



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/23/1406

Re: Property at Flat 1, 5 Lochinvar Drive, Edinburgh, EH5 1GJ (“the Property”)

Parties:

Burnside Property Ltd, 29 Whitehill Village, Dalkeith, EH22 2QD (“the Applicant”)

Mr Muhammad Asghar, Ms Paulina Szczypek, Flat 1, 5 Lochinvar Drive, Edinburgh, EH5 1GJ (“the Respondent”)

Tribunal Members:

Ruth O'Hare (Legal Member) and John Blackwood (Ordinary Member)

Decision (in absence of the Applicant)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to refuse the application and make no order.

Background

- 1 By application to the Tribunal the Applicant sought an eviction order against the Respondent under ground 1 of Schedule 3 of the Private Housing Tenancies (Scotland) Act 2016 (“the 2016 Act”). In support of the application the Applicant submitted the following:-
 - (i) Copy Private Residential Tenancy Agreement between the parties dated 8 and 9 March 2022;
 - (ii) Notice to Leave dated 23 January 2023
 - (iii) Recorded delivery receipt dated 8 March 2023;
 - (iv) Copy email from PP Letting to the Applicant dated 7 March 2023 with Notice to Leave and Guidance for Tenants attached;
 - (v) Residential Mortgage Valuation Report pertaining to the property dated 27 March 2023;

- (vi) Copy email correspondence between PP Letting and the Applicant regarding application for direct rent payments; and
- (vii) Copy email from the Applicant to Edinburgh City Council dated 12 May 2023 with notice under section 11 of the Homelessness etc (Scotland) Act 2003 attached.

2 On 15 June 2023 the Tribunal wrote to the Applicant in the following terms:-

“Before a decision can be made, we need you to provide us with the following:

- 1. Please provide evidence of service of the notice to leave such as a statement or affidavit of the person who hand delivered the notice.*
- 2. Please provide evidence in support of the Ground of eviction such as terms of engagement with a solicitor or estate agent to sell the Property. A mortgage application is not sufficient.”*

By email dated 12 July 2023 the Applicant provided a copy letter from Moore MacDonald Solicitors dated 22nd February 2023 with terms of business in respect of the sale of the property and an email dated 5 June 2023 from Edinburgh City Council to the Applicant confirming that the Respondent had arranged an appointment for later that month to discuss homelessness assistance.

- 3 By Notice of Acceptance of Application dated 9 August 2023 the Legal Member with delegated powers from the Chamber President intimated that there were no grounds upon which to reject the application. A Case Management Discussion was therefore assigned and a copy of the application paperwork together with the date and time of the Case Management Discussion with instructions for joining the teleconference was served upon the Respondent by Sheriff Officers.
- 4 Both parties submitted further written representations following acceptance of the application.

Case Management Discussion

- 5 The Case Management Discussion took place on 24th October 2023. The Applicant was represented by Mrs Heather Burnside. The second Respondent was represented by Ms Natasha McGourt of Granton Information Centre. The first Respondent was not present nor represented however Ms McGourt confirmed that he was aware of the proceedings. The Tribunal noted he had been served with the application paperwork together with notification of the date and time of the Case Management Discussion and determined to proceed in his absence.
- 6 The Tribunal explained the legal test to be applied to the application and noted an issue with the service of the Notice to Leave as a preliminary point for the Tribunal to consider. Mrs Burnside confirmed that the Notice to Leave had been hand delivered to the property on 23rd January 2023. She had subsequently

made an appointment to visit the Respondents in March to find out what their plans were. Her letting agent had advised that they were not getting any response from the Respondents. The Respondents were short on their rent. Mrs Burnside advised that she had to make payment towards her mortgage from the rent therefore this caused her financial difficulty. She understood that the Respondents had been receiving housing benefit but had not paid this over.

- 7 Mrs Burnside confirmed that the Respondents had advised that they had not received the Notice to Leave. Mrs Burnside had therefore provided the Respondents with a further Notice to Leave on 8th March 2023, sent by recorded delivery, so that the Respondents could show this to the local authority as part of their housing application. Mrs Burnside had been happy to do that. She confirmed in response to questions from the Tribunal that her son had been present when the Notice to Leave was served and could speak to this. There appeared to be somebody in the property at the time but there was no answer when they attended. The second Respondent had not said she did not receive the Notice to Leave, only that she did not have it. She needed the Notice to Leave to get priority on the local authority housing list.
- 8 Ms McGourt advised that it remained the second Respondent's position that only 44 days notice had been given, as opposed to 84 days as required by the 2016 Act. They had not received the Notice to Leave on 23rd January 2023.
- 9 The Tribunal then heard from the parties on the ground upon which the eviction order was sought and the reasonableness of making the order. The Tribunal subsequently determined that it did not have sufficient information upon which to make a decision on the application. In particular the Tribunal required further evidence regarding the service of the Notice to Leave. The Tribunal was not satisfied on the basis of the information before it that the Notice to Leave had been hand delivered on the 23rd January 2023, and therefore that the application was competent. On that basis the Tribunal determined to fix a hearing for these matters to be considered in further detail.
- 10 Following the Case Management Discussion both parties submitted further written representations for consideration at the hearing.

The Hearings

- 11 The first hearing took place on 23rd January 2024. The second Respondent was in attendance and represented by Ms McGourt. The Applicant was not present. The hearing was adjourned to a further date. The Tribunal subsequently wrote to the Applicant asking her to confirm if she wished to continue with the application. The Applicant responded by email dated 31st January 2024 stating that she wished to continue. Notice of the date and time of the hearing, together with instructions for joining the teleconference was intimated on the Applicant on 14 March 2024 by email. Said notification confirmed that the Applicant was required to attend the hearing.

- 12 The second hearing took place on 19 April 2024. The Respondent was in attendance and represented by Ms Elvira Vila of Granton Information Centre. The Applicant was not present.
- 13 The Tribunal considered the terms of Rule 29 of the First-tier Tribunal for Scotland (Rules of Procedure) 2017 as amended, which permitted the Tribunal to proceed with the hearing if satisfied that the requirements of Rule 24(1) regarding the giving of notice had been complied with. Rule 24(1) states that the Tribunal must give parties reasonable notice of the hearing and that the notice period must be no less than 14 days from the date of receipt of the notice. The Tribunal noted that notice had been given to the Applicant on 14th March 2024. The Tribunal was therefore satisfied that the provisions of Rule 24(1) had been complied with, in that reasonable notice of the hearing had been given to the Applicant. The Tribunal also took into account the fact that the Applicant had failed to attend the previous hearing and had been given the opportunity to attend a second hearing, having stated her wish to continue with the application. She had not provided any explanation as to why she had failed to attend either hearing. The second Respondent had however been present at both hearings and ready to proceed. Accordingly taking into account the particular circumstances of the case the Tribunal determined to proceed in the absence of the Applicant.
- 14 The Tribunal then heard evidence regarding the service of the Notice to Leave from the second named Respondent. The Notice to Leave had been served by recorded delivery on the 9th March. It was not served on the 23rd January 2023 as had been claimed by the Applicant. There was no evidence before the Tribunal to establish service on that date, for example a signature by the Respondents or a delivery receipt. On the basis that the Notice to Leave had been served on the 9th March it did not comply with the requirements of the 2016 Act as it did not give a sufficient notice period. The effective date on the notice was the 19th April 2024. The application should therefore be dismissed.
- 15 The Tribunal then adjourned the hearing to discuss the evidence before it. The hearing resumed and the Tribunal confirmed its decision.

Findings in Fact and Law

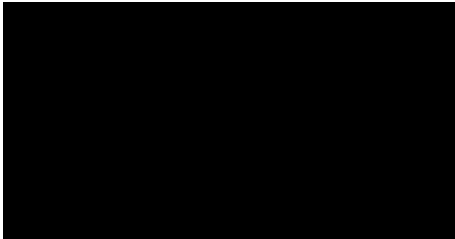
- 16 The parties entered into a Tenancy Agreement in respect of the property dated 8 and 9 March 2022.
- 17 The tenancy between the parties was a private residential tenancy as defined by section 1 of the 2016 Act.
- 18 On 8 March 2023 the Applicant sent a Notice to Leave to the Respondents by recorded delivery mail. The Notice to Leave cited ground 1 of Schedule 3 of the 2016 Act and confirmed that proceedings would not be raised any earlier than 19 April 2023.

Reasons for Decision

- 19 The Tribunal took into account the terms of the application, the written representations from both parties and the evidence from the second Respondent at the hearing in reaching its decision. The Tribunal was satisfied that it had sufficient information upon which to reach a determination of the application.
- 20 The Tribunal considered the relevant provisions of the 2016 Act regarding the Notice to Leave. Section 52 states that the Tribunal cannot entertain an application for an eviction order that is not accompanied by a copy of a notice to leave which has been given to the tenant. Section 54 states that a landlord may not make an application to the 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 terms of section 54(2) the relevant period for a Notice to Leave in respect of ground 1 of Schedule 3 of the said Act is 84 days.
- 21 The Tribunal accepted that the Notice to Leave had been served on the Respondents on the 8 March 2023 by recorded delivery, and not on the 23rd January 2023 as had been stated by the Applicant. There was no evidence before the Tribunal to support the Applicant's position in this regard. She had produced an email from the local authority dated 5 June 2023 confirming that the Respondent had made an appointment to discuss homelessness assistance, however this post-dated the service of the second Notice to Leave on 8 March 2023 and the Tribunal did not accept that this was supportive of her assertion that service took place on 23rd January 2023. The Applicant had also produced an email from her letting agent dated 8 March 2023. In terms of that email the agent had sent the Applicant the Notice to Leave document and had provided advice on the date to be inserted as the effective date. The Tribunal did not consider this to be evidence of service of the Notice to Leave in January, in fact the email supported the Respondents' position that service had been effected in March.
- 22 The Applicant had stated at the Case Management Discussion that her son could speak to service of the Notice to Leave on the 23rd January 2023. She had however failed to attend either hearing, and had failed to present this as evidence to the Tribunal.
- 23 The Tribunal therefore preferred the evidence from the Respondents regarding service of the Notice to Leave and concluded that the Notice to Leave did not comply with the provisions of section 54(2) of the 2016 Act, in that the Applicant had failed to give sufficient notice to the Respondent under the terms of that section. The application did not therefore comply with the terms of section 52 of the Act. On that basis the Tribunal determined to refuse the application and make no order.
- 24 The decision of the Tribunal was unanimous.

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.



30 April 2024

Legal Member/Chair

Date