) the tenant has ceased to occupy the let property.
> (2) A tenancy comes to an end under subsection (1) on the later of—
> (a) the day specified in the notice to leave in accordance with section 62(1)(b), or
> (b) the day on which the tenant ceases to occupy the let property.
> …
>
> **51 First-tier Tribunal's power to issue an eviction 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.

69. 15 April 2020 (the date stated at part 4 of the Notice to Leave) would only be the "termination date" of the parties' PRT, if the respondent had ceased to occupy the let property, under section 50(1), and had thereby consented to the tenancy being terminated: in the Act, section 50 has the italicised heading: "Consensual termination". If the tenant does not leave, the termination date of the PRT is fixed by section 51(4). In short, 15 April (if correct) would have been the date on which the landlord expected to make an application to the Tribunal, not the date on which the PRT terminated. The respondent was not "required to leave the property on or before" 15 April, as the letter stated.

70. As to this issue, the applicant:

(a) accepted that above quoted part of the covering letter was inaccurate and misleading;
(b) but maintained that the content of the letter did not form part of the Notice to Leave;
(c) pointed out that the true position was made clear by the Guidance Notes for tenants;
(d) and that the respondent had not, apparently, been misled by the notice, as he was still resident at the property.

71. However, this submission put the applicant in the awkward position of maintaining that the Tribunal should have regard to the covering letter, for the purposes of the second issue (the notice was undated), but should disregard it, in considering this issue.

72. I confess to finding it difficult to come to a conclusion on this aspect of the case, and in the end, I considered that it was not necessary to do so. I have decided that the application falls to be refused, on two other grounds. Also, I think it a somewhat artificial exercise to assess the importance of the letter misstating the legal significance of the date 15 April 2020, given that that is the wrong date, in any event. Having already found that the notice is invalid, I believe it is not necessary to consider the effect of the covering letter on its validity.

Decision

72. For the reasons described, I have decided that the Tribunal cannot entertain the application, and it must therefore be refused.

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.

Adrian Stalker

9 December 2020

Legal Member