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 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/20/2268

Re: Property at Flat 12 19 Kirkvale Drive, Newton Mearns, Glasgow, G77 5HD ("the Property")

Parties:

Dr Alison Sandford, 14 Heys Street, Barrhead, Glasgow, G78 2EN ("the Applicant")

Ms Melissa Rutherford, Flat 12 19 Kirkvale Drive, Newton Mearns, Glasgow, G77 5HD ("the Respondent")

Tribunal Members:

Andrew Upton (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that:- (i) it is reasonable to dispense with the requirement to serve a notice in terms of section 19(1) of the Housing (Scotland) Act 1988; and (ii) an eviction order should be granted.

FINDINGS IN FACT

1. The Applicant is the landlord, and the Respondent the tenant, of the Property under and in terms of a Short Assured Tenancy Agreement which commenced on 8 April 2011.

2. The monthly rent payable by the Respondent to the Applicant is £726.

3. Clause 7 of the Tenancy Agreement provides that the Applicant may seek to repossess the Property under grounds 11 and 12 of Schedule 5 to the Housing (Scotland) Act 1988.

4. The Respondent has not made full payment of rent, and is in arrears of £10,658.

5. During the period October 2019 until April 2021, the Respondent has persistently paid rent late or not at all.

6. The Applicant served invalid Notice to Quit on the Respondent dated 1 July 2020.

7. The Applicant served invalid notice under section 19 of the 1988 Act ("Form AT6") dated 1 July 2020.

8. The Respondent is a single mother of two children aged 10 and 14, both of whom require access to learning support services.

9. The Respondent has resided in the Property since April 2011.

10. The Property is not adapted for any additional support needs of the Respondent or her family.

11. The Respondent is a nurse and works shifts acquired through a nursing agency which accord with her childcare commitments.

12. The Respondent suffers from anxiety and depression, which limits her earning capacity.

13. The Respondent is unable to afford rent for the Property.

14. The Respondent does not intend to pay rent for the Property.

15. The Respondent has sought assistance to find alternative accommodation from East Renfrewshire Council.

16. The Respondent has previously been offered alternative accommodation by East Renfrewshire Council, being a property in Barrhead. The Respondent has successfully appealed that offer of housing as unsuitable for her children's needs.

17. The Respondent's children are settled in Newton Mearns, and have access to required support services.

18. The Respondent's children would have access to suitable support services in other schools if they required to move schools, and existing assessments would follow them.

19. The Respondent wishes to move to a more affordable property, but does not want to leave the area within which the Property is located.

20. The Applicant is liable to make regular payments in respect of the Property, including for mortgage repayments and factor charges, in an average monthly sum of £641.

21. The Applicant is occasionally liable for exceptional costs in respect of the Property, including a £20,000 liability in or around 2019 for refurbishment of the block.

22. The Respondent was in continuous dialogue with the Applicant, through the Applicant's husband, about her arrears and ability to pay since at least December 2019 until in or around July 2020.

23. The Respondent expressly stated to the Applicant's husband by text message in June 2020 that should could not afford to pay rent and wished to be served with notices to terminate the tenancy.

24. The Applicant is suffering financial hardship as a consequence of the Respondent's continued occupation of the Property without paying rent.

25. The Respondent's continued occupation of the Property without paying rent is causing stress to the Applicant and her husband.

26. The Applicant requires to work additional hours, including in excess of 80 hours per week from time to time, in order to afford the additional costs associated with the Property due to the Respondent's non-payment of rent.

27. The Applicant intends to sell the Property once possession has been recovered.

28. If the Applicant was required to serve a fresh notice under section 19(1) of the Housing (Scotland) Act 1988, it would likely take in excess of 10 months to obtain an order for possession of the Property.

FINDINGS IN FACT AND LAW

1. In all of the circumstances, it is reasonable to dispense with the Applicant's requirement to serve notice on the Respondent in terms of section 19(1) of the Housing (Scotland) Act 1988.

2. In all of the circumstances, it is reasonable to grant an order for possession of the Property in favour of the Applicant against the Respondent under Grounds 11 and 12 of Schedule 5 to the Housing (Scotland) Act 1988.

3. The Applicant seeking possession of a property let on a contractual assured tenancy under Grounds 11 and 12 of Schedule 5 to the Housing (Scotland) Act 1988, and the tenancy agreement between the parties having made provision for recovery of possession on those grounds, the Tribunal may

make an order for possession in terms of section 18(6) of the Housing (Scotland) Act 1988.

4. The Applicant has substantially complied with Regulation 3 of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020.

STATEMENT OF REASONS

1. This Application called for a Hearing by teleconference on 7 April 2021, together with the related application CV/20/2474. The Applicant was represented by Miss Lynch, solicitor. The Respondent was represented by Mr MacPhee, solicitor.

2. In this Application, the Applicant seeks the grant of an eviction order under section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). At the previous Case Management Discussion on 17 February 2021, the parties confirmed that the following matters were not in dispute:-

    a. The Applicant is the landlord, and the Respondent the tenant, of the Property under and in terms of a Short Assured Tenancy Agreement which commenced on 8 April 2011.
    b. The Respondent has not made full payment of rent.
    c. The Applicant served invalid Notice to Quit on the Respondent dated 1 July 2020.
    d. The Applicant served invalid notice under section 19 of the 1988 Act ("Form AT6") dated 1 July 2020.
    e. The Application now only proceeds under Grounds 11 and 12 of Schedule 5 to the 1988 Act.

3. In the related Application, the parties agreed that the Respondent had persistently failed to pay rent, and that the sum of £10,658 for the period October 2019 to March 2021 was due by the Respondent to the Applicant in respect of unpaid rent. In that respect, it was accepted that the requirements of Eviction Grounds 11 and 12 were satisfied.

<u>Witnesses</u>

Dr Alison Sandford

4. The Applicant's case began with the evidence of the Applicant herself. She is a doctor at University Hospital Ayr. She resides with her husband from whom she was briefly estranged during 2020, but with whom she has reconciled. She spoke to having bought the Property in or around April 2005 as her main residence, and to having lived there. It is a 3 bedroom flat with a standalone garage, though the garage does not form part of the letting to the Respondent.

5. The Applicant advised that the Property is subject to secured lending. She spoke to the mortgage statement produced at Item 2 in the Applicant's

productions, with an outstanding mortgage of £108,717.42 due over a term of 10 years and 1 month, and a contractual monthly payment of £541.80. She confirmed that she has been maintaining the monthly payments, and referred to a transaction statement produced at Item 3 in the Applicant's productions showing payments to the mortgage account.

6. The Applicant spoke to other regular payments that she makes related to the Property. She pays £60 monthly to the residents association. She pays an average of £21 per month to the factors, MacPhee & Co. She pays an average of £18.33 per month in respect of the building insurance, which is arranged annually be an individual within the residents association, Morag McPherson. In all, the Applicant said that the average monthly costs to her of the Property amount to approximately £641.

7. In addition to those regular costs, the Applicant spoke to other exceptional costs which arise from time to time. She spoke in particular about a renovation programme in 2019 which affected the whole block and involved rendering and remedial works to existing pipework. Her individual liability for that project was approximately £20,000, which she funds from a combination of personal savings and a bank loan.

8. The Applicant spoke to the Property having been initially let in April 2011 to both the Respondent and her husband, Scott Rutherford. However, Scott Rutherford no longer resides in the Property and moved out at least five years ago.

9. The Applicant spoke to the rent amounting to £726 per calendar month. There was a separate agreement between the Respondent and the Applicant's husband, Ian Mungall, whereby Mr Mungall paid the utilities for the Property and the Respondent would pay him £200 per month towards that. Focusing on the rent figure, that meant that the surplus of rent against the monthly outgoings was approximately £85 per month.

10. The Applicant advised that there had been no issues with the Respondent prior to October 2019. She had first become aware that the Respondent was in rent arrears in December 2019, just before Christmas, when advised of that by her husband. She said that Mr Mungall had been acting as a sort of informal agent for her, and was the principal contact for the Respondent. The Applicant works long hours, in some cases in excess of 80 hours per week. For that reason, she has very limited time to devote to the tenancy matters and relied on her husband's support.

11. The Applicant spoke to having discussed pursuing the Respondent for payment of rent arrears with her husband in December 2019. She said that she felt sorry for the Respondent. She had been told by Mr Mungall that the Respondent had said she was in financial difficulty. The Applicant was aware that the Respondent had two children, and it was approaching Christmas. Against that background, the Applicant and her husband decided to take no action at that time and see if things worked out. The arrears position did not

improve, and the decision was ultimately made to seek to evict the Respondent.

12. Having made that decision, the Applicant says that she contacted the local authority for advice on the eviction process. She then proceeded to serve notices on the Respondent in July 2020. With hindsight, she says that the advice she was given by the local authority was inaccurate. She received no other advice regarding the preparation and service of the notices. At that time, the Applicant said that she and her husband were experiencing marital difficulties and that she wished to move out of the matrimonial home. Her intention at that time was to move back into the Property, and so notice was served under Ground 1 of Schedule 5 to the 1988 Act, as well as under the rent arrears grounds. She had never been through an eviction process before, and had never prepared or served the relevant notices.

13. The Applicant said that, prior to service of the notices, she had been told by Mr Mungall that the Respondent had asked for notices to be served on her. She had been told that the Respondent had apparently spoken to the local authority homelessness unit, and that they would not prioritise her housing application unless she was imminently to be made homeless. To that end, she had requested that appropriate notices be served, to improve her priority listing.

14. The Applicant advised that there was no further direct communication by her with the Respondent after service of the notices. She spoke to having contacted the local authority on multiple occasions to see if she could get an update on the Respondent's housing application, but that no information was given to her on those occasions.

15. The Applicant confirmed that she had reconciled with her husband and that they were living together again. Her husband is retired. In order to meet their living expenses and the costs associated with the Property, the Applicant requires to work significant overtime hours. She has some savings, but they are reducing. Her father has helped her with the legal costs associated with the eviction. If it were not for the Property, the Applicant advised that she would only occasionally require to work overtime shifts.

16. The Applicant said that the effect of the Respondent continuing to reside in the Property without paying rent had caused her a lot of stress. She had been overdrawn on a few occasions due to her inability to meet all of the regular payments associated with the Property in addition to her own living expenses. She spoke to everything having been very difficult over the past 19 months.

17. The Applicant spoke to her intention to recover possession of the Property and immediately sell it. Her evidence was that the Property had become a significant liability for her and that it needed to be sold.

18. The Applicant confirmed that she was aware that the Respondent had two children, aged 10 and 14. She is aware that the Respondent is trained as a

nurse. The Respondent has family who live near to the Property. Otherwise, the Applicant was unaware of anything else about the Respondent. She confirmed that the Property had not been adapted to meet any particular needs of the Respondent or her family. She was unaware of any reason why the Respondent required to remain in the Property, or of any particular vulnerabilities.

19. In cross examination, the Applicant confirmed again that she did not take any legal advice regarding the preparation and service of the notices. She had spoken to the local authority, but decided not to take legal advice. She confirmed that she was concerned that legal advice in this matter would be unaffordable.

Ian Scott Mungall

20. The Applicant's husband, Mr Mungall, gave his evidence next. The Tribunal understood that he had been absent from the room whilst the applicant had given her evidence. Mr Mungall is a retired police officer. He confirmed that he assisted the Applicant with the letting of the Property, and was the one who mainly dealt with the tenants.

21. Mr Mungall spoke to there being regular payments due in respect of the Property. He spoke of occasional factors fees in addition to a quarterly invoice for property management and maintenance. He referred to a renovation project a couple of years ago involving re-roofing and re-rendering the block, along with drainage works to remedy a longstanding issue with drainage. Work was also undertaken to a window which was the cause of water ingress.

22. Mr Mungall spoke about the Respondent and her husband, Scott Rutherford becoming tenants of the Property. He advised that Mr Rutherford had moved out several years ago, perhaps in the region of six years ago. He said that there had been no historic issues and that the Respondent had been a good tenant up to October 2019. He described their relationship as good and cordial. However, since October 2019, the rent payments had become sporadic. He said that rent had only been paid in full on three occasions, and there were few occasions where rent had been paid at all.

23. Mr Mungall spoke to Item 1 in the Applicant's productions, which was a payment schedule that he had created. He confirmed that he had come to an agreement with the Respondent that he would pay the utilities for the Property and that she would pay him £200 per month to reimburse him for his outlay. Mr Mungall said that the purpose of that arrangement was to help the Respondent to budget her ongoing liabilities. He also confirmed that he wished comfort that the bills for the Property were being paid.

24. Mr Mungall spoke of the stress that this situation was causing the Applicant. He said that the Applicant needs to work additional hours at the hospital for them to afford their living expenses, including the costs for the Property. He said that the Applicant already worked long hours as it was, without the

additional hours required to meet their liabilities for the Property. He said that the Applicant was a first point of contact for Covid patients attending at her hospital.

25. Mr Mungall confirmed that he first made the Applicant aware of the Respondent's failure to pay rent around Christmas 2019. He confirmed that they discussed needing to seek enforcement action if the payments were not made, but that they were reluctant to do so. The Respondent had been a good tenant to that point and the relationship was good. However, that relationship soured thereafter.

26. Mr Mungall said that the Respondent had told him that she would not be paying her rent. He was aware that she was some sort of nurse, but was told by the Respondent that she had lost her job and was due to start a new job. There would be a period of time where she would not be earning. The Respondent told him that she wanted to bring the payments up to date, including in text messages, but it seemed that her financial difficulties worsened. Ultimately, in or around June 2020, the Respondent confirmed that she would be unable to bring the rent arrears up to date. The pressure of the situation caused strife in Mr Mungall's marriage, and lead to him and the Applicant separating for a period.

27. Mr Mungall said that the Respondent stopped paying anything after the eviction notices were served in July 2020. He said that the decision to serve notices to bring the tenancy to an end were in part driven by the Respondent, who had requested the service of such notices. He was referred to Item 2 in the Applications list of productions. This was a copy of a text message exchange between the Respondent and Mr Mungall in June 2020. The Respondent confirmed that she was not going to be able to make payments for rent. She said that she had sought housing from the local authority but was not a priority. She said that she needed an eviction notice. Against that background, the eviction notices were prepared and served. The Respondent wanted to be evicted so that she could be rehoused. Mr Mungall said that he now knows that the notices were invalid, but they were only served when they were to assist the Respondent. Mr Mungall said that he had wanted to give the Respondent every opportunity to get back on an even keel.

28. Mr Mungall confirmed that no further contact or payments were received from the Respondent, or anyone acting on her behalf, after the eviction notices were served.

29. Mr Mungall advised that the Respondent has an on-off relationship with a man who had been living in the flat for a period of time. There had been several complaints from neighbours about the conduct of this unknown man, including that he was fixing cars and motorbikes in the garage associated with the Property. It appeared that the man in question had forced entry to the garage and had separately drilled holes to connect an electricity supply from the Property to the garage in summer 2019. The issues were resolved after Mr Mungall had spoken to the Respondent about them. The man moved out for a

period and then moved back in around Christmas 2019. Mr Mungall did not know if the man continued to reside there.

30. Mr Mungall spoke to the stress that this situation was causing his wife. He said that she would frequently return home from work and burst into tears. She was working very long hours, some weeks in excess of 80 hours. The whole situation was putting them into financial difficulty. They had no income from the Property to offset against its outgoings. He said that the Property needed to be sold for them to avoid going into debt. He confirmed that any rent payments received had gone directly into the Applicant's bank account.

31. Under cross examination, Mr Mungall confirmed again that the Respondent had been a good tenant until she stopped paying rent. Their relationship had been good, and she had not previously missed a rent payment. He confirmed that, in December 2019, enforcement action had been considered and discussed but that he and the Applicant did not want to take that step at that time. The Respondent's children were younger at that time, and they did not want to see anyone evicted. They wanted to give her an opportunity to bring the account up to date, and so waited a while before serving papers. The catalyst for doing so was the Respondent's request to be served with appropriate notice.

32. When asked why legal advice had not been taken prior to service of the notice, Mr Mungall said that he and the Applicant had not thought it necessary. He said that the matter seemed straight forward. The Respondent had not paid rent and did not intend to pay rent. The Applicant then contacted the local authority to check what papers were required, and they completed them. It was only later that they discovered that the advice they had been given was inaccurate. When it became clear that the Respondent was not going to move out, Mr Mungall spoke of a family meeting where the issue was discussed, and the decision taken to instruct solicitors.

Melissa Rutherford

33. The Respondent gave her evidence next. She confirmed that she is a nurse employed by NHS Lanarkshire. She described her income as variable, and spoke to working different shifts to accommodate child care requirements. Previously, her income had been in the region of £25,000 to £30,000, but this year it was less due to a combination of the pandemic and her own mental health challenges.

34. The Respondent said that she was a single mother of two children. Her parents are vulnerable, and she cannot rely on them for childcare purposes anymore. She confirmed that they used to assist her with childcare but that, even once the pandemic is over, they will not be able to resume such assistance.

35. The Respondent said that she is under financial strain. She confirmed that she is currently living outwith her means. She confirmed that she could not

afford to remain in the Property. She advised that she had left previous employment to take up a role providing PIP assessments, but had failed to make the grade to continue in that role. She described that process as frustrating. She confirmed that she had been working with a nursing agency service since June/July 2020. She was taking shifts based on when her partner, Scott, could look after the children.

36. The Respondent advised that her rent arrears had been caused by a number of factors. She had initially moved into the Property with her husband, but her relationship broke down six months after they moved in. She said that he was an alcoholic and was not working. They had chosen the Property because they were already living in that area. While her children were very young she was a student. She was eligible for housing benefit at that time, which was during 2012 to 2015. She was also in receipt of a nursing bursary. Once she graduated, she was no longer eligible for housing benefit. She also had additional transport costs to attend her workplace.

37. The Respondent confirmed that her children were in a local school. Both children have learning support needs. Her daughter has learning difficulties. Her son is awaiting assessment for ADHD and autism. Both have dyslexia. They are settled in their school, where they get excellent support. Her son has psychologists working with him at present. The children are settled in Newton Mearns. The Respondent recognises that she is living outwith her means, but her primary goal is to stay in the area so that the children are not uprooted. She also spoke to having a strong connection to the local community, including having worked as a community nurse in the recent past.

38. The Respondent spoke of having received notices from the Applicant. She said that it was not correct. She said that she understood that the Applicant wanted her out of the Property, but felt that it was only because she was not paying rent. She felt that if she had been paying then the Applicant would not want her out. She said that she required the eviction documents for the local authority. She could not afford to move into private accommodation, so eviction would leave her homeless. It was her understanding that the local authority could not put her on the housing list unless she was going to be made homeless. She said that the local authority had not been very helpful.

39. The Respondent confirmed that the local authority had offered her a property in Barrhead, but that she had successfully appealed that offer as unsuitable because of her children's vulnerabilities. However, the local authority does not currently have any housing options in Newton Mearns for her. The Respondent spoke of a proposed new housing development at Maidenhill which will be served by a school with sensory rooms and similar support services that would be beneficial to her son. She understands that the said development will be ready in or around August 2021.

40. Under cross examination, the Respondent accepted that she was in significant arrears, and that she had not paid anything towards ongoing rent for a number of months. She had no proposals to make. She was sorry for the

situation that they found themselves in, and wanted to clear the arrears. She went as far as to say that she would clear the arrears, but that she was simply not in a position to do so at present. She had no savings to draw from and limited income.

41. The Respondent confirmed that she had received a financial assessment from the local authority. It had reviewed her income and outgoings, but determined that there was nothing that could be offset to assist with rent payments. The biggest outgoing is rent for the Property. She accepted that she needs to live somewhere else with a lower rent in order to have disposable income and a more comfortable life.

42. The Respondent advised that she could only rely on her ex-husband for childcare. She cannot ask anyone outwith the household to assist with childcare. She is a nurse working in hospitals, which exposes her to risk in the current climate. She previously relied on her parents for assistance but cannot anymore. Her children are demanding, and her parents would be unable to cope.

43. The Respondent confirmed that her son has had an assessment of needs at his school. She accepted that this assessment would follow him to another school if he needed to change schools due to a home move. She accepted that his needs would be known by the new school and he would receive the same support, at least theoretically. The Respondent accepted that her son was not in receipt of support provision that was only available at his current school.

44. Under questioning from the Tribunal, the Respondent confirmed that she had made several applications for assistance with housing but received no assistance. She was in receipt of child tax credits, but that fluctuates depending on what shifts she is able to work. She is not paying rent and has no provision to allow rent to be paid. She pays council tax, but is only entitled to single person reduction, which she believes is about a £21 reduction per month. Her mental health continues to suffer. She suffers from anxiety and depression, which affects her ability to care for others and impacts her earning potential.

45. The Respondent confirmed that she had made a homelessness application to the local authority which had been accepted. She is awaiting a further offer of alternative accommodation.

Assessment of Evidence

46. Having heard the witnesses, there was no evidence led by any one of them that contradicted what any of the others had to say. In reality, the witnesses all spoke to their own circumstances. In that respect, the Tribunal found the witnesses to be both credible and reliable, and it accepted their evidence in full.

Submissions

For the Applicant

47. The Applicant's representative submitted that there were two questions that the Tribunal required to answer:-

    a. Is it reasonable to dispense with the requirement to serve a notice under section 19(1) of the 1988 Act; and
    b. If the answer to the above is in the affirmative, then is it reasonable to grant the eviction order?

    Practically speaking, Miss Lynch submitted that the evidence required to answer those questions was the same. It was her submission that the evidence favoured the Applicant.

48. Miss Lynch submitted that the applicant is not a commercial landlord in the sense that she does not have a portfolio of properties. She has only one property to let, and the surplus of rent over outgoings is very small, not including exceptional expenses. She highlighted the evidence led about the recent large renovation project that included the Property, and how that had to be financed by the Applicant.

49. Miss Lynch drew attention to the fact that arrears started to accrue some seven months before notice was served. In her submission, the Respondent was aware she was in arrears and wanted to be served with eviction paperwork. That finding was to be derived from the Respondent's own evidence.

50. Miss Lynch submitted that the function of a notice under section 19(1) is to give a tenant a "heads up" on the reasons why the landlord is proceeding with eviction. In this case, the notice served was invalid, but was still sufficient in its terms as to have given the Respondent clear notice of why eviction action was going to proceed. In that respect, the proceedings have not come as a surprise to her; particularly where she requested service of the notice. As it happened, the Respondent ultimately got her 6 months' notice in practical terms, since the Application was not accepted by the Tribunal until 11 January 2021.

51. Miss Lynch submitted that it was reasonable to dispense with notice under section 19(1), having regard to the applicant's circumstances. She said that the Tribunal had heard what the Applicant needs to do to afford her living expenses and the Property expenses given the Respondent's continued occupation without payment. In her submission, insofar as reasonableness is a balancing of interests, the balance lies with the applicant.

52. Turning to the reasonableness of the eviction, Miss Lynch highlighted that there was approximately 15 months' worth of rent outstanding, and Respondent herself said that she cannot afford to stay in the Property. The Respondent had no proposals to clear arrears or meet ongoing rent. Whilst

Miss Lynch accepted that the Respondent's circumstances were difficult, her submission was that the Tribunal needed to take circumstances in the round. The Respondent's children may be happy and settled, but there is no evidence to show that they must stay in the Property, or must remain in the same schools.

53. Separately, Miss Lynch submitted that no particular reason had been given why the respondent needs to stay in the Property. That ought to be considered by the Tribunal against the background of the significant arrears admittedly owed by the Respondent.

54. Accordingly, Miss Lynch invited the Tribunal to exercise its discretion in favour of the Applicant, dispense with the requirement to serve notice under section 19(1) of the 1988 Act, and grant the eviction order in favour of the Applicant.

For the Respondent

55. In advance of the Hearing, Mr MacPhee had lodged written submissions for the Respondent, which he adopted. In terms thereof, he submitted that the notice under section 19(1) ("the AT6") was invalid insofar as it failed to give six months' extended notice as required by the Coronavirus (Scotland) Act 2020. The invalidity of the notice was accepted by the Applicant, and it was his submission that it was not reasonable to dispense with the need to serve the AT6.

56. Mr MacPhee submitted that what is reasonable is a highly fact-sensitive question. He directed the Tribunal to *Bradshaw v Baldwin-Wiseman*, (1985) 17 HLR 260, where the Court of Appeal considered what he termed a "comparable" test of "just and equitable" in the context of section 98 of the Rent Act 1977. In that case, the Court held that what was required was to examine all the circumstances as they affected all of the parties, including the circumstances in which the failure to give valid notice arose.

57. Mr MacPhee objected to the submission that the AT6 gave sufficient notice to the Respondent of what the reasons for seeking eviction were. He said that the AT6 specified a single ground of recovery, being that the landlord intended to return to live in the property, but that ground is no longer relied upon. He said that notice did not provide fair notice of what grounds were to be relied upon or how they arose. He described this error as a fundamental error which went to the heart of validity, and was too serious to be overlooked. He submitted that the discretion afforded by section 19(1)(b) is limited to fixing minor oversights, and that the Tribunal cannot look beyond the four corners of the deed when determining whether it is reasonable to dispense with the requirement to serve the notice.

58. Mr MacPhee spoke to the Respondent's previous good behaviour as tenant for nearly ten years. He submitted that her lapse in payment had been caused by a loss of earnings and her mental health being impacted. He referenced the Respondent's children, speaking to their settled lives at the Property and the support that they were receiving. Due to the length of the tenancy, it was

the only home they had ever known. He said that there was no urgency to grant the eviction order insofar as there was no anti-social behaviour or damage to the subjects. There was, he said, limited prejudice to the Applicant in having to start the process again with fresh, valid, notices.

59. Mr MacPhee described the Applicant as a professional commercial landlord. He said that the Applicant had entered into the tenancy in full knowledge of the risks associated with contracts of that nature. If she had been in doubt about what was required for a notice to be valid, she could have and ought to have sought legal advice. She has had the benefit of legal advice throughout these proceedings. Her suggestion that she had completed the notices "as best as she could" was not enough. The fact is that the notice is not valid, and ignorance of the law is not an excuse.

60. Mr MacPhee directed the Tribunal to *P v O*, 2014 Hous. L.R. 44, where Sheriff Jameson stated at paragraph 24:

"I am not persuaded that the pursuers' naivety or failure to obtain legal advice before allowing the defenders the right to occupy the subjects makes it reasonable to dispense with the notice requirements."

Mr MacPhee submitted that whilst the facts are not directly applicable here, Sheriff Jameson's dicta is persuasive nonetheless. In his submission, the Applicant's lack of knowledge and failure to obtain legal advice did not render it reasonable to dispense with the AT6 when she completed it incorrectly.

61. Accordingly, Mr MacPhee invited the Tribunal not to exercise its discretion to dispense with the requirement to serve the AT6.

62. In the event that the Tribunal determined that the requirement to serve the AT6 should be dispensed with, Mr MacPhee submitted that it would not be reasonable to grant an eviction order.

63. Mr MacPhee submitted that it is the duty of the Tribunal to take into account all relevant circumstances as they exist at the date of the hearing: *Midlothian District Council v Drummond*, 1991 SLT (Sh Ct) 67.

64. Mr MacPhee submitted that the subjects are the only home to which the Respondent and her children have access. If evicted, they would become homeless. They would find it difficult to secure suitable alternative accommodation in the private rented sector. They would require to avail themselves of local authority assistance to homeless persons, a system which he said is under considerable strain at present. They will likely be required to move away from their current area. The schooling of the children of the household is likely to be significantly disrupted, and education must be a priority consideration. The Respondent has historically paid her rent timeously and fully each month, until some months ago, when her mental health deteriorated and her earning capacity reduced. He contended that the

Applicant acknowledged the Respondent's payments of rent generated a "significant surplus", and argued that this is not a case which concerns a rogue tenant who simply will not pay rent, but one which concerns a vulnerable tenant who has encountered a relatively short-term difficulty. The Respondent's record as a tenant was, until this recent difficulty, unblemished. He said that the Respondent had engaged positively with support services. He said that she is taking positive steps to address the arrears and ongoing rental liability. She has accepted a referral to debt management and income maximisation advice services.

65. In all of those circumstances, Mr MacPhee submitted that it was not reasonable to grant an eviction order.

Reply for the Applicant

66. In reply, Miss Lynch highlighted a contradiction in the Respondent's submissions. Mr MacPhee had suggested that the discretion in section 19(1)(b) was limited to fix minor oversights and that the Tribunal could not look outwith the document itself, but the test is whether dispensing with the requirement is reasonable and that, according to Mr MacPhee, involves taking into account all relevant circumstances. It was her submission that the Tribunal required to take into account all relevant circumstances.

Decision

67. This Application seeks an eviction order under section 18 of the 1988 Act. In terms of the 1988 Act, as amended by the Coronavirus (Scotland) Act 1988:-

18.— Orders for possession.

(1) The First-tier Tribunal shall not make an order for possession of a house let on an assured tenancy except on one or more of the grounds set out in Schedule 5 to this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3) […]

(3A) […]

(3B) Subsection (3C) applies where the First-tier Tribunal is satisfied—

(a) that Ground 8 in Schedule 5 is established, and

(b) that all or part of the rent in respect of which the tenant is in arrears as mentioned in that Ground relates to the period during which paragraph 4 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 is in force.

(3C) Where this subsection applies, in considering for the purposes of subsection (4) (as applied in accordance with the modification made by paragraph 3(2)(b) of schedule 1 of the Coronavirus (Scotland) Act 2020) whether it is reasonable to make an order for possession against the tenant, the First-tier Tribunal is to consider the extent to which the landlord has complied with pre-action requirements before raising the proceedings for possession.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part I or Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 8 in Part I of Schedule 5 to this Act or on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—

(a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and

(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

(6A) Nothing in subsection (6) above affects the First-tier Tribunal's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds

relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) *"relevant housing benefit"* means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) *"relevant universal credit"* means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant.

(9) In subsection (3C), *"pre-action requirements"* means such requirements as the Scottish Ministers may specify in regulations.

(10) Regulations under subsection (9) may in particular make provision about—

(a) information to be provided by a landlord to a tenant including information about the terms of the tenancy, rent arrears and any other outstanding financial obligation under the tenancy,

(b) steps to be taken by a landlord with a view to seeking to agree arrangements with a tenant for payment of future rent, rent arrears and any other outstanding financial obligation under the tenancy,

(c) such other matters as the Scottish Ministers consider appropriate.

(11) Regulations under subsection (9) are subject to the affirmative procedure.

19.— Notice of proceedings for possession.

(1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless—

(a) the landlord (or, where there are joint landlords, any of them) has served on the tenant a notice in accordance with this section; or

(b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.

(3) A notice under this section is one in the prescribed form informing the tenant that—

(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and

(b) those proceedings will not be raised earlier than the expiry of the period of 28 days, two months, three months or, as the case may be, six months (whichever is appropriate under subsection (4) or (4A) below) from the date of service of the notice.

(4) The minimum period to be specified in a notice served before 3 October 2020 as mentioned in subsection (3)(b) is—

(a) two months if the notice specifies only Ground 9 in Part II of Schedule 5 to this Act,

(b) three months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without also specifying the ground referred to in paragraph (a))—

(i) Ground 1 in Part I,

(ii) Ground 15 in Part II,

(c) six months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without other grounds)—

(i) Grounds 2 to 8 in Part I,

(ii) Grounds 10 to 14 in Part II,

(iii) Ground 16 or 17 in Part II.

(4A) The minimum period to be specified in a notice served on or after 3 October 2020 as mentioned in subsection (3)(b) is—

(a) 28 days if the notice specifies only Ground 15 in Part II of Schedule 5 to this Act,

(b) two months if the notice specifies Ground 9 in Part II of Schedule 5 to this Act (whether with or without also specifying the ground referred to in paragraph (a)),

(c) three months if the notice specifies Ground 1 in Part I of Schedule 5 to this Act (whether with or without also specifying either or both of the grounds referred to in paragraphs (a) and (b)),

(d) six months if the notice specifies any of the following grounds in Schedule 5 to this Act (whether with or without other grounds)—

(i) Grounds 2 to 8 in Part I,

(ii) Grounds 10 to 14 in Part II,

(iii) Ground 16 or 17 in Part II.

(5) The First-tier Tribunal may not exercise the power conferred by subsection (1)(b) above if the landlord seeks to recover possession on Ground 8 in Schedule 5 to this Act.

(6) Where a notice under this section relating to a contractual tenancy—

(a) is served during the tenancy; or

(b) is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy,

the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7) A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.

Schedule 5, Ground 11
Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.

Schedule 5, Ground 12
Some rent lawfully due from the tenant—

(a) is unpaid on the date on which the proceedings for possession are begun; and
(b) except where subsection (1)(b) of section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings."

Notice to Quit

68. Firstly, and for completeness, the Tribunal noted that the Notice to Quit in this action is invalid in that it does not seek to terminate the contractual tenancy agreement at an ish. In terms of clause 1.9 of the Tenancy Agreement produced with the Application, the tenancy commenced on 8 April 2011 and expired on 8 October 2011, declaring that if it was not brought to an end by either party at the expiry date then it would continue on a monthly basis until terminated. In other words, the tenancy agreement continued by tacit relocation to the eighth of November 2011, and then to the eighth of each consecutive month thereafter. To be valid, the Notice to Quit would have had to seek to terminate the tenancy agreement on the eighth day of a month after expiry of the relevant period of notice. Instead, it seeks to terminate the tenancy agreement on 1 October 2020. That was not an ish, which is why the Notice to Quit is invalid. The contractual tenancy agreement is continuing.

69. In terms of s.18(6) of the 1988 Act, the Tribunal cannot grant an eviction order in respect of an ongoing contractual assured tenancy under the criteria in subsections (a) and (b) are met. The Grounds for eviction are 11 and 12, so the requirements of subsection (a) are met. Additionally, the Tenancy Agreement specifies at Clause 7 that the tenancy may be brought to an end under, amongst other grounds, Grounds 11 and 12. Accordingly, the requirements of subsection (b) are met. It follows that the Tribunal may grant the eviction order in this case if the requirements of sections 18 and 19 are met.

Notice under Section 19

70. In terms of section 19(1), the Tribunal shall not entertain proceedings for possession unless either a notice under section 19(1)(a) (known as a Form AT6 Notice) is given, or it is reasonable to dispense with the requirement to serve that notice. That is truly the crux of this case. It is accepted that the AT6 in this case is invalid. The Applicant has asked the Tribunal to dispenses with the requirement to serve it at all.

71. It is the Tribunal's view that the determination of whether it is reasonable to dispense with the need to serve a form AT6 necessarily requires it to consider all of the circumstances of the case (*Midlothian District Council v Drummond*). In that respect, the Tribunal does not agree with Mr MacPhee's submission that it is somehow limited to consideration of the defective AT6 itself. That is particularly true when the effect of s.19(1)(b) is to give the Tribunal authority to dispense with service of the AT6 altogether; not to set aside a minorly defective notice that otherwise gives fair notice.

72. This is an Application for the grant of an eviction order where the Applicant accepts that neither the Notice to Quit nor the AT6 are valid. The fact is that Parliament has legislated to provide what is an onerous system for landlords to navigate in order to procure orders to evict tenants. That was to ensure that tenants who occupied properties under Assured Tenancies obtained real security of tenure. The onerous nature of the requirement to give notice was itself a protection for tenants. That the Applicant has failed to give any notice properly is significant factor that the Tribunal has had regard to.

73. However, it is only one of a number of relevant factors here. The invalid AT6 did specify that the Respondent was in rent arrears and had persistently delayed to pay rent. The Respondent was well aware of her failures; she had been in dialogue with the Applicant's husband since at least December 2019 regarding her arrears, employment situation and financial difficulties. In June 2020, she wrote to Mr Mungall confirming that she could not afford to pay the arrears and actively seeking to have appropriate eviction notices served on her. The notices, though invalid, were prepared with her knowledge and at her request.

74. Separately, the Tribunal cannot ignore what it considers to be the exceptional prejudice that the Applicant would suffer here if required to effectively start again. The Respondent has been in arrears since October 2019. She has paid nothing since before July 2020. She has stated clearly and unequivocally that she cannot pay anything towards the rent and has no intention to do so. She is already in arrears of £10,658, which will continue to accrue at a rate of £726 per month. She would require to give six months' notice due to the reason for eviction being rent arrears. She would then require to submit a fresh Application for eviction and progress that to a conclusion, which one can conservatively assume would take a further four months. During that period, she will continue to have monthly expenditure for the Property of approximately £641.

75. The Tribunal agrees with Miss Lynch's submission that, when determining matters of reasonableness, the Tribunal must look at matters "in the round". Taking into account all of the circumstances here, and in particular the fact that: (i) the Respondent is in significant arrears; (ii) the Respondent has been in continuous dialogue with the Applicant, through the Applicant's husband, about her arrears and ability to pay since at least December 2019; (iii) the invalid AT6 makes reference to grounds 11 and 12 of Schedule 5 to the 1988 Act and specifies both that the Respondent is in arrears of rent and has persistently been late in paying rent; (iv) the Respondent expressly stated to the Applicant's husband by text message in June 2020 that should could not afford to pay rent and wished to be served with notices to terminate the tenancy; (v) the Respondent has repeatedly stated that she cannot afford to pay rent or make a contribution to arrears; (vi) the Respondent has stated that she will not make any payments towards rent or her arrears; (vii) a period of nine months has already elapsed since service of the invalid notices; and (viii) the Applicant is suffering, and will continue to suffer, financial hardship for a period of at least 10 months if required to serve a fresh form AT6, the Tribunal has determined that it is reasonable in this case to exercise its discretion

under section 19(1)(b) of the 1988 Act and dispense with the requirement on the Applicant to serve notice under section 19(1)(a).

Eviction Order

76. The final matter which requires to be determined is whether it is reasonable to grant an eviction order in this case. It is accepted by the Respondent that she is in significant arrears of rent, and that she has persistently been late in paying rent. Accordingly, those requirements of Grounds 11 and 12 of Schedule 5 to the 1988 Act are met. In terms of s.18(4) of the 1988 Act, the Tribunal may only grant an order for possession under those grounds if it is satisfied that it is reasonable to do so. In terms of s.18(3C), that also means that the Tribunal must consider to what extent the Applicant has sought to comply with the pre-action requirements.

77. Dealing firstly with the pre-action requirements, in terms of the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 ("the 2020 Regulations"):-

"3.— Pre-action requirements for assured and short assured tenancies

(1) For the purposes of section 18(3C) of the 1988 Act1, the Scottish Ministers specify the pre-action requirements set out in paragraphs 2 to 4.

(2) The provision by the landlord to the tenant of clear information relating to—

(a) the terms of the tenancy agreement,

(b) the amount of rent for which the tenant is in arrears,

(c) the tenant's rights in relation to proceedings for possession of a house (including the preaction requirements set out in this regulation), and

(d) how the tenant may access information and advice on financial support and debt management.

(3) The making by the landlord of reasonable efforts to agree with the tenant a reasonable plan to make payments to the landlord of—

(a) future payments of rent, and

(b) the rent for which the tenant is in arrears.

(4) The reasonable consideration by the landlord of—

(a) any steps being taken by the tenant which may affect the ability of the tenant to make payment to the landlord of the rent for which the tenant is in arrears within a reasonable time,

(b) the extent to which the tenant has complied with the terms of any plan agreed to in accordance with paragraph (3), and

(c) any changes to the tenant's circumstances which are likely to impact on the extent to which the tenant complies with the terms of a plan agreed to in accordance with paragraph (3).

5. Transitional arrangements: assured and short assured tenancies
The pre-action requirements specified under regulation 3 apply to proceedings before the First-tier Tribunal for Scotland for the order for possession of a house let on an assured tenancy under section 18 of the 1988 Act which are raised by the landlord on or after 6 October 2020."

78. Regulation 3 of the 2020 Regulations was repealed on 31 March 2021. However, this Application was raised whilst the 2020 Regulations were in force, and it is the Tribunal's view that it must consider whether, and to what extent, the pre-action requirements in Regulation 3 were satisfied.

79. The Tribunal is satisfied that the Applicant, through her husband, was in regular contact with the Respondent to discuss her contractual obligations and accruing rent arrears. The Applicant was entitled to conclude, from the information provided by the Respondent, that the Respondent was actively seeking assistance from the local authority for her housing and financial issues. The Applicant actively sought to assist the Respondent by giving her time to get back on track with rent payments. Ultimately, the Respondent clearly asserted that she would not be able to make ongoing payments, let alone afford contributions to arrears. In all of the circumstances, the Tribunal is satisfied that the Applicant's actions substantially met the pre-action requirements, notwithstanding the fact that the 2020 Regulations had not yet been enacted when the notices were served.

80. Thereafter, the Tribunal is required to assess all of the circumstances to determine reasonableness. In that respect, the Tribunal is mindful of all of the factors previously referred to in relation to its decision to dispense with the requirement to serve notice under s.19(1) of the 1988 Act.

81. In addition, the Tribunal recognises that there is weight in ensuring that the education of the Respondent's children, and the support that they receive, is not interrupted. However, the Tribunal is satisfied that the children would still have access to equivalent education and support services in other schools with the East Renfrewshire local authority area if they were required to move. Insofar as Mr MacPhee seemed to suggest, with reference to *Falkirk District Council v McLay*, 1991 SCLR 895, that the paramount consideration here was the effect of eviction on the children, the Tribunal disagrees. Whilst it is undoubtedly a significant factor, it is not the determining factor. It cannot be

the case that where eviction proceedings adversely affect a child those proceedings can never be successful. To put it into context, the Respondent in this case has not paid any rent for many months, and has expressly stated that she will not pay any rent moving forward either. It is not the Applicant's duty to provide a home for the Respondent's children free of charge, and such a duty is not created by virtue of the impact it may have on the children.

82. In the end, it is the Respondent's own evidence as to her inability to pay rent, desire to move to other affordable accommodation, and acceptance that she had requested service of a notice to quit in order to increase her housing priority listing, which demonstrate that the balance lies with the Applicant. The Tribunal was surprised by Mr MacPhee's submission that "This is not a case which concerns a rogue tenant who simply will not pay rent, but one which concerns a vulnerable tenant who has encountered a relatively short-term difficulty". That submission is patently false. The arrears may have started to accrue by virtue of the Respondent's vulnerabilities and a short-term difficulty, but 19 months is not a short-term period. The decision of the Respondent to pay nothing at all towards her ongoing rent, and her candid assertion of intention to pay nothing towards ongoing rent if she is successful in this action, demonstrate that she has moved away from the characterisation made by Mr MacPhee and is now very much a rogue tenant. The Applicant quite simply cannot be expected to pay the price for the Respondent living outwith her means. The Respondent's lifestyle is not her responsibility, and the purpose of the statutory protections for tenants is to prevent unfair practices by landlords. In the Tribunal's assessment of this case, there is nothing unfair about a landlord seeking to evict a tenant who is in rent arrears equivalent to over one year's rent and who has openly affirmed that she will continue to pay no rent.

83. Finally, and for completeness, the Tribunal does not agree with the Respondent's assertion that the rent in this case generated a "substantial surplus" when measured against the costs payable for the Property. From the evidence which we have heard, it is clear that the surplus being generated from the Property was, at best, modest. In any event, it is clear that once the exceptional expenditure is taken into account, the Property has cost the Applicant more than it has generated since the Respondent's tenancy began. In fact, based on a surplus of approximately £85 per month for the eight and a half years that the Respondent was in occupation until October 2019, the surplus generated from the rent is less than the Respondent's current arrears, disregarding the exceptional expenditure.

84. Accordingly, having heard evidence and considered all of the circumstances as spoken to by the witnesses, the Tribunal is satisfied that it is reasonable to grant an eviction order in this case. We accordingly do so.

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.

23 April 2021

_____	_____
Legal Member/Chair	**Date**