



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/24/0664

Property : 92 Baldwin Avenue, Knightswood, Glasgow G13 2QU (“Property”)

Parties:

Linda Russell and James Russell, The Post Room, Box 19, Via Park 3, Calle Panticosa, Orihuela Costa, Alicante, Spain 03189 (“Applicant”)

Angela McKellar, 92 Baldwin Avenue, Knightswood, Glasgow G13 2QU (“Respondent”)

Tribunal Members:

Joan Devine (Legal Member)

Gerard Darroch (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“Tribunal”) determined to dismiss the Application.

Background

The Applicant sought recovery of possession of the Property. The Applicant had lodged Form E. The documents produced were: Tenancy Agreement which commenced on 23 November 2018; Notice to Leave under Section 50(1)(a) of the Private Housing (Tenancies) (Scotland) Act 2016 ("2016 Act") dated 1 August 2023 ("Notice to Leave"); copy email to the Respondent dated 2 August 2023 attaching the Notice to Leave; notification to the Local Authority in terms of Section 11 of the Homelessness Etc. (Scotland) Act 2003 with covering email dated 7 March 2024; copy letter from LoveLetts Estate Agent dated 11 December 2023 stating they are instructed to sell the Property; written submission from the Applicant and sheriff officer's execution of service certifying service of the Application on 6 June 2024.

Case Management Discussion

A case management discussion (“CMD”) took place before the Tribunal on 9 July 2024 by teleconference. In advance of the CMD the Tribunal contacted the Applicant noting that the Notice to Leave had been served by email but that the tenancy agreement did

not provide for service in that manner. The Tribunal asked the Applicant to provide evidence of the Parties having agreed in writing that notices could be served by email. The Applicant responded by email dated 3 July 2024 stating that the Notice to Leave was delivered by hand and attaching screenshots of messages between the Parties. By email dated 5 July 2024 the Respondent told the Tribunal that she had “confirmed an eviction date” with the Applicant of 23 July 2024 and would not attend the CMD.

The Applicant was in attendance at the CMD. The Respondent was not. The Applicant told the Tribunal that Mrs Russell intended to return to the UK from Spain. She would move into the Property to ensure it was ready to be marketed for sale. The Applicant said they intended to sell the Property as soon as possible after they gained possession. The Applicant told the Tribunal that the Respondent lives in the Property with 4 children aged between 3 and 12. They said that the Respondent is their niece and that a lot of communication was via the Respondent’s mother. They told the Tribunal that the Respondent had sent them an email on 7 May 2024 stating that she intended to vacate the Property on 23 July 2024.

The Tribunal noted that the tenancy agreement did not provide for service of notices by email. Mrs Russell said that she delivered a copy of the Notice to Leave to the Respondent personally. She said it was the same Notice to Leave as had been sent by email on 2 August 2023. She said she returned to Scotland in December 2023 to meet up with the estate agent to see the Property with a view to marketing. She said the Respondent consented to her visiting the Property with the estate agent while the Respondent attended an appointment. She said that in the course of that visit on 11 December 2023 she left a copy of the Notice to Leave on the sideboard. She said she saw the Respondent later that day at the Respondent’s mother’s house and the Respondent acknowledged that a copy of the Notice to Leave had been left in the Property. The Tribunal explained that giving the Respondent a copy of the Notice to Leave over 4 months after it had been issued by email meant that inadequate notice had been given to the Respondent. The Applicant agreed to send to the Tribunal a copy of the email of 7 May 2024 sent to them by the Respondent. The Tribunal said that following receipt of that a decision would be issued. Following conclusion of the CMD the Applicant sent to the Tribunal a copy of an email received by them from the Respondent dated 7 May 2024 in which she stated that she wished to terminate the tenancy and vacate the Property on or before 23 July 2024.

Findings in Fact

The Tribunal made the following findings in fact:

1. The Applicant and the Respondent entered into a Tenancy Agreement for the Property which commenced on 23 November 2018.

2. A Notice to Leave was sent to the Respondent by email on 2 August 2023.
3. The Tenancy Agreement did not provide that the Parties consented to service of documents by email.
4. A copy of the Notice to Leave was left in the Property on 11 December 2023, some 4 months after it was sent by email. The Respondent was not present in the Property at that time.

Findings in Fact and Law

1. The Notice to Leave was not “given” to the Respondent as required by section 52(3) of the 2016 Act.
2. The Tribunal cannot entertain the application for an eviction order as it is made in breach of section 52(3) of the 2016 Act.

Reasons for the Decision

In terms of section 52(2) of the Act, the Tribunal is not to entertain an application for an eviction order if it is made in breach of subsection (3). Subsection (3) states that 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. In order to understand what is meant by the notice being “given” to the tenant it is necessary to consider section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“2010 Act”) which 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).*
- (2) *The document may be served on the person –*
 - (a) *By being delivered personally to the person*
 - (b) *By being sent to the proper address of the person –*
 - (i) *By a registered post service ...or*
 - (ii) *By a postal service which provides for the delivery of the document to be recorded, or*
 - (c) *Where subsection (3) applies, by being sent to the person using electronic communications.*

(3) This subsection applies where before the document is served the person authorised or required to serve the document and the person on whom it is to be served agree in writing that the document may be sent to the person by being transmitted to an electronic address and in an electronic form specified by the person for the purpose.

The Notice to Leave was not sent by any form of postal service. A copy was left in the Property on 11 December 2023 but it was not delivered into the hands of the Respondent which meant it was not delivered “personally” see *Rae v Calor Gas Ltd* 1995 SLT 244. In any event, delivering a copy of the Notice to Leave on 11 December 2023 did not provide the Respondent with the required period of notice. There were two versions of the Notice to Leave in the case papers. Both were dated 2 August 2023. In one, the expiry date at part 4 was stated to be 26 January 2024 and in the other it was stated to be 28 February 2024. In neither case was the requisite 84 days notice provided from the date on which a copy was left at the Property being 11 December 2023.

The tenancy agreement did not provide for service by email. The Applicant was unable to point to any other written agreement in terms of which the Parties agreed that documents such as a notice to leave could be served by email. The Applicant did provide a copy email from the Respondent dated 7 May 2024 in which she gave notice of her intention to vacate the Property. That seemed to the Tribunal to fall short of what would be required to constitute the written agreement required by section 26(3) of the 2010 Act. In any event it came too late as section 26(3) of the 2010 Act requires the agreement to serve by electronic means to have been reached before the date of service of the notice in question.

In summary, the Notice to Leave has not been served in accordance with the provisions of the 2016 Act which means it cannot be entertained as provided in section 52(2) of the 2016 Act. The Tribunal is sympathetic to the position of the Applicant but cannot overlook a fundamental invalidity in the paperwork supporting the Application. Had the Notice to Leave been validly served, it appeared to the Tribunal that the ground for eviction had been established and, on the basis of the submissions of the Applicant, it would have been reasonable to grant an order for eviction.

Decision

The Tribunal determined to dismiss the Application.

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.

J Devine

Legal Member:

Date : 9 July 2024