



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/PR/20/2171

Re: Property at 28 Nith Place, Kilmarnock, KA1 3NJ (“the Property”)

Parties:

Mrs Gillian McKenna-Cansfield, Michael McKenna-Cansfield, 185 Hurlford Road, Kilmarnock, KA1 3QB (“the Applicants”)

Mr Paul Anderson, 7 Wilson Ave, Kilmarnock, KA3 7AP (“the Respondent”)

Tribunal Members:

Melanie Barbour (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it would not make a wrongful termination order in terms of Section 58 (2) of the Private Housing (Tenancies) (Scotland) Act 2016

Background

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 110 (an order for wrongful termination) of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”). This application was heard = with a conjoined application under Rule 103 (seeking an order for payment for failure to lodge a tenancy deposit into an approved scheme). There was a further application for repayment of a deposit which had been made under Rule 111, however that case was continued as the Respondent advised that he did not have a full copy of the lease agreement before him.
2. This application contained,
 - a. a copy of the rental agreement.
 - b. evidence of the payment of the deposit.

- c. Photographs
 - d. Copies of text message history between the parties
3. A case management discussion had been held on 1 December 2020. Reference is made to the case management discussion note. A direction was issued at that case management discussion. Only the Applicants submitted any further documentation, namely a full copy of the tenancy agreement which they had received from the landlord. That agreement had been emailed to the Tribunal on 8 December 2020.
 4. The Applicants and the Respondent both attended the hearing by telephone conference. Both parties confirmed that they had not lodged any further documentation other than the Applicants lodging the tenancy agreement, the only new papers were pages 2 and 3 of the tenancy agreement which had been originally submitted with the application.
 5. Preliminary matters to be dealt with:-

Whether or not the Tribunal could proceed to hear this application given that the Respondent advised that he did not have a full copy of the tenancy agreement before him. The Respondent indicated that he did not have it before him at the hearing. He did not dispute that it had been sent to him but advised that there were so many papers he did not have them all with him. A copy of the tenancy agreement was emailed to him during the hearing by the Tribunal clerk. The Applicants objected to a postponement, advising that they were prepared and ready to proceed. The Tribunal considered that in terms of the tenancy deposit application and the application for wrongful termination those hearings could proceed. We considered that the matters in dispute in those applications could be determined without the Respondent having before him the second and third pages of the tenancy agreement; and if any sections were relevant to those matters then the Tribunal would read those sections to the parties.

6. The Applicants confirmed that the application was to be put into the joint names of Mrs Gillian McKenna-Cansfield and her husband, Michael McKenna-Cansfield. The Respondent had no objection to this amendment. The Tribunal allowed this amendment.

The Hearing

7. The First Applicant, Mrs Gillian McKenna-Cansfield advised that they had moved into the property on 27 September 2019. They leased the property from the Respondent. She had produced the lease agreement which the Respondent had given her in March 2020, the lease agreement had a date on it of 27 September 2019 which was when the tenancy had commenced. The Respondent did not dispute that the Applicants had leased the property from him in September 2019. He advised that he had provided them with a tenancy agreement in March 2020, albeit he indicated that he had also given them an earlier one in September 2019. The Respondent had not however lodged any copies of any tenancy agreements in support of his position.

8. In early September 2020, the First Applicant was asked to go and see the Respondent at his office. He advised her that he was going to sell the property. He was getting the ball rolling but she had until around March 2021 before they had to leave. She advised that two days later she was contacted by a friend who told her that the property was up for sale on Facebook. She checked Facebook and saw the property advertised for sale. She thought she had until March 2021 and she said that she felt pressurised to leave before then.
9. The First Applicant advised that she was then contacted on 24 September 2020 by the Respondent, he asked if she had found any accommodation yet; and the rent was to be paid in advance if they were staying longer.
10. The Applicants referred to texts that were sent on 29 September 2020. The First Applicant had advised the Respondent that she had understood that she had 6 months until she had to leave the property. However, she had received a text response from the Respondent advising that each party only had to give 30 days' notice.
11. She advised that she had never received any written notice to leave the property. The Respondent told her that she could have another month if she wanted, but she felt unable to do so as she had had managed to get all her belongings packed and was then ready to leave.
12. The First Applicant advised that she had not known how much notice she was entitled to from the landlord, she had thought it was 6 months due to the pandemic, but she was not sure. She had assumed that what the Respondent advised her was correct that she only had 30 days' notice.
13. She advised that after she had left, she took advice and discovered that she had been entitled to longer notice. She said that she considered that she had been misled to leave the property as she had been told that the notice period was 30 days only.
14. She advised that the tenancy agreement was the one she had lodged with the Tribunal, and it was the one that she had been given in March 2020.
15. The Respondent advised that he had told the Applicants that he was selling the property, he had offered to sell it to them first, but they had said no. He told them that he was going to sell it, but he was in no rush to do so. He confirmed that he had put the house up on Facebook, but this was on his personal Facebook page to gauge interest, it was not through a professional estate agency at that point.
16. The Respondent advised that he believed that the Applicants were keen to leave the property as they could not afford the rent. There was an issue with them wanting to live in the property for a further 4 days without paying rent and this was part of the reason why the deposit had not been repaid to them. He advised that the Applicants had not left the property in a good condition.

17. On 24 September 2020 he had only texted to see how they were getting on; he was not harassing them to move. In relation to the texts of 29 September 2020, he advised that there was no tenancy contract, it had run out. He advised that he wanted the rent paid, but he was not throwing anyone out. And they could have stayed longer.
18. The Tribunal asked the Respondent if he was aware that the law had changed for residential tenancies and that these leases did not have an end date. He advised that he was unaware of this and he queried this open-ended provision as he advised that the parties had agreed that the tenancy would have an end date.
19. The Respondent advised that the Applicants should either pay rent or leave the property. He advised that he did want the Applicants to leave the property but there was no timescale imposed; anytime until March 2021 was fine. The Respondent advised that he had not provided the Applicants with any written notice about leaving the property.
20. The Tribunal asked why he had told the Applicants that they had until March until they had to leave the property and was this date significant. He advised that it was not. He was not in a rush to sell the property. He had planned to start on an extension of his home once he had sold the property. He thought that the property would sell easily.
21. The Respondent advised that they were no longer planning to put on an extension due to the pandemic. He advised that he also did not want to be a landlord any longer and to deal with other people's problems. He said that he had told the Applicants to take as long as they liked and that they had until March 2021. He would put the property on the market at some point. He said that the Applicants were comfortable with one month's notice and they could leave whenever they wanted to.
22. The Tribunal asked the Respondent if he undertook any legal procedures to terminate the tenancy. The Respondent advised that he had no idea how to end a tenancy formally. He said he ran a van sales business and rented out one property. He submitted that the Applicants could have stayed longer, however they had secured another tenancy and were therefore able to move.
23. The Applicants advised that they considered that they had been misled into ending the tenancy when they had been advised that they had a 30 days' notice period. Further, they considered that they had been pressurised by the Respondent to move out. They advised that they had accepted the notice period as advised to them by the landlord.
24. In conclusion the Respondent stated that there had been no rush for anyone to move out. The only issue for him was that the Applicants had to pay rent for the following month if they intended to stay on in the property. He advised however the rent had stopped being paid in September and there was nothing for October. The Applicants had found somewhere else to live and they had already packed and left.

25. The Applicants advised that when they moved out of the property on 4 October 2020 they moved to reside with a friend for a couple of weeks while some work was being done to the new property. They advised that they could have moved into the property on the 4 October 2020, but they waited until the work had been carried out. They would have stayed in Nith Place, and they would have paid for an additional week's rent but not for a whole month. They advised that they were already paying for the next tenancy by that point.

Findings in Fact and Law

26. The Tribunal made the following findings in fact and law:-

- a. That a tenancy had commenced on 27 September 2019.
- b. The Respondent was the landlord, and the Applicants were the tenants.
- c. The tenancy was a private residential tenancy and was therefore regulated in terms of the Private Housing (Tenancies) (Scotland) Act 2016.
- d. That the tenancy had ended on 4 October 2020.
- e. The Respondent advised the Applicants on 5 September 2020 that he intended to sell the property in the next 6 months.
- f. The Respondent advised the Applicants by text on 29 September 2020 that each party only had to give 30 days' notice before ending the tenancy.
- g. That section 50 of the Private Housing (Tenancies) (Scotland) Act 2016 sets out how the landlord may terminate a private residential tenancy by issuing a notice to leave to a tenant.
- h. That the Respondent did not issue a notice to leave to the Applicants seeking to terminate the tenancy.

Reasons for Decision

27. Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016 deals with wrongful termination where there has been no eviction order. This application was brought under section 58. Relevant sections include 50, 58, 59 and 62.

50 Termination by notice to leave and tenant leaving.

(1) A tenancy which is a private residential tenancy comes to an end if—

(a) the tenant has received a notice to leave from the landlord, and

- (b) the tenant has ceased to occupy the let property.*
- (2) A tenancy comes to an end under subsection (1) on the later of—*
 - (a) the day specified in the notice to leave in accordance with section 62(1)(b), or*
 - (b) the day on which the tenant ceases to occupy the let property.*
- (3) For the avoidance of doubt, a tenancy which is to come to an end under subsection (1) may be brought to an end earlier in accordance with section 48*

Section 58 Wrongful termination without eviction order

- (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.*
- (4) In a case where two or more persons jointly were the landlord under the tenancy immediately before it ended, the reference to the landlord in subsection (3) is to any one of those persons*

59 Wrongful-termination order

- (1) In this section and in sections 57, 58 and 60, “a wrongful-termination order” means an order requiring the person who was the landlord under the tenancy immediately before it ended to pay the person who made the application for the wrongful-termination order an amount not exceeding six months’ rent.*
- (2)*

62 Meaning of notice to leave and stated eviction ground.

- (1) References in this Part to a notice to leave are to a notice which—*
 - (a) is in writing,*
 - (b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,*
 - (c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and*
 - (d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.*

28. Section 58 applies in cases where a private residential tenancy has been brought to an end in accordance with section 50.

29. Section 50 provides that a tenancy comes to an end where a notice to leave has been received by a tenant from the landlord. Section 62 sets out what is meant by “a notice to leave”. It provides that the notice must be in writing, must specify the date on which the landlord expects to become entitled to make an application for an eviction order; must state the eviction ground; and fulfil any other requirements of the Scottish Ministers.
30. In this case both parties confirmed that no written notice to leave had been issued by the Respondent to the Applicant. In fact, it appeared that no written notice whatsoever had been given to the Applicants by the Respondent when he advised them that he was selling the property and he wanted them to leave. There does not appear to be any dispute that the Respondent did ask the Applicants to leave the property, however this was done verbally.
31. As section 58 only applies in cases where a private residential tenancy has been brought to an end in accordance with section 50, the Tribunal find that the private residential tenancy was not been brought to an end in accordance with section 50 as no notice to leave was issued to the Applicants.
32. The statutory requirements of section 58 have not therefore been met and no order under section 58 could be made.
33. Observed: The Tribunal would observe that while no order could be made under section 58, it considered that this may not preclude the Applicants from seeking an order for unlawful eviction in terms of section 36 of the Housing (Scotland) Act 1988.

Decision

34. Application refused.

Right of Appeal

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

Melanie Barbour
Legal Member/Chair

20 January 2021
Date