

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 51 of the Private Housing (Tenancies) (Scotland) Act 2016

Chamber Ref: FTS/HPC/EV/21/1343

Property : 144 Scott Street, Galashiels, TD1 1DX ("Property")

Parties:

Hugh Smith, 3a Fife Crescent, Glasgow G71 8DG ("Applicant")

Reiver Property Management, 65 Bank Street, Galashiels, TD1 1EL ("Applicant's Representative")

Susan Statham, present whereabouts unknown ("Respondent")

Tribunal Members:

**Joan Devine (Legal Member)
Elizabeth Dickson (Ordinary Member)**

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") determined to make an order for eviction of the Respondent from the Property.

Background

The Applicant sought recovery of possession of the Property. The Applicant had lodged Form E dated 3 June 2021. The documents produced were: a Private Residential Tenancy Agreement dated 1 August 2018; Notice to Leave under Section 50(1)(a) of the Private Housing (Tenancies) (Scotland) Act 2016 ("Act") dated 3 May 2021 ("May Notice to Leave") which included photographs inside the Property and a timeline of contact between the parties; post office certificate of posting dated 30 April 2021; post office proof of delivery indicating delivery on 1 May 2021 and signed for by "Stratham"; notification to the Local Authority in terms of Section 11 of the Homelessness Etc. (Scotland) Act 2003; email from tracing agents dated 9 July 2021 stating they could not trace the Respondent; request for service of notice by advertisement dated 22 July 2022; Notice to Leave dated 10 August 2021 ("August Notice to Leave"); certificate of service by advertisement of August Notice to Leave

dated 10 August 2021; and certificate of service by advertisement of the Application dated 12 October 2021.

Case Management Discussion

A case management discussion took place before the Tribunal on 18 November 2021 by conference call. The Applicant was represented by Ronnie Shearer and Wendy Wilson of the Applicant's Representative. There was no appearance on behalf of the Respondent.

Ms Wilson told the Tribunal that the Respondent had contacted her in February 2020 and said that she was going to the Philippines on holiday. The Respondent continued to pay rent. A payment was made on 16 July 2020. the August payment was missed. Further payments were made on 15 September 2020 and 13 January 2021. No payment had been made since then. The arrears were £4551.90.

The Applicant had provided photographs showing mail piled up behind the door of the Property and a timeline of contact made and attempted for the period 19 November 2019 to 10 March 2021.

Ms Wilson told the Tribunal that she had an exchange of text messages with the Respondent in January 2021 in which she said she was still in the Philippines but was hoping to return to Scotland. There had been no communication from the Respondent since then.

Ms Wilson told the Tribunal that she had tried to contact the Respondent via facebook. that resulted in a response from a friend or family member of the Respondent who said that she was fine. the Respondent's facebook account has now been taken down.

Mr Shearer told the Tribunal that the Respondent's furniture and personal belongings remained in the Property. He said that on 27 August 2021 he received a message from the Respondent via facebook messenger which was a photograph of a ticket for her to fly from Manila to Edinburgh on 15 September 2021. She also sent a picture of a negative covid test. Ms Wilson said that there was no contact from the Respondent after 15 September so on 17 September she contacted then police. They investigated and told her that the Respondent had not entered the country. Ms Wilson said that she had visited the Property around 6 weeks ago and the pile of mail was twice the size of that shown in the photographs lodged with the Application.

As regards the May Notice to Leave, the Tribunal asked about the discrepancy in dates. Ms Wilson appeared not to have been aware that the date of the May Notice to Leave was after the date of service. The Tribunal asked about the post office proof of delivery which suggested that it had been signed for by the Respondent. Ms Wilson

said that she asked the post office about that and they said that sometimes the postman will put a letter through the letter box and sign for it himself.

As regards the August Notice to Leave. The Tribunal noted that it stated that the date of expiry of the period of notice was 19 September 2021 when in fact it was 9 September 2021. Ms Wilson said that she sought advice from the First-tier Tribunal and had completed the notice with the date they told her to use.

Findings in Fact

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent had entered into a Private Residential Tenancy Agreement which commenced on 1 August 2018 ("Tenancy Agreement").
2. The Respondent left the Property on or about February 2020.
3. The Respondent is not occupying the Property as her home.
4. A Notice to Leave was sent to the Respondent at the Property by recorded delivery post on 30 April 2021.
5. A Notice to Leave was served on the Respondent by advertisement on 10 August 2021.
6. Notification was provided to the Local Authority in terms of Section 11 of the Homelessness Etc. (Scotland) Act 2003.
7. Notice of the Application and the date of the case management discussion had been given to the Respondent by advertisement on 12 October 2021.

Reasons for the Decision

The Tribunal determined to make an Order for possession of the Property in terms of Section 51 of the Act.

Firstly the Tribunal considered whether the May Notice to Leave and / or the August Notice to Leave was valid.

The date of 3 May 2021 on the May Notice to Leave appeared to be an error. The post office information that the notice had been signed for on 1 May 2021 was possibly incorrect.

The August Notice to Leave was served by advertisement some 2 months after the Application had been submitted to the Tribunal. In terms of section 62(1)(b) of the Act

the Notice to Leave must specify the day on which the landlord under the tenancy expects to become entitled to make an application for an eviction order. In terms of section 62(4) of the Act that date is to be the day falling after the day on which the period of notice defined in section 54(2) will expire. In this case the date for the purposes of section 62(4) was 9 September 2021 whilst the date narrated in the Notice to Leave was 19 September 2021.

In terms of section 73 of the Act an error in a notice to leave does not make it invalid unless the error materially affects the effect of the notice to leave.

The Tribunal considered whether the error in the August Notice to Leave materially affected the effect of the notice. As the result of the error was that a longer period of notice was given in the Notice to Leave, the Tribunal took the view that the error did not affect the effect. There was no prejudice to the Respondent.

In terms of section 54(1) of the Act a landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice. In this case the Application was made on 3 June 2021 and the relevant period of notice expired on 9 September 2021.

In terms of section 52(2) and 52(4) of the Act the Tribunal is not to entertain an application for an eviction order if it is made in breach of section 54 unless the Tribunal considers that it is reasonable to do so.

The Tribunal considered whether it was reasonable to entertain the Application which had been made before the expiry of the relevant period. The Tribunal determined that it was reasonable to entertain the Application. The Applicant's Representative had made every effort to contact the Respondent even going so far as to involve the police.

The Tribunal then considered whether to grant an eviction order. In terms of section 51 of the Act, the First-tier Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

In the Application the Applicant stated that he sought recovery of possession of the Property on the basis set out in Ground 10 which is that the tenant is not occupying the property.

Ground 10 (as amended by the Coronavirus (Scotland) Act 2020) states:

"(1) It is an eviction ground that the tenant is not occupying the let property as the tenant's home.

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

(a) the let property is not being occupied as the only or principal home of -

(i) the tenant.....

(b) the property's not being so occupied is not attributable to a breach of the landlord's duties under Chapter 4 of Part 1 of the Housing (Scotland) Act 2006..."

The Respondent had left Scotland in February 2020. The Applicant's Representative had instructed a trace in July 2021 which was unsuccessful. The tracing agents had attended the Property and interviewed neighbours who said that they had not seen the Respondent. On 27 August 2021 the Respondent had indicated an intention to return to Scotland in September 2021. The police had however advised the Applicant's Representative that she had not re-entered Scotland. The Applicant's Representative had visited the Property and it appeared to be unoccupied. On the basis of the information provided the Tribunal concluded that the Respondent was not occupying the Property as her principal home.

Decision

The Tribunal grants an order for eviction of the Respondent from the Property.

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.

Legal Member: Joan Devine

Date: 18th November 2021