

Housing and Property Chamber

First-tier Tribunal for Scotland



DECISION AND STATEMENT OF REASONS OF THE CHAMBER PRESIDENT

**Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber
Rules of Procedure 2017 ("the Chamber Rules")**

in connection with

9 Frogston Road West, Edinburgh EH10 7AB ("the property")

Case Reference: FTS/HPC/CV/18/0299

Mr Stephen Scott ('the applicant')

Pure Property Management Edinburgh Ltd ("the applicant's representative")

Mr Khelil Bachhaznadji and Mrs Penny Bachhaznadji ("the respondents")

Background of this Application

On 5 February 2018 paperwork was received from the applicant via his representative seeking a payment order for rent arrears. The application was made in terms of Rule 70 of the Chamber Rules. The application was acknowledged on 9 February 2018 by the First-tier Tribunal for Scotland Housing and Property Chamber ("the Tribunal").

On 13 February 2018 the application and accompanying papers were considered by a legal member of the Tribunal with delegated powers of the Chamber President and it was considered that no further information was required before the application could be accepted for determination by the Tribunal. Based on the paperwork submitted by the applicant, the legal member did not consider that there were grounds for rejection of the application in terms of Rule 8 of the Chamber Rules.

A case management discussion was fixed for 16 April 2018 at 10am at George House, George Street, Edinburgh and a sheriff officer attempted to serve papers on the respondents advising them of the date, time and place of the case management

discussion and including the application paperwork and giving them an opportunity to submit written representations within a given timescale. The sheriff officer reported that neighbours of the respondents believed that the respondents had vacated the property. The applicant's representative also contacted the Tribunal by e-mail requesting a postponement of the case management discussion and advising that the respondents had vacated the property and stating that no forwarding address had been given by the respondents. Correspondence by e-mail was sent by the Tribunal to the applicant's representative on 28 March 2018 and on 1 and 25 May 2018 asking for an up to date address for the respondents. No response has been received from the applicant's representative.

Decision

After reassessment of the application, the attachments and submission from the applicant, the Chamber President decided that the application should be rejected on the basis that Rule 8(1) (c) of the Chamber Rules applies as there is "good reason to believe that it would not be appropriate to accept the application" in that it does not, in fact, meet the prescribed requirements for a Rule 70 application and in absence of an address for the respondents, the Tribunal is unable to comply with the Chamber Rules and notify the application and details of a case management discussion and hearing on the respondents.

Reasons for Decision

The Source of the Tribunal's powers

The First-tier Tribunal for Scotland Housing and Property Chamber ("the Tribunal") came into existence on 1 December 2016. From 1 December 2017 the Tribunal was given powers to deal with civil cases in terms of Section 16 of the Housing (Scotland) Act 2014 ("HAS 2014")

Section 16 of the HSA 2014 transfers the sheriff's functions and jurisdiction in specified civil actions in relation to regulated and assured tenancies in the private rented housing sector to the Tribunal, including repossession cases and various non-repossession cases.

However, the only functions and jurisdiction which are transferred from the Sheriff to the Tribunal by **Section 16 HSA 2014** are those in relation to actions arising from the specified tenancies and occupancy agreements, with reference to **Rent (Scotland) Act 1984 ("the 1984 Act")** and the **Housing (Scotland) Act 1988 ("HSA 1988")**

“16 HSA 2014: Regulated and assured tenancies etc.

The functions and jurisdiction of the sheriff in relation to actions arising from the following tenancies and occupancy agreements are transferred to the First-tier Tribunal—

a regulated tenancy (within the meaning of section 8 of the Rent (Scotland) Act 1984 (c.58)),

a Part VII contract (within the meaning of section 63 of that Act),

an assured tenancy (within the meaning of section 12 of the Housing (Scotland) Act 1988 (c.43)).

But that does not include any function or jurisdiction relating to the prosecution of, or the imposition of a penalty for, a criminal offence.”

Part 1 of Schedule 1 HSA 2014 makes minor and consequential amendments to Rent (Scotland) Act 1984 and Housing (Scotland) Act 1988 only to insert “First-tier Tribunal” in place of “Sheriff”.

Section 16 of the 2014 Act transfers the specified functions and jurisdiction but does not bring with it a set of procedural rules.

The procedural rules which apply to the Tribunal are those made by Scottish Ministers in exercise of the powers conferred by **Sections 55(1) and 80 (1) and paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014**. The procedural rules for the Tribunal are contained in **First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017** (“the Chamber Rules”).

Making an Application to the Tribunal

Where a Landlord makes an application for a payment order for rent arrears relating to a short assured tenancy to which **Section 16 of the HAS 2014** applies, **Rule 70 of the 2017 Rules** provides that “*the application must (a) state: ... (iii) the name and address of any other party; ...*”.

The phrase “(where known)” does not appear in **Rule 70** in relation to the other party’s address.

The wording of **Rules 70** can be interpreted as meaning that any such application which does not contain the other party's address does not meet the mandatory requirements for an application.

The relevant Chamber Rule in relation to the requirements for making an application is contained in **Rule 5 of the 2017 Rules**.

“Requirements for making an application

5.—(1) An application is held to have been made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules 43, 47 to 50, 55, 59, 61, 65 to 70, 72, 75 to 91, 93 to 95, 98 to 101, 103 or 105 to 111, as appropriate.

(2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

(3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held to be made on the date that the First-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

(4) The application is not accepted where the outstanding documents requested under paragraph (3) are not received within such reasonable period from the date of request as the Chamber President considers appropriate.”

In terms of **Rule 5(2)** the Chamber President or another member of the tribunal, under the delegated powers of the Chamber President, must determine whether an application has been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.

Although **Rule 5(3) of the 2017 Rules** permits the Chamber President / member with delegated powers in cases where an application has not been lodged in the prescribed

manner to request further documents from the applicant, an applicant who does not know the address of the other person would not be in a position to cure the defect in the application. The application should not be accepted in such cases, in terms of **Rule 5(4)**. There is, for example, no provision allowing the applicant to provide details of the steps which they have taken to find the other party's address and for this material to be considered by the President / member with delegated powers.

Therefore, as the Chamber Rules stand, such an application should not pass the sift by the President or member with delegated powers as the mandatory requirements for an application in terms of **Rule 70** have not been met. Unlike the sheriff court procedural rules there is no provision for service by way of advertisement or using "walls of court".

There are no tribunal procedural rules directed towards an application where the other party's address is not known and all reasonable steps have been taken by the landlord / person to find it out. As concluded above, all such applications where the other party's address is not known should be rejected at sift under the Chamber Rules.

Provisions which apply to the Tribunal with regard to notification

Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRSA 2010") applies for service provisions and indeed **Rule 6 of the Chamber Rules** is taken from that section. Section 26 applies where a Scottish Statutory Instrument such as the Chamber Rules (SSI 2017 No 328) requires documents to be given to a person (**Rule 9 of the Chamber Rules** states the Tribunal must as soon as practicable **give** notice to each party)

"26 Service of documents

This section has no associated Explanatory Notes

(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."

Section 26 of the ILRSA 2010 provides the definition of "proper address" detailed in **Rule 6** as the Chamber Rules are silent on this in the interpretation section of the procedural rules at **Rule 1**. In terms of Section 26 service can be carried out by recorded delivery post to the last address of a party but the document will not be served if the contrary is shown. With service by recorded delivery the Tribunal must ensure the Tribunal deal with the proceedings justly (**Overriding Objective in Rule 2 of the Chamber Rules**). This involves making inquiry in terms of **Rule 20(1) of the Chamber Rules** that the item of post has been recorded as delivered as it is only then that it is given to the party. **Rule 20(1)** provides that the Tribunal may make such inquiries as it thinks fit for the purpose of exercising its functions. Inquiry is made via the track and trace service of the Royal Mail for evidence of the document being signed for by the party.

Procedure once the Application proceeds

If the Application is not rejected in terms of **Rule 8 of the Chamber Rules**, **Rule 9(1)** requires that the Tribunal must as soon as practicable give notice to each party setting out the detail of the application and specifying a day by which any written representations must be made. Furthermore, **Rule 17(2) and Rule 24(1)** of the Chamber Rules provides that the Tribunal must give each party reasonable notice of the date, time and place of a case management discussion and hearing and any changes to these details. A hearing in absence in terms of **Rule 29 of the Chamber Rules** can only take place on being satisfied with compliance with **Rule 24(1)** with regard to notice.

Discussion and Conclusion

In this case, when the acceptance of the application was notified to the respondents by the Tribunal in terms of **Rule 9** and details of a case management discussion for this application given in terms of **Rule 17(2)**, the sheriff officer indicates that his enquiries reveal that the respondents had vacated the address provided in the application. The Applicant's representative also confirmed that the respondents were no longer staying at the address provided in the application. Information concerning the up to date address of the respondents has been sought from the applicant's representatives by the Tribunal to allow notification and compliance with the Chamber Rules but the information sought has not been provided.

Since the Tribunal cannot carry out the notification requirements in the Chamber Rules, the application cannot proceed to a determination. In that event the application returns to be considered again in terms of Rule 8 of the Chamber Rules. Since acceptance of an application is not a decision of the Tribunal, unlike a rejection decision which requires a statement of reasons, the Tribunal does not require to carry out a review of the previous acceptance in terms of **Rule 39 of the Chamber Rules**. The Tribunal can reject the application in terms of **Rule 8(1) (c)** on the basis that there is "good reason to believe that it would not be appropriate to accept the application" in that it does not, in fact, meet the prescribed requirements of a **Rule 70** application and in absence of an address for the respondents, the Tribunal is unable to comply with the Chamber Rules and notify the application and details of a case management discussion and hearing on the respondents. Unless a time limit applies for lodging an application, such a rejection will not usually prevent the applicant from making a competent application seeking the

same remedy provided the fresh application meets the prescribed requirements in the procedural rules.

What you should do now

If you accept the Chamber President's decision, there is no need to reply.

If you disagree with this decision –

An applicant aggrieved by the decision of the Chamber President 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. Information about the appeal procedure can be forwarded to you on request.

Mrs. Aileen Devanny
Chamber President
25 June 2018