



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/20/2356

Re: Property at 10 Sandbed, Hawick, TD9 0HE (“the Property”)

Parties:

Mr Ross Stisi, 52 Wilson Place, Dunbar, EH42 1GG (“the Applicant”)

Mr Grzegorz Kowalski, GIC HMP Edinburgh, 33 Stenhouse Road, Edinburgh, EH11 3LN (“the Respondent”)

Tribunal Members:

Neil Kinnear (Legal Member) and Frances Wood (Ordinary 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 for an eviction order dated 10th November 2020 and brought in terms of Rule 109 (Application for an eviction order) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant seeks an eviction order in relation to the Property against the Respondent, and provided with his application copies of the private residential tenancy agreement, notice to leave, section 11 notice, relevant executions of service, and copy e-mails between the Applicant and the Scottish Prison Service.

All of these documents and forms had been correctly and validly prepared in terms of the provisions of the *Private Housing (Tenancies) (Scotland) Act 2016*, the *Coronavirus (Scotland) Act 2020*, and the *Coronavirus (Scotland) Act 2020 (Eviction from Dwelling-houses)(Notice Periods) Modification Regulations 2020*, and the

procedures set out in those Acts and that Regulation appeared to have been correctly followed and applied.

The Respondent had been validly served personally at GIC HMP Edinburgh by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 17th December 2020, and the Tribunal was provided with the execution of service.

Hearing

A Hearing was held at 10.00 on 8th February 2021 by Tele-Conference. The Applicant did not participate, but was represented by Miss Donnelly, solicitor. The Respondent did not participate, 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 satisfied that the requirements of giving notice had been duly complied with, and proceeded with the application in terms of Rules 17 and 29 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Tribunal had previously sought further information from the Applicant concerning the validity of service of the notice to leave. The circumstances in this application were somewhat unusual.

The Applicant sought an eviction order against the Respondent on ground 10 of Schedule 3 to the *Private Housing (Tenancies) (Scotland) Act 2016*, namely that the Respondent is not occupying the let property as his home.

The notice to leave dated 18th September 2020 relied on that ground, and was in all respects a valid notice. The difficulty was in relation to whether or not the notice had been validly served.

The Applicant became aware that the Respondent had been remanded in custody after police raided the Property. The Applicant understood that the Respondent had not occupied the Property since about 15th June 2020 in consequence of his remand.

The Applicant contacted the Scottish Prison Service by e-mail of 14th July 2020 asking it to confirm whether the Respondent was remanded at GIC HMP Edinburgh, and the Scottish Prison Service responded to him confirming that the Respondent was in custody there.

Subsequently, the Applicant's representatives prepared the notice to leave, and instructed sheriff officers to serve it on the Respondent at the Property. The Sheriff officers duly did so, and provided an execution of service on 22nd September 2020 stating that they had been unable to locate the Respondent (unsurprisingly standing his incarceration) and had deposited the notice to leave through the letterbox.

The Tribunal invited Miss Donnelly to address it upon the question of whether the notice to leave had been validly served upon the Respondent. Miss Donnelly had, in advance of the Hearing, helpfully provided the Tribunal with her written submissions and legal authorities upon a number of potential legal issues, for which the Tribunal notes its gratitude.

Miss Donnelly invited the Tribunal to conclude that there was valid service of the notice. She relied upon section 26 of the *Interpretation and Legislative Reform (Scotland) Act 2010* (“the 2010 Act”), which provides that a document (in this case a notice to leave) may be served on a person by being delivered personally to the person, or by being sent to the proper address of the person. The “proper address” of the person is defined in the case of an individual as being the last known address of that person.

Miss Donnelly submitted that the Property was the last known address of the Respondent, and drew the Tribunal’s attention to a number of previous reported cases where courts and tribunals had accepted that where a tenant had abandoned the let property, the tenant’s whereabouts were unknown, and the landlord served a notice to leave relying on ground 10 at the let property, that this was sufficient and effective service in terms of section 26 of the 2010 Act.

In response to the Tribunal’s enquiry, Miss Donnelly accepted that the Applicant was well aware at the date of service of the notice that the Respondent was not resident at the Property, and that he was remanded at GIC HMP Edinburgh. The Applicant’s representatives had possibly believed that due to the coronavirus pandemic, service could not be effected by sheriff officers at a prison, hence why they had instructed the sheriff officers to serve the notice to leave at the Property.

Miss Donnelly, after a brief adjournment to consider matters, confirmed that she was unable to find any legal authority dealing with the unusual circumstances pertaining in this application, and invited the Tribunal to hold that service of the notice to leave was valid, and to grant the order sought.

Statement of Reasons

In terms of Section 51 of the *Private Housing (Tenancies) (Scotland) Act 2016* (“the 2016 Act”), the Tribunal is to issue an eviction order against the tenant under a private residential tenancy if, on an application by the landlord, it finds that one of the eviction grounds named in schedule 3 applies.

Paragraph 10 of Schedule 3 to the 2016 Act provides that it is an eviction ground that the Respondent is not occupying the let property as his home.

However, in terms of section 52 of the 2016 Act, the Tribunal is not to entertain an application for an eviction order unless it is accompanied by a copy of a notice to leave which has been given to the tenant.

The Applicant has provided the Tribunal with a valid notice to leave, but the question for the Tribunal is whether that notice to leave has been “given” to the tenant.

The Tribunal agrees that section 26 of the 2010 Act applies where an Act of the Scottish Parliament requires a document to be given to a person, and so applies to service of a notice to leave to leave under the 2016 Act.

However, section 26 states that a document may be served on a person by being delivered personally to the person, or by being sent to the proper address of the person. The “proper address” of the person, as Miss Donnelly rightly accepted, is defined in the case of an individual as being the last known address of that person.

For that reason, the Tribunal and the courts have in previous cases held that where a tenant had abandoned the let property, the tenant’s whereabouts were unknown, and the landlord had served a notice to leave relying on ground 10 at the let property, that this was sufficient and effective service in terms of section 26 of the Act.

The difficulty in this application was that the Applicant knew as at the date of service of the notice to leave not only that the Respondent was not residing at the Property, but that he was resident (undoubtedly not of his own volition) at GIC HMP Edinburgh.

The purpose of intimation or service of the notice to leave on a tenant such as the Respondent, is to provide the tenant with fair notice that the landlord seeks to regain possession of the Property from the tenant, and the legal basis or bases upon which the landlord relies in seeking to do so. For that reason, there are various legal rules which provide how such service might be legally carried out. Section 26 of the 2010 Act provides that valid service may be made at “the last known address” of the tenant.

In this application however, the property was not “the last known address” of the Respondent. The Applicant knew the Respondent’s current address at the date of service of the notice to leave, namely GIC HMP Edinburgh.

For that reason, the Applicant cannot rely upon section 26 of the 2010 Act to demonstrate valid service of the notice to leave, and accordingly, in the absence of effective service, the Tribunal cannot entertain this application and must dismiss it.

The Tribunal would note that the Applicant appears to have acted entirely in good faith, and that he and his representatives have fully disclosed the background to this matter to the Tribunal from the outset. The application, unfortunately for the Applicant, appears to have proceeded upon the erroneous belief that sheriff officers cannot during the coronavirus pandemic effect service on individuals at a prison, which is not in fact the case.

Decision

In these circumstances, the Tribunal will dismiss 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

08.02.2021

Legal Member/Chair

Date