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 58 Housing (Scotland) Act 2016 ("the 2016 Act")

Chamber Ref: FTS/HPC/PR/19/4030

Re: Property at 34 (3F2) Gillespie Crescent, Edinburgh, EH10 4HX ("the Property")

Parties:

Mr Alessandro Carcangiu, 9 Montague Street, Edinburgh, EH8 9QT ("the Applicant")

Edinburgh Holiday & Party Lets Limited, 2c Costorphine High Street, Edinburgh, EH12 7ST ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the application should be refused.

Background

1. By application dated 4 December 2019 the Applicant seeks a wrongful termination order in terms of Section 58 of the 2016 Act.

2. A copy of the application was served on the Respondent by Sheriff Officer on 31 January 2020. Both parties were advised that a Case Management Discussion ("CMD") would take place on 4 March 2020 and that they were required to attend. A representative of the Respondent contacted the Tribunal to advise that they did not intend to attend the CMD. The application called for a CMD on 4 March 2020. The Applicant attended with his representative, Mr MacLeod. The Respondent did not attend and was not represented. The Legal Member advised the Applicant that it did not appear that the application

met the requirements of Section 58 of the 2016 Act, as it had not been accompanied by a copy of the Notice to leave which had been served on the Applicant. Following discussion, the Legal Member adjourned the CMD to allow the Applicant to consider this matter and to lodge submissions in relation to same, if the Applicant considered the application to be competent.

3. On 22 June 2020 parties were advised that a further CMD would take place by conference call on 30 July 2020 at 2pm. Both were provided with a telephone number and passcode. The Applicant was notified by email. The Respondent was notified by recorded delivery letter. The recorded delivery letter was not returned to the Tribunal by Royal Mail, but a track and trace carried out on 30 July 2020 established that the letter had not been delivered to the Respondent. The application called for a CMD at 2 pm on 30 July 2020. The Applicant and his representative participated. The Respondent did not participate. The Tribunal was not contacted by the Respondent in advance of the CMD. The Legal Member noted that that the Respondent may not have received the letter advising them of the date and time of the CMD. The Legal Member determined that the CMD should be adjourned to a later date to allow for notification to be made to the Respondent, by Sheriff Officer service. The Legal Member also directed the Applicant to lodge written representations regarding the validity of the application, as he had failed to do so following the previous CMD.

4. The parties were notified that a further CMD would take place by telephone conference call on 18 September 2020 at 10am. The Respondent was notified by Sheriff Officer on 24 August 2020. Mr Mark Fortune, director of the Respondent, was also notified by Sheriff officer on 28 August 2020. On 13 August and 10 September 2020, the Tribunal received emails from email address edpl@aol.co.uk. The emails said they were sent on behalf of Mr Fortune. The emails stated that Mr Fortune did not have access to the emails, that he is currently furloughed, that he is not be able to participate in the conference call due to his location and furlough, and that service of documents by the Tribunal had been made at the wrong address. The emails also stated, " What is very clear to him is that the contract and license to occupy issued to all people staying has already been tested more than once at Edinburgh Sheriff Court both by party litigants and parties with legal agents instructed. Not only did said court warrant the cases and accepted jurisdiction but any suggestion otherwise was not upheld by the Sheriff a decision never appealed" and "Mr Fortune is very concerned that the current application appears to go against 3 court rulings at Edinburgh Sheriff Court, one in which a Sheriff ruled Mr Fortune business was legitimate ie all contracts must be ok and other rulings in which a person was evicted from a property by the Sheriff having considered jurisdiction of the court – clearly the Sheriff was content that Edinburgh Sheriff Court had jurisdiction over the Housing and Property Chamber Scotland having previously been advised of a jurisdiction question. The Applicant has not supplied any paperwork required for HPC jurisdiction nor has he supplied any "written document" as required for his claim under Section 58 of the Act. He has not supplied any to the HPC or the respondent."

5. On 10 August 2020, the Applicant submitted written representations. These are in two parts. Part 1 addresses the issue of the type of tenancy the Applicant

had in connection with the property. Part 2 deals with the requirement for a notice to leave to have been served on a tenant, before an application can be made in terms of Section 58 of the 2016 Act.

(a) Part 1. The Applicant refers to the definition of a private residential tenancy in Section 1 of the 2016 Act and states that the Applicant's tenancy meets the requirements. He then refers to Paragraph 6 of Schedule 1 of the 2016 Act, which states that holiday lets are not private residential tenancies. The Applicant refers to the decision of Sheriff Collins in the case of St Andrews Forest Lodges Ltd v Jeremy Grieve and Iona Grieve 2017 SC DUN 25 and particularly to the Sheriff 's remarks in paragraph 54 to the effect that a tenancy is not a holiday let just because one or both of the parties "wish it so or describe it as such in a written agreement". The Applicant states that the tenancy was not a holiday let and was a private residential tenancy in terms of the 2016 Act.

(b) Part 2. The Applicant refers to Section 62 of the 2016 Act and the four features of a Notice to leave identified in this Section. The Applicant states that the notice given to him meets the criteria specified in Sections 62(1)(a) and (c). Although it did not meet the requirements of Section 62(b) and (d), the Applicant argues that the notice given is sufficient to engage Section 58 and that it would be unreasonable for the Tribunal to expect the correct form to be used in the circumstances of the case. The Applicant also refers to Section 73 of the 2016 Act, minor errors in Notices to leave, and argues that the Tribunal should adopt a purposive approach to the statutory provisions or landlords would be able to take advantage of their own failures to follow the correct process to defeat an application under Section 58.

6. The application called for a CMD on 18 September 2020. The Applicant was represented by Mr McLeod. The Respondent did not participate and was not represented.

Case Management Discussion

7. Mr McLeod advised the Legal Member that the Applicant had been looking for accommodation as he had come to Scotland to work. He secured a job In Edinburgh. The property was advertised on Gumtree. He chose it because it was more affordable than most of the alternative accommodation in Edinburgh and he was keen to get something quickly. The accommodation comprised a bedroom in a shared flat. He moved into the property on 15 March 2019. The Legal Member noted that the tenancy agreement lodged with the application is a one page document. It is headed "HOUSING (SCOTLAND) ACT 1988 Schedule 4 Paragraph 8." It states, "The license period is 18 March 2019 – 18 May 2019 and you confirm in acceptance the property is not your sole or main residence and you are not entering an assured tenancy. The license holder agrees and acknowledges that this agreement is an excluded agreement for the purpose of the Rent (Scotland) Act 1984." The agreement is signed by the Applicant. In response to questions for the Legal Member Mr McLeod advised that the Applicant had just arrived in Scotland from Italy. He had no awareness of the private rented sector in Scotland and had been keen to secure affordable accommodation as quickly as possible. He had come to Scotland to work, not

a holiday. He has worked since moving into the property. He was not asked to vacate the property in May 2019 but lived there until 15 October 2019. He referred the Legal member to the copy wage slips lodged with the application which specify the property as the Applicant's home address. He advised that the property was the Applicant's sole residence throughout the time he lived there. He confirmed that the Applicant still lives and works in Scotland. He referred to the written representations lodged on behalf of the Applicant and invited the Legal Member to find that the tenancy was a private residential tenancy in terms of the 2016 Act.

8. The Legal Member proceeded to discuss the circumstances which led to the Applicant vacating the property. A series of text messages were lodged with the application. These start on 20 October 2019 and state "Rent due 18th has not been received, as such there is now no license to occupy. You must confirm by return to avoid further action inc immediate removal". " it appears you did not reply to our message when read, the room will now be opened and cleared as there is no valid license to occupy. Any items within will be removed to the council street bins". 2 You don't have that type of tenancy and the photo you sent is irrelevant…you have a short term holiday let which clearly states its exempt from the protection of eviction." "Formal notification: no license to occupy was issued on 18 October to grant you a legal right to enter the property, as such as like AirBnB the room will be cleared."" Make sure the room is clear and the keys on bed by tomorrow (Tuesday) at 1pm or the room will be cleared". The Applicant responded to these messages by firstly listing eviction grounds from the 2016 Act and saying "It would be not really smart to evict me without waiting a couple of days, I'm just gonna see what the council has to say…I'm gonna need one day to leave and possibly to talk to the police about the situation. .In no way somebody can kick somebody out in less than 24 hours"

9. Mr McLeod confirmed that a Notice to leave (in the format specified in the relevant regulations) was not issued to the Applicant. He vacated the property in response to the messages he received. He did not take advice on his rights. He was concerned that, if he did not comply with the instruction to move out, his belongings would be disposed of when he was out at work. He assumed that if he took advice, any assistance he received would be too late to protect his belongings. However, he did not accept the premise that he had a holiday let and that the landlord was entitled to eject him from the property without proper process. Mr McLeod referred to the written submissions and said that although a Notice to leave in the usual format was not issued, formal notice was given in the text messages. The Respondent stated that he did not have to give the usual form of notice, because the Applicant did not have that type of tenancy. However, the Applicant should not be penalised because of the Respondent's failure to follow the correct process. He further stated that the provisions of the legislation would be rendered "toothless" if a landlord could rely on his own failure to avoid an order under this section of the 2016 Act.

Findings in Fact

10. The Applicant was the tenant of the property between 18 March 2019 and 15 October 2019.

11. The Respondent was the landlord of the property.

12. The property was the Applicant's only or principal home between 18 March 2019 and 15 October 2020

13. The Applicant did not reside in the property for a holiday and was in employment throughout the period of the tenancy.

14. The Applicant vacated the property on 15 October 2019, having received several messages which stated that he had to move out or his belongings would be removed and disposed of by the Respondent. The messages also stated that the tenancy was a short term holiday let and not a residential tenancy.

Reasons for decision

The Tenancy

15. The Legal Member is satisfied that the Applicant occupied the property as his only or principal home for a period of 7 months. He required accommodation because he had moved to Edinburgh to live and work. He did not take the property for a holiday.

16. Section 1 of the 2016 Act states "(1) A tenancy is a private residential tenancy where (a) the tenancy is one under which a property is let to an individual 9"the tenant") as a separate dwelling, (b) the tenant occupies the property (or any part of it) as the tenant's only or principal home, and (c) the tenancy is not one to which schedule 1 states cannot be a private residential tenancy". In terms of Section 2(4), shared accommodation, such as that occupied by the Applicant, can be "regarded as one under which property is let as a separate dwelling". Based on the evidence, the Legal member is satisfied that the Applicant's occupation of the property meets the criteria for a private residential tenancy in terms of Section 1 and 2 of the 2016 Act.

17. Paragraph 6 of Schedule 1 of the 2016 Act states "A tenancy cannot be a private residential tenancy if the purpose of it is to confer on the tenant the right to occupy the let property for a holiday"

18. The agreement signed by the Applicant in connection with the property is a one page document. It refers to Paragraph 8 of Schedule 4 of the Housing (Scotland) Act 1988. This is an error, as the agreement between the parties is dated March 2019 and is therefore subject to the provisions of the 2016 Act which came in to force on 1 December 2017. Paragraph 8 states that a tenancy is not an assured tenancy, in terms of the 1988 Act, if it is " A tenancy the

purpose of which is to confer on the tenant the right to occupy the house for a holiday"

19. The Respondent argues, in the emails submitted to the Tribunal, that the tenancy in question was a holiday let. This is certainly what the agreement states. The Respondent also refers to decisions made at Edinburgh Sheriff Court on this issue. Unfortunately, the Respondent does not provide copies of these decisions or any information about them which would allow them to be identified and considered. The Applicant referred, in the written submissions, to the case of St Andrews Forest Lodges Ltd v Grieve 2017 SC DUN 27. In this case, the Defenders resided in a lodge in a holiday park. It was their only or principal home. They had lived there for a number of years. There was a gap in their occupation, for legal reasons, and when they resumed occupation they were given an adapted version of the standard holiday letting agreement used by the Pursuer for the holiday park. The term of the agreement was 27 February 2015 to 26 March 2015. The agreement was not signed, because there was disagreement about the level of rent. There was later an exchange of emails whereby the Defenders agreed to a "hire" of the property under a holiday lodge hire agreement, on a month to month basis. The Sheriff concluded that the Pursuers intended the occupancy of the lodge to have the legal status of a holiday let. The Defenders did not. In any event, "the defender's occupation of the lodge from 7 March 2015 was not for the purpose of a holiday. It was the first defender's principal home and the second defenders only home". At paragraph 50, Sheriff Collins referred to paragraph 8 of Schedule 4 of the 1988 Act (which was the regime in place at the relevant time). He states "A "holiday let" is therefore still a tenancy, and one which but for the statutory exclusion in section 12(2), would be an assured tenancy assuming that the other requirements of section 12(1) are satisfied" He goes on to say, at paragraph 53 "where the let does not fall within the terms of one of the exclusions, the default position is that an individual tenant who pays rent and occupies a separate dwelling house as his only or principal home for an agreed period will be an assured tenant, and will have security of tenure." And in paragraph 54, "…I have no difficulty accepting that Mr Mulholland did not want to give the defenders security of tenure as assured tenants. However, the means that he chose to achieve this result was to offer the defenders a lease which he thought would be a holiday let. …Critically, in my opinion, whether or not the terms of paragraph 8 are satisfied is a matter for the Court to determine in the light of the evidence before it. The tenancy does not become a holiday let just because one or both of the parties wish it so or describe it as such in a written agreement". The Sheriff concluded that the hire of the lodge was not a holiday let, and was an assured tenancy."

20. The regime under the 2016 Act is similar to the 1988 Act. If a tenancy does not fall within one of the exclusions in schedule 1, the tenancy "is" a private residential tenancy. Furthermore, the terms of Paragraph 8 of schedule 4 of the 1988 Act and Paragraph 4 of Schedule 1 of the 2016 Act are virtually identical. The Legal Member is therefore satisfied that the reasoning in the St Andrews Forrest Lodges case can be applied to the present application.

21. The agreement signed by the parties states that it is a holiday let. However, the evidence clearly establishes that it was not. The Applicant did not intend to occupy the property for a holiday. He had moved to the city and was living and working there. He occupied the property as his only home. It is also evident that the Respondent did not intend the property to be a short term holiday let. The Applicant resided there for 7 months. He paid rent each month. He was only asked to leave when he failed to pay the rent which was due for the month of October. He was asked to vacate the property for that sole reason. As in the St Andrews Forest Lodges case, the Respondent appears to have called the tenancy agreement a holiday let in an attempt to avoid security of tenure and the requirement to serve proper notice and apply to the Tribunal for an eviction order. The Legal Member is satisfied that Applicant occupied the property in terms of a private residential tenancy.

Notice to Leave

22. Section 58 (Wrongful termination without eviction order) states, "(1) This section applies where a private residential tenancy has been brought to an end in accordance with Section 50. (2) An application for a wrongful termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy ("the former tenant"). (3) The Tribunal may make a wrongful termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end."

23. Section 50(1) states, "(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."

24. Section 62 states 2"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 on which the landlord proposes to seek an eviction order in the event that tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and (d) fulfils any other requirement ss prescribed by the Scottish Ministers in regulations.

25. The Applicant concedes that the from prescribed by the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 was not used by the Respondent when it gave notice to the Applicant that he was to vacate the property. It is also conceded that the "notice" which was given did not specify the date on which the Respondent expected to be able to make an application to the Tribunal. The Applicant explains that the Respondent told the Applicant that the property was a holiday let, and therefore the requirement to issue the prescribed form with the relevant date did not apply.

26. The Applicant states that the "notice" does comply with Sections 62(a) and (c) as it is in writing and specifies rent arrears as the eviction ground. The Legal

Member is persuaded by the argument in relation to subsection (a). Notice was given to the Applicant in writing. However, “eviction ground” is defined in the legislation. Section 51 provides that an eviction order can only be granted on one of the eviction grounds specified in Schedule 3 and that these are “exhaustive of the circumstances” in which an eviction can be granted. The rent arrears ground is ground 12. For this to apply the tenant must have been “in rent arrears for three or more consecutive months”. In terms of the messages to the Applicant, he was being asked to leave because of one late or missed payment. This is not an eviction ground under the 2016 Act. It therefore appears that the “notice” given to the Applicant only complies with the first of the four criteria which define a Notice to leave under Section 62.

27. The Applicant argues that the “errors” in the notice to leave should be deemed to be minor errors in terms of Section 73 of the 2016 Act. This section states that a “minor error” does not “make the document invalid unless the error materially affects the effect of the document”. The Applicant refers to the decision of the Tribunal in Holleran v McAlister, where the materiality of errors in notices were discussed. The Tribunal concluded that, at the very least, the Notice should inform the tenant why the proceedings were being taken (ie the statutory ground) and when the landlord expects to be able to raise the proceedings. The Applicant states that both of those requirements are present in the notice he was given because it mentions rent arrears and tells the Applicant when he is required to vacate. The Legal Member is not persuaded by the argument for the following reasons -

(i) It is quite clear from the terms of Section 62 that a Notice to Leave must comply with the four requirements stipulated. The Notice in the present case only complies with one of the four.

(ii) The notice in not the format prescribed by the 2017 Regulations.

(iii) The notice does not provide the Applicant with the information specified in Section 62. It does not refer to an eviction ground under the 2016 Act and does not tell him when the landlord expects to be able to make an application to the Tribunal.

(iv) The Notice in the present case does not meet the minimum criteria for a Notice to Leave. It cannot therefore become a valid Notice to leave as a result of the “minor errors” provisions in Section 73. These provisions assume that the Notice in question would be valid, but for the error which has been made. Furthermore, Section 73(1) states that it is an “error in the completion of a document” which can effectively be ignored.

(v) The Halloran decision, being a decision of the Tribunal at first instance, is not binding. Furthermore, it can be distinguished on the grounds that it concerned the validity of a notice which was in the correct format and had been submitted in connection with an application for an eviction order under Section 51. In any event, the Legal Member’s conclusions in that case would tend to support a finding that the notice in the present case does not qualify

as a notice to leave under the legislation since it is not in the correct format and does not comply with Section 62.

28. The second part of the applicant's argument in relation to the Notice is that the Tribunal should take a purposive approach to interpretation of the statutory provisions. The Applicant states that the purpose of Section 58 is to "prevent tenants from being misled by their landlords into ending and leaving their tenancies. In this case the Respondent misled the Applicant into ceasing to occupy the tenancy by claiming that the Applicant had a holiday let…and into believing that the Applicant had no security of tenure and could be required to leave the tenancy at extremely short notice without any need for the Respondent to first obtain an eviction order from the Tribunal". Furthermore, the Applicant states that to insist upon "strict adherence to the requirements for a notice to leave" would "undermine the statutory intention behind S58" and "provide landlords the opportunity to mislead tenants about their type of tenancy, their security of tenure and the question of whether due process is required to lawfully evict them, then fail to serve tenants with the correct paperwork in terms of S62 requirements for a notice to leave without any possibility of a remedy for tenants".

29. The Legal Member notes that the legislation is unambiguous. Section 58 refers to Section 51. Section 51 uses the term "notice to leave". Section 62 provides a definition of a "notice to leave". It therefore appears that the intention was to protect tenants in a situation where the landlord appears to have followed the correct legal process. Some support for this conclusion can be found if the related provision, Section 57(Wrongful termination by eviction order), is considered. This provides a remedy for a tenant where the Tribunal was misled by the landlord into granting an eviction order, where a landlord has served a notice to leave and then applied to the Tribunal for an eviction order, when the tenant has failed to vacate the property.

30. The explanatory notes to the legislation provide further insight. The note relating to Section 58 simply states, "Section 58 provides that where a tenancy has been brought to an end as a result of the tenant leaving following receipt of a notice to leave from a landlord, the former tenant can apply to the Tribunal for a wrongful termination order on the basis that he or she was misled into leaving the property by the landlord. " The note relating to section 57 states, " Section 57 provides that where a tenancy has been ended by eviction order and the tenant is not satisfied that the landlord was genuinely entitled to recover possession of the property under one of the specified eviction grounds, meaning that the Tribunal was misled into issuing an eviction order, the tenant can apply to the Tribunal for a wrongful termination order. In such cases – and in the case of section 58 wrongful termination applications – the test will be whether the landlord genuinely intended to use the property in the way that the eviction ground required (even if, for some reason, that intention has not come to fruition). For example, a landlord might evict his or her tenant because he or she wants to sell the let property. However, after a year on the open market, the property has not sold and the landlord can no longer afford to maintain the mortgage payments on it, so is forced to withdraw the property from the open

market and relet it to a different tenant. In such a case, if required, it is likely that the landlord could present a strong case to the Tribunal to demonstrate his or her genuine intent to sell". The reference to both section 57 and 58 in this note suggests that the misleading information in both cases is expected to relate to the eviction ground. This supports the conclusion that the right to seek an order under these sections relates to situations where the landlord appears to have acted in accordance with the law but has relied on an eviction ground which did not exist.

31. The Legal Member therefore concludes that an application under Section 58 can only be made where the tenant has been issued with a Notice to Leave under the 2016 Act. In the present case, the Applicant was not issued with a Notice to leave which complies with Section 50, 58 and 62 of the 2016 Act. As a result, he is not entitled to a wrongful termination order.

32. The Legal Member notes that one further issue arises in relation to the application. The word used in Section 58 is "misled" which means to cause someone to have a wrong idea or impression (Oxford Dictionary). From the copy messages submitted with the application, and the information provided at the CMD, the Legal Member notes that the Applicant referred the Respondent to the eviction grounds in the 2016 Act, in response to the message telling him to vacate the property. He also makes reference to speaking to the council and to the police, and says "In no way somebody can kick somebody out in less than 24 hours" At the CMD his representative advised the Legal Member that the Applicant chose not to stay at the property, and take advice about his rights, because he was concerned about the Respondent following through with the threat to evict him illegally and remove and dispose of his belongings. This is perhaps understandable. Furthermore, the Legal Member is satisfied that the Respondent did give the Applicant false information about the nature of the tenancy and his obligations as landlord if he wished to evict the Applicant. Whether this information succeeded in misleading the Applicant, and causing him to cease to occupy the property, is less clear. It appears that he knew or strongly suspected that the Respondent's actions were not lawful but did not want to risk losing his possessions by staying at the property and taking advice on his rights. The Legal Member therefore concludes that, had the Applicant been entitled to seek a wrongful termination order under Section 58, he may have been unable to establish that he met the test specified in Section 58(3).

Decision

33. The Legal Member determines that the application should be refused on the grounds that the Applicant was not served with a Notice to Leave and is therefore not entitled to seek an order in terms of Section 58 of the 2016 Act.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

_____ **24 September 2020**

Josephine Bonnar, Legal Member