Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/19/2613

Re: Property at 60 Polmont Park, Polmont, FK2 0XU ("the Property")

Parties:

Mr David McDougall, 2 Booth Place, Falkirk, FK1 1BA ("the Applicant")

Mr Paul Campbell, 60 Polmont Park, Polmont, FK2 0XU ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

Background

This is an application dated 20th August 2019 and brought in terms of Rule 66 (Application for order for possession upon termination of a short assured tenancy) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant provided with his application copies of the short assured tenancy agreement, form AT5, Notice to Quit, Section 33 notice, and Section 11 notice.

All of these documents and forms had been correctly and validly prepared in terms of the provisions of the *Housing (Scotland) Act 1988*, and the procedures set out in that Act had been correctly followed and applied.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 20th November 2019, and the Tribunal was provided with the execution of service.

Case Management Discussion

A Case Management Discussion was held on 18th December 2019 at Wallace House, Maxwell Place, Stirling. The Applicant appeared, and was not represented. The Respondent did not appear, nor was he represented. The Respondent has not responded to this application at any stage either in writing or by any other form of communication.

The Tribunal was invited by the Applicant with reference to the application and papers to grant the order sought.

In response to an enquiry by the Tribunal, the Applicant provided an execution of service of the section 11 notice upon the local authority by e-mail from him to it dated 19th August 2019, and e-mail acknowledgement to him by it on the same day.

In response to a further enquiry by the Tribunal, the Applicant confirmed that the notice to quit and section 33 notice, both dated 6th June 2019, were sent by recorded delivery post. However, those had not been delivered, as the post office reported that the letter had not been called for after it left the Respondent notification that it had a letter for him.

The Applicant confirmed that the notices had been sent by letter dated 6th June 2019 to the Respondent by conventional post, a copy of which letter he has provided.

The Tribunal referred the Applicant to the terms of section 54 of the *Housing (Scotland) Act 1988*, which concern methods of service. This section provides that postal service should be by recorded delivery.

The Applicant accepted the terms of that section, but argued that he had proof that the Respondent had received the notices.

The Applicant produced to the Tribunal the full thread of text messages between himself and the Respondent on his mobile phone relating to the Property. This was extensive, and it was clear from the terms of those texts that the content related to discussion of various issues to do with the tenancy between the parties.

In particular, the Applicant produced a text message sent to him by the Respondent at 10:08 on 13th June 2019, in which the Respondent stated "...I received your notice and shall be vacated on 18th Aug as per letter request". The notices and letter specified 18th August as the date by which the Respondent should vacate the Property.

The Applicant produced details of the Respondent's mobile telephone number used for these texts. Sheriff Officers who executed service of this application for the Tribunal upon the Respondent carried out checks for the Respondent's details, and provided the same mobile phone number as being that of the Respondent.

Statement of Reasons

In terms of Section 33 of the *Housing (Scotland) Act 1988*, the Tribunal shall make an order for possession of the house let on the tenancy if:

(1) the short assured tenancy has reached its ish;
(2) tacit relocation is not operating; and
(3) the landlord has given to the tenant notice stating that he requires possession of the house.

The first two criteria have been satisfied, but there is a potential difficulty with the third in relation to the section 33 notice, and also a potential difficulty with regard to service of the notice to quit.

Section 54 of the *Housing (Scotland) Act 1988*, which applies in relation to notices required to be given to a person under section 33, provides that such notice may be served or given by delivering it to that person, by leaving it at their last known address, or by sending it by recorded delivery letter to them at that address.

In this case, none of these methods of service have been used. The notice was not given to the Respondent in person, and it was not hand delivered by leaving it at his last known address. What was done was that the notice was sent by regular post to the Respondent, as opposed to being sent by recorded delivery.

That being so, service appears not to have been validly effected in terms of section 54, and but for the reasons which follow, the Tribunal in the absence of further information would be obliged to refuse the grant of an order for possession.

However, the Tribunal finds itself in the very unusual position that there is clear and compelling evidence produced by the Applicant which the Tribunal is satisfied proves that the Respondent received the notices.

In terms of the text message correspondence referred to above, the Respondent refers to his receipt of the notices, and indicates that he will vacate as at the date given in those notices of 18th August. The whole text message thread from its contents clearly establishes that the text messages are passing between the parties, and beyond that, sheriff officers have confirmed a mobile phone number for the Respondent which corresponds with that used in the text message thread.

Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that the overriding objective of the Tribunal is to deal with the proceedings justly, which includes, *inter alia*, avoiding delay, so far as compatible with the proper consideration of the issues. Rule 3 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that the Tribunal must seek to give effect to the overriding objective when interpreting any rule.

In the case of *Angus Assessor v George Ogilvie (Montrose) Ltd* 1968 SLT 348 at 352, 353, Lord Fraser observed in connection with the maxim *de minimis non curat praetor* in relation to the interpretation of statutes that:
"The question is an important one of principle in relation to the construction of statutes. I fully recognise the logical difficulty of treating a word such as "solely" or "only" in a statute as being open to construction by the application of the de minimis brocard. On the other hand, it is not difficult to figure circumstances where the literal reading of such words would lead to results that might reasonably be described as harsh or even absurd and I am not, as at present advised, satisfied that in such circumstances the Court could not avoid those results by applying the brocard."

The Tribunal has found no direct authority on the situation where notices in terms of the *Housing (Scotland) Act 1988* have not been served in terms of section 54 thereof, but where there is clear evidence that the person upon whom they were served has received them.

The Tribunal considers in interpreting section 54, that the purpose of the provision is to set out methods of service to ensure, in so far as possible, that the recipient receives the notices. The Tribunal notes by analogy, that any defect in service of a citation in a court process is cured by the appearance of the party upon whom the defective service has been made.

For the reasons noted by Lord Fraser noted in *Angus Assessor* supra, if the Tribunal were to conclude that in interpreting the terms of section 54 it was bound to dismiss this application for want of valid service, in circumstances where the Respondent has clearly acknowledged in writing that he has received the notice timeously, that would produce an absurd result where the obvious purpose of the provision is to make sure that the Respondent receives the notice and the Respondent has acknowledged in writing that he has.

The Applicant would have to start again with taking steps to recover possession of the Property, by serving fresh notices, and bring a fresh application to the Tribunal, resulting in delay, expense and unnecessary further procedure.

That being so, the Tribunal concludes that the clear acknowledgement by the Respondent that he has received the notices is sufficient to satisfy it that the section 33 notice has been given by the Applicant to the Respondent in terms of section 33(d) of the *Housing (Scotland) Act 1988*.

That leaves the question of whether the notice to quit has been validly served. The Tribunal notes that the previously well-understood procedural rules applying to the method of service of notices to quit were to be found in the rules of the Sheriff Court, which do not apply to the Tribunal.

Since the Tribunal acquired jurisdiction from the Sheriff Court in the recovery of possession of rented property under the *Housing (Scotland) Act 1988*, no equivalent procedural rules applying to it concerning methods of service of notices to quit have been enacted.

That being so, the Tribunal concludes that it can hold that service has been validly made if it is satisfied by evidence that the notice has been given to the tenant. In this case, the Tribunal is so satisfied by the evidence narrated above.

On the above bases, the Tribunal is satisfied that all of the above criteria have been met in this application, and accordingly the Tribunal shall make an order for possession.

Decision

In these circumstances, the Tribunal will make an order for possession of the house let on the tenancy as sought in this 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.

Neil Kinnear
Legal Member/Chair

18/12/19
Date