



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/22/0377

Re: Property at 9 Overton Mains, Kirkaldy, Fife, KY1 3JN (“the Property”)

Parties:

Mr Iain Rosie, 9 Whitson Walk, Edinburgh, EH11 3BX (“the Applicant”)

Mr Robert Fyfe, 9 Overton Mains, Kirkaldy, Fife, KY1 3JN (“the Respondent”)

Tribunal Members:

Susan Christie (Legal Member) and Gerard Darroch (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) determined that the application for an eviction order be refused. The decision of the tribunal is unanimous.

Background

1. The application was accepted by the tribunal on 9 May 2022 and the Applicant seeks recovery of the Property from the Respondent by an eviction order under Ground 12 of Schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016.
2. Written responses were invited by the Respondent by 11 June 2022. None were submitted.
3. The tribunal paperwork was served on the Respondent on 23 May 2022 by Sheriff Officer service, by letterbox.

The First Case Management Discussion (CMD)

4. The Case Management Discussion took place on 20 July 2022 at 2 pm. At 10.13 am, the Applicant’s Representative forwarded to the tribunal a copy e mail that had been received by them the same morning at 10.01am. This was from a Debt Respite Scheme (Breathing Space).
5. The Applicant was represented by Mrs Blaik, Lettings Manager. The Respondent did not participate. The tribunal proceeded in the Respondent’s

absence being satisfied that he was aware of the day and time of the Case Management Discussion.

6. The e mail received by the tribunal at 10.13 am from the Applicant's Representative was considered by the tribunal although late. It referred to the Respondent having gone into 'Breathing Space', which was described as a government scheme to help people deal with their debts. It appeared to the tribunal to potentially be a scheme that applied to England and Wales and not to Scotland. The Applicant's Representative was unable to assist the tribunal as she had not made any enquiry into it since receiving the e mail.
7. The tribunal noted that 'Breathing Space' related possibly to a prohibition on enforcement of a debt owed and not an eviction application. In other words, it did not appear to preclude the tribunal deciding in an eviction application.
8. The Applicant's Representative asked for an eviction order to be granted. She stated that:
 - (1) The arrears stood at £3,900 today including the rent due on 16 July 2022 payable in advance
 - (2) Payments had been made by the Respondent as follows-6 February £400;8 March and 23 March, both of £150;6 April, two payments of £200;19 April £250;3 May £250;18 May £150;15 June £100;22 June £150; and 29 June £100, all 2022.Those payments appeared to have come directly from the Respondent.
 - (3) There did not appear to be any payments coming from benefits.
 - (4) The Respondent is 51 years of age, self-employed and suffering from fibromyalgia and lives in the Property which is a one bedroom apartment.
 - (5) The Pre-Action requirements had been met by monthly Rent Arrears Notices being sent out and two letters were produced showing that detailed information had been sent to the Respondent on 13 January,24 January and 3 August, all 2021.Payment plans had been tried but were unsuccessful.
 - (6) It was the view of the Applicant's Representative that if the Respondent could make the rent payment of £380 in full every month and on time and make a smaller payment towards the arrears, then eviction would not be needed, but the Respondent had not done that, and left the landlord in a difficult position.
9. The tribunal raised the question of the mode of service of the Notice to Leave as no certificate of service had been produced, simply an e mail from the Applicant's Representative. This suggested that the agent had gone out to the Property with the Notice to Leave, and the Respondent did not answer the door. The Applicant's Representative stated that she had gone out with a witness.
10. The tribunal considered the wording of the Interpretation and Legislative Reform (Scotland) Act 2010 Section 26-Service of documents 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 (as defined in section 125(1) of the Postal Services Act 2000 (c. 26)), 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.

(4) For the purposes of subsection (2)(b), the proper address of a person is—

(a) in the case of a body corporate, the address of the registered or principal office of the body,

(b) in the case of a partnership, the address of the principal office of the partnership,

(c) in any other case, the last known address of the person.

(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.

(6) Where a document is served as mentioned in subsection (2)(c) it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

11. The tribunal required detail of the mode of service and a signed certificate of service to consider. The tribunal continued the Case Management Discussion to a later date for that to be produced and a Direction was issued. It was also explained the tribunal requires to be satisfied that Ground 12 is met and that it is reasonable to grant an order of eviction. It was noted in the subsequent Note produced that should the Respondent have any information that he wishes the tribunal to consider before deciding, then he should participate in the next CMD.

The Direction

12. The Applicant was required to provide by 22 August 2022 the following:

(1) An updated Rent Schedule for the Property.

(2) A Certificate of Service relating to the service of the Notice to Leave on the Respondent. This should state the date of service, the mode of service, whom it was served on, and the place of service. It should have the signatures of those involved including any witness present.

13. The Respondent was required to provide by 22 August 2022 the following:
- (1) Any written representations, documents, or information he wishes the tribunal to consider before deciding.

The Response to the Direction

14. On 29 July 2022 the Applicant's Representative sent an e mail to the tribunal which in summation stated that she was unable to supply proof of delivery of the Notice to Leave. Her colleague who would have been her witness had not in fact been in the office when she stated the notice was delivered. She stated it had been delivered to the door. There was no reply. None of this was contained in a Certificate of Service as directed. It was indicated that if the application failed on this, the Notice would be re-served, and the process would be started yet again. An updated Statement of Account was produced in line with the Direction.
15. Further e mails and comments were submitted to the tribunal which included further submissions and e mail exchanges between the Parties regarding the rent arrears, which were crossed over to the Respondent. The Respondent's e mails to the Applicant's Representative dated 19 July 2022 and 29 August 2022 were produced and stated that he had entered into a dissolve debt plan and secondly that he would give up the tenancy and hand the keys in on 19 September 2022, amongst other comments.

The Second Case Management Discussion (CMD)

16. The Case Management Discussion took place on 20 July 2022 at 10am.
17. The Applicant was represented by Mrs Blaik, Lettings Manager. The Respondent did not participate. The tribunal proceeded in the Respondent's absence being satisfied that he was aware of the day and time of the Second Case Management Discussion.
18. The tribunal summated the outcome of the First CMD and the information supplied in response to the Direction. It appeared to the tribunal that the issue of whether proper service of the Notice to Leave on the Respondent had been made could not be evidenced. It appeared to the tribunal that service had not been evidenced as having been carried out in a way that was compliant with the Interpretation and Legislative Reform (Scotland) Act 2010, Section 26- Service of documents. It was agreed by the Applicant's Representative that she was unable to supply proof of delivery of the Notice to Leave. She was advised that the application therefore fell to be refused. She was given the opportunity to add any further observations or comments but declined, stating she expected as much, then left the call.

Findings in Fact

- I. The Parties entered into a Private Residential Tenancy on 19 October 2020. It does not provide for service by electronic communications by e mail for documents including Notices required under the Private Housing (Tenancies) (Scotland) Act 2016 ('the 2016 Act') and the tenancy agreement.

- II. The Notice to Leave produced along with the application by the Applicant was not given or sent to the Respondent in one of the ways set out in Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010('the 2010 Act').
- III. The tribunal refuses the application for an eviction order.

Reasons for Decision

19. The tribunal required to be satisfied that a valid Notice to Leave had been given or sent to the Respondent, as the tenant, in one of the ways set out in Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010('the 2010 Act') before it can consider whether or not to issue an eviction order on an eviction ground named in Schedule 3 to the 2016 Act.. It could have been placed in the hands of the tenant personally, sent by registered post service or by a recorded postal service, or where agreed in writing between the Parties by electronic communication. The terms of the Private Residential Tenancy agreement did not provide for electronic communication as a mode of delivery. The tribunal had regard to the case of Rae v Calor Gas Ltd, Court of Session Inner House First Division, dated 7 December 1994, and reported at 1995 SC 214.It held that personal service could be effected only in the case of an individual and by placing (the document) into the hands of the person on whom it was served personally. The Applicant's Representative was at best able to state that she had taken it to the Property. It was agreed by the Applicant's Representative that she was unable to supply proof of delivery of the Notice to Leave. She could not satisfy the tribunal that a valid Notice to Leave had been given or sent to the Respondent, as the tenant, in one of the ways set out in Section 26 of the 2010 Act. Accordingly, the application for an eviction order for recovery of possession of the Property from the Respondent is 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.

S Christie

Legal Member/Chair

31 August 2022.
Date