Housing and Property Chamber
First-tier Tribunal for Scotland

DECISION AND STATEMENT OF REASONS OF JOSEPHINE BONNAR, LEGAL MEMBER OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER PRESIDENT

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules")

in connection with

Reference number: FTS/HPC/EV/20/1159

23 Barward Road, Galston, KA4 8BX ("the Property")

The Parties:

James Hendrie, Purroch Farm, Hurlford, KA1 5JJ ("the Applicant")

William Shaw, 23 Barward Road, Galston, KA4 8BX ("the Respondent")

1. By application received on 11 May 2020 the Applicant seeks an eviction order in terms of Rule 109 of the Rules and Section 51(1) of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act"). The Applicant lodged a copy private residential tenancy agreement, rent statement, copy Notice to Leave and Post Office receipt dated 9 March 2020, in support of the application. The eviction ground stated in both the application and the Notice to Leave is ground 12, rent arrears over three consecutive months.

2. On 21 May 2020 the Tribunal issued a request for further information to the Applicant. The Applicant was asked to provide a track and trace report or other evidence of delivery of the Notice to Leave. On 9 June 2020 the Applicant provided the Tribunal with a further copy of the post office receipt already

lodged. On 17 June 2020 the Tribunal made a further request for a track and trace report. On 18 June 2020 the Applicant lodged a track and trace report which showed that delivery had been attempted on 10 March 2020 and that the document had been "returned to sender", and forwarded to the national returns centre on 10 April 2020. The Applicant also lodged a page from a document which he said was a, "Property mark training manual". This document contained the following " The tenant will be assumed to have received the notice 48 hours after it has been sent and the time period of the notice is calculated from the assumed time the notice is received by the tenant." An example is then given which says that if a Notice is, "sent on 6 March, it will be assumed it is received on 8 March ". The document goes on to state that it is hoped by landlords that there will be "consensual termination" of the tenancy following service of the Notice to leave so that applications to the Tribunal are unnecessary.

DECISION

3. The Legal Member considered the application in terms of Rule 8 of the Chamber Procedural Rules. That Rule provides:-

"Rejection of application

***8.**—(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if—*

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application;

(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or

(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of

the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

4. **After consideration of the application and the documents submitted by the Applicant in support of same, the Legal Member considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Rules.**

Reasons for Decision

5. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court,* (1998) Env LR9. He indicated at page 16 of the judgment; *"What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic".* It is that definition which the Legal Member has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.

6. The Notice to Leave which accompanies the application is dated 9 March 2020 and a copy post office receipt appears to establish that it was sent by recorded delivery post to the Respondent on the same date. The track and trace report which has been produced indicates that Royal Mail attempted delivery on 10 March 2020 but were unsuccessful. The document was not subsequently collected by the Respondent and on 10 April 2020 was sent to the national returns centre to be returned to the Applicant, as undelivered. This is accepted by the Applicant and it is not claimed that the notice was sent given to the Respondent by any other method. The Applicant argues, by reference to a section of a training manual for landlords and agents, that the Notice to Leave lodged with an application does not have to be delivered to or received by the tenant. It is enough that the document has been sent to them by the landlord or his agent.

7. Section 53(3) of the 2016 Act states “An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.” However, the 2016 Act does not prescribe the way in which a Notice to leave is to be “given”. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 Act”) states, “ (1)This section applies where an Act of the Scottish Parliament or a Scottish Instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used)” Subsection 2 provides that the document may be served by “(b) (ii) by a postal service which provides for the delivery of the document to be recorded.” The Legal Member is therefore satisfied that sending the document by recorded delivery post is a competent method of service for the purposes of the 2016 Act.

8. The Applicant appears to rely on Section 62(5) of the 2016 Act which states - “For the purpose of subsection (4) it is to be assumed that the tenant will receive the notice 48 hours after it is sent.” However, subsection 4 states, “The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.” It therefore appears that the “assumed” date of receipt is only for the purposes of calculating the notice period and the date to be specified in Part 4 of the Notice to Leave. It does not allow a landlord to rely on a Notice which, the evidence shows, has never been delivered. Section 26 of the 2010 Act has a similar provision in relation to the sending of documents. It states “(5) Where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.”

9. The Legal Member notes that the reason for sending documents by recorded delivery post is so that the sender has evidence that it was sent and the date on which it was sent. In addition, the sender can track the delivery of the item, and take appropriate action if the item does not reach its destination. The Legal Member is satisfied that the track and trace report, submitted by the Applicant, is evidence that “the contrary is shown” in terms of Section 26 of the 2010 Act. Furthermore, it is evident from the provisions of the 2016 Act that it is not enough for a Notice to be sent. There is presumption that the tenant will receive it and be aware of the landlord’s intentions. The word “received” is used in various sections of the 2016 Act, including Section 50 which relates to a tenant leaving a property after service of the Notice to Leave. Subsection 1 states “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 property.” In the present application, the Respondent has not had the Notice to which they are entitled in terms of the legislation

10. Section 52(2) of the 2016 Act states, "The Tribunal is not to entertain an application for an eviction order if it is made in breach of – (a) subsection (3)" The Legal Member is satisfied that as the Notice to leave was not delivered to or received by the Respondent, that the Notice has not been "given", as required Section 52(3). Accordingly, the Tribunal cannot "entertain" the application.

11. The Legal member therefore determines that the application is frivolous, misconceived and has no prospect of success. The application is rejected on that basis.

What you should do now

If you accept the Legal Member's decision, there is no need to reply.

If you disagree with this decision –

An applicant aggrieved by the decision of the Chamber President, or any Legal Member acting under delegated powers, 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. Information about the appeal procedure can be forwarded to you on request.

Josephine Bonnar

Josephine Bonnar
Legal Member
8 July 2020