



**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/20/1424**

**Re: Property at 10 Harlaw March, Balerno, Edinburgh, EH14 7BJ (“the Property”)**

**Parties:**

**Mr Calum McCaskell, Mrs Margaret McCaskell, 48 Marchbank Drive, Balerno, Edinburgh, EH14 7ER (“the Applicant”)**

**Mr Chika Osita Kanu, Mrs Ifeyinwa Rita Kanu, 10 Harlaw March, Balerno, Edinburgh, EH14 7BJ (“the Respondent”)**

**Tribunal Members:**

**Petra Hennig-McFatridge (Legal Member)**

**Decision**

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

1. The application was made on 25 June 2020. The application asked for eviction of the Respondent on the basis of Ground 1 of Schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act).
2. Attached to the application were:
  - a) Copy Notice to Leave dated 22 January 2020 with the date on which proceedings could first be raised stated as 17 April 2020.
  - b) Copy S 11 Notice,
  - c) Email of 22 January 2020 of Mr McCaskell stating "we're very likely to sell the property at Harlaw and we would like to serve notice on the tenants."
3. On 14 July 2020 the Tribunal wrote to the Applicants asking for various documents. The letter of the Tribunal is referred to for its terms and held to be incorporated herein. The letter specifically asked for "an explanation of calculation of the date stated in part 4 of the Notice to Leave. If the notice was

served either by email or recorded delivery it appears that the date given in part 4 of the notice as 17 April 2020 may be a day short in terms of the provisions of S 62(5) of the 2016 Act, which could result in the application being rejected." The letter further requested clarification of the applicant as only Mr McCaskell is stated as landlord on the lease and the application was made in the name of both joint owners of the property.

4. The Applicants provided a copy of the tenancy agreement (PRT), proof of service of the Notice to Leave by email and recorded delivery on 22 January 2020 with track and trace receipt 23 January 2020 and an explanation that Mrs McCaskell had been stated as a Applicant as she liaised with the representatives. The email of 14 July 2020 from Mr Erskine of Cox and Co, the Applicants' representative, also stated that the calculation of the date in part 4 was made on the basis that February had 29 days in 2020 and an explanation that the Applicants were in discussion with Cox and Co re the sale of the property but wished vacant possession first.
5. On 16 July 2020 Mr Erskine emailed to the Tribunal an engagement letter for the sale of the property which was not signed by the Applicants and correspondence with a surveyor dated 30 June 2020 confirming a home report had been instructed. Further email correspondence with the surveyor of 30 June 2020 confirms that the home report should not be prepared at that time.
6. On 17 August 2020 a direction was issued by the Tribunal to the Applicants. This is referred to for its terms and held to be incorporated herein. In it the Applicants were asked to make written submissions regarding the entry in part 4 of the Notice to Leave and to provide proof of the intention to sell the property in terms of ground 1 of the 2016 Act as stated in paragraph 1 of schedule 3 of the 2016 Act.
7. The Applicants representative sent a reply on 27 August 2020 stating "3. The date was calculated by counting the days from submission (84 days + 2 for delivery)" and "4. Calum and Margaret cannot provide any further evidence to prove they were going to sell the property as they had cancelled the home report originally booked and had not fully or formally instructed an agent yet as it was their preference to wait until they had vacant possession to instruct an agent formally". The email of 27 August 2020 is referred to for its terms and is held to be incorporated herein.
8. A Case Management Discussion (CMD) was scheduled for 29 September 2020. In terms of Rule 17 (1) (a) of the Procedural Rules a CMD may be held by conference call.
9. The Respondents had lodged representations on 18 September 2020 setting out their plans to vacate the property and to take part in the CMD. The representations are referred to for their terms and held to be incorporated herein.

## **The Case Management Discussion**

1. The CMD was held by telephone conference call. Mr Erskine took part on behalf of the Applicants. The Respondents both took part.
2. The Respondents stated that the tribunal would have to make a decision in the matter. They confirmed they are still in the property and that they had received the Notice to Leave.
3. Mr Erskine was asked by the legal member to address the issues raised in the direction. He stated it was now clear that both Mr and Mrs McCaskell were the landlords and she had been omitted from the tenancy document in error. She was also not a registered landlord and the Applicants had been advised to take steps to remedy that. There was no further evidence to support ground 1 as the Applicants had decided not to take any further steps until they had vacant possession. They are not in a desperate need to sell. The calculation of the date entered into part 4 had been explained. It was 84 days plus 2.
4. The legal member advised the parties of the definition of the date as stated in part 4 of the Notice to Leave and the calculation of the date in terms of s 62 (1) (b), (4), (5) and s 54 (2) of the 2016 Act. Following that explanation Mr Erskine agreed that it appeared that the calculation of the date entered in part 4 of the Notice to Leave was one day short.
5. The legal member explicitly gave Mr Erskine the opportunity to ask for a further CMD on behalf of the Applicants if they wished to make legal representations on this point. Although this had previously been raised by the Tribunal in the letter of 14 July 2020 and the direction of 13 August 2020 it appeared that this had not been identified by the Applicants and their representative as a problem that required to be addressed.
6. Mr Erskine stated that in light of the explanation he would not be seeking an adjournment for the purpose of obtaining legal advice and he understood and appreciated that the Tribunal would be entitled to make a decision on the matter at the CMD. The Applicants were not seeking to make any further representations. If the decision went against them they would start the process anew unless the Respondents were moving out in early October, which was what the Respondents had indicated in their representations.
7. The decision is made on the basis of the information provided at the CMD, the written representations and the documents lodged in evidence, which are referred to for their terms and held to be incorporated herein.

## **Findings in Fact:**

1. The parties entered into a Private Residential Tenancy for the property with a start date of 11 May 2018 (clause 5).
2. Mrs McCaskell is not a registered landlord.
3. A Notice to Leave dated 22 January 2020 and stating ground 1 of schedule 3 of the 2016 Act was emailed and sent recorded delivery to the Respondents by the Applicants on 22 January 2020.
4. It stated in part 4 as the first they on which proceedings with the First-tier Tribunal could be raised the date of 17 April 2020.
5. Attached to the Notice to Leave was the email from the Applicants to their representative of 22 January 2020.
6. In terms of S 64 (5) of the 2016 Act the Notice to Leave is held to have been received on 24 January 2020.

7. The correct date to be entered into part 4 of the Notice to Leave would have been 18 April 2020 taking into account the 84 day notice period, the 48 hours service period and the definition of the date to be entered in the 2016 Act. The date was not the correct date and was one day earlier than the correct date as per the legislation.

## **Reasons for the Decision:**

### **1. Relevant legislation:**

#### **a) In terms of 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.

#### **b) However, in terms of Rule 18 of the Rules of Procedure:**

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.

#### **c) S 51 of the Act states:**

*Eviction order*

#### **51 First-tier Tribunal's power to issue an eviction order**

(1) The First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

(2) The provisions of schedule 3 stating the circumstances in which the Tribunal may or

must find that an eviction ground applies are exhaustive of the circumstances in which the Tribunal is entitled to find that the ground in question applies.

(3) The Tribunal must state in an eviction order the eviction ground, or grounds, on the basis of which it is issuing the order.

(4) An eviction order brings a tenancy which is a private residential tenancy to an end on the day specified by the Tribunal in the order.

## **52 Applications for eviction orders and consideration of them**

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a) subsection (3), or

(b) any of sections 54 to 56 (but see subsection (4)).

(3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which—

(a) is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or

(b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

## **54 Restriction on applying during the notice period**

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies,

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

## **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.

Ground 1 in Schedule 3 of the Act states

**Landlord intends to sell**

1(1) It is an eviction ground that the landlord intends to sell the let property.

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

(a) is entitled to sell the let property, and

(b) intends to sell it for market value, or at least put it up for sale, within 3 months of the tenant ceasing to occupy it.

(3) Evidence tending to show that the landlord has the intention mentioned in sub-paragraph (2)(b) includes (for example)—

(a) a letter of engagement from a solicitor or estate agent concerning the sale of the let property,

(b) a recently prepared document that anyone responsible for marketing the let property would be required to possess under section 98 of the Housing (Scotland) Act 2006 were the property already on the market.

2. Reasons:

8. I consider that I was able to make a decision refusing the application at the CMD stage in terms of Rule 18 of the Procedure Rules as the Applicants' representative explicitly did not wish a further opportunity to make legal representations regarding the issue whether or not the Notice to Leave was valid. If the Notice to Leave is not a valid Notice to Leave the application cannot be successful. There would have been no benefit to either party in adjourning the case to a further CMD or to a hearing. The issue of the date entered in part 4 of the Notice to Leave had been raised with the Applicants on two previous occasions and no further representations would have been made by the Applicants regarding this. On that basis the relevant facts were established at the stage of the CMD and thus a decision had to be made.
9. I consider that the requirements in s 52 (3) of the 2016 Act and Rule 109 (b) (ii) of the Procedure Rules are not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application.
10. In this case the Notice to Leave lodged with the application was dated 22 January 2020. The Notice to Leave states that it relies on Ground 1 of Schedule 3 of the Act. The entry in part 4 states: *An application will not be submitted to the Tribunal for an eviction order before 17 April 2020. This is the earliest date that 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).*
11. The legislation sets out explicitly the dates and periods which have to be observed to create a valid Notice to Leave. This is further described in detail in the guidance notes on the Notice to Leave. A tenant, having so been advised, must then be able to rely on the accuracy of the information provided in the Notice to Leave.
12. The date stated in part 4 of the notice submitted is incorrect.
13. The requirements for a valid Notice to Leave in terms of part 4 of the Notice to Leave are set out in S62 of the Act. S 62 1 (b) requires the Notice to specify

the date on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the FTT. The date is to be calculated in accordance with S 62 (4), and S 54 of the Act. These are referred to for their terms. As the notice was issued in January 2020 respectively they were issued prior to the temporary changes of the Act by the Coronavirus (Scotland) Act 2020 after 7 April 2020 and for both the original notice periods under the Act apply.

14. In terms of S 54 (2) and (3) of the Act, for any Notice to Leave which states as one of the grounds or the sole ground of the notice Ground 1 of Schedule 3 of the Act the notice period is 84 days. In terms of S 62 (4) of the Act, the day to be specified in accordance with S 62 (1) (b) of the Act is the day falling after the day on which the notice period defined in S 54 (2) of the Act will expire. This was calculated one day too short.
15. S 54 (2) (b) (ii) of the Act refers to the notice period being 84 days unless subsection (3) applies. Subsection 3 (a) does not apply for the notice lodged because the tenants had been entitled to occupy the let property since 2018 and thus for more than 6 months on 22 January 2020.
16. The notice was sent by email and recorded delivery on 22 January 2020 and thus in terms of S 62 (5) of the Act is deemed to have been received on 24 January 2020, which is 48 hours after it was sent. The notice period expires 84 days after it begins in terms of S 54 (2) (a) and (b) of the Act. The date to be stated on part 4 of the Notice to Leave would then be the date after the notice period expired according to S 62 (4) of the Act. The notice period in terms of S 54 (2) (ii) would have expired 84 days after the date it was received. The calculation of the start date for the period in terms of S 62 (5) is 24 January 2020. The date falling 84 days after that date is 17 April 2020. The date to be entered into part 4 of the Notice to Leave in terms of S 62 (4) is the date after the expiry of the notice period and thus not 17 April 2020 but 18 April 2020.
17. The Applicants had been advised of the issue and given the opportunity to argue that the calculation applied by the Applicants was correct. No representations were made prior to the CMD regarding this and at the CMD the Applicant's representative agreed that applying the calculation as set out above would mean that the date should have been 18 April 2020.
18. The Tribunal has considered whether S 73 of the Act may be applicable in this case to assist the applicant. This states: (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.
19. In the Tribunal's view, the word "effect" in section 73 (and in the explanatory note) denotes the effect the notice is intended to have if it is completed without error. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will give the tenant certain information, namely: 1. 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, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that "An application will not be submitted to the Tribunal for an eviction order before [the date]", 2. The eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is indicated by ticking the appropriate box in part 3 of the prescribed form, 3. Details and evidence of the eviction ground

- (section 62(1)(d) and part 3 of the prescribed form, 4. The tenant's details (section 62(1)(d) and part 1 of the prescribed form, 5. The name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form). All these parts of the form require to be completed.
20. In the Tribunal's view, 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 correct notice would have informed the Respondents of the correct date on or after which an application to the Tribunal could be submitted. That was not done.
  21. The notice should, at the very least, correctly inform the tenant of the "why" (the statutory ground) and the "when" of the proceedings that the landlord anticipates raising.
  22. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, "an obviously minor error" which could then be dealt with in terms of S 73 of the Act by the Tribunal. It is an error which causes the notice to fail in achieving one of its fundamental purposes.
  23. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating "17 April 2020" in part 4 of the notice to leave of 22 January 2020, rather than "18 April 2020" materially affects the effect of the notice and makes it 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 accordingly, given section 52(2)(a), the Tribunal cannot entertain the application on the basis of that notice and the Notice to Leave did not constitute a valid notice in terms of the lodging requirement in Rule 109 (b) (ii) of the Rules. From the information provided it is not evidenced that the required requirement in Rule 109 (b) (ii) has been met by that notice.
  24. The Notice to Leave was not valid because it did not comply with the statutory requirements. Without a valid Notice to Leave the Tribunal cannot entertain granting an order.
  25. The application is refused.

## **Decision**

**The Tribunal refuses the application.**

## **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.**



**Petra Hennig McFatridge  
Legal Member/Chair**

**29 September 2020  
Date**