



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/23/3514

Re: Property at 34/2 Balcarres Street, Morningside, Edinburgh, EH10 5JF (“the Property”)

Parties:

Ms Judy Cheverton, Caemawr, Pontrhydfendigaid, Ystrad Meurig, Ceredigion, SY25 6ET (“the Applicant”)

Mr Alan Redpath, 34/2 Balcarres Street, Morningside, Edinburgh, EH10 5JF (“the Respondent”)

Tribunal Members:

George Clark (Legal Member) and Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application should be decided without a Hearing and made an Order for Possession of the Property.

Background

1. By application, dated 4 October 2023, the Applicant sought an Order for Possession under Section 33 of the Housing (Scotland) Act 1988, (“the 1988 Act”), namely recovery of possession on termination of a Short Assured Tenancy. The application stated that the Applicant wishes to sell the Property, due to the cost of living and increases in the interest rate on her mortgage.
2. The application was accompanied by a copy of a Short Assured Tenancy Agreement between the Parties, commencing on 27 May 2011 and, if not brought to an end on 27 November 2011, continuing on a monthly basis thereafter until terminated by either party giving not less than one month’s notice to the other party. The Applicant also supplied copies of a Form AT5 Notice dated 27 May 2011 and of both a Notice given under Section 33 of the 1988 Act and a Notice to Quit, both dated 4 July 2023, and both requiring the Respondent to vacate the Property by 27 September 2023, with proof of

service of both Notices on the Respondent by sheriff officer on 4 July 2023. The Applicant also provided a copy of an estate agents' letter of engagement, dated 3 October 2023 in respect of the marketing and sale of the Property.

3. On 7 November 2023, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the Respondent was invited to make written representations by 28 November 2023.
4. On 27 November 2023, the Tribunal received written representations from Community Help and Advice Initiative ("CHAI") on behalf of the Respondent. They contended that the service of a Notice to Quit in connection with previous proceedings had brought the contractual tenancy to an end on 27 January 2022 and that it was replaced by a statutory assured tenancy. Possession under a statutory assured tenancy could only be recovered on one or more of the Grounds contained in Schedule 5 to the 1988 Act. As the Notices served on the Respondent did not give notice of proceedings under Section 19 of the 1988 Act and did not give a Ground for recovery allowed for in Schedule 5, the application should be dismissed.
5. On 13 December 2023, the Applicant's letting agents provided the Tribunal with a Landlord Statement in which the Applicant stated that as soon as she can get vacant possession she intends to market and sell the Property. Her income has been declining year on year for the past 5 years due to her personal circumstances, ill health having resulted in her having to reduce her working hours. Eventually she had to take early retirement. She does not have sufficient income to cover the expense of maintaining the Property to the necessary standard for a tenanted property and her own home has been falling into disrepair because she is not able to afford to carry out any regular building maintenance. In particular, she cannot afford necessary repairs to the roof and for the provision of a new soakaway. She provided copies of estimates for these works and tax return calculations to support her argument about falling income. She also supplied information regarding her health and stated that she found it very unfair that she is tied to the responsibilities of being a landlord even though her circumstances have changed. The fact that she seemed to have no way out of the situation is tremendously stressful and is affecting her health and her life to a huge degree.

Case Management Discussion

6. A Case Management Discussion was held by means of a telephone conference call on the morning of 20 December 2023. The Applicant was represented by Mr Rafael Bar of DJ Alexander, Edinburgh. The Respondent was represented by Mr Andrew Wilson of CHAI.
7. Mr Wilson asked the Tribunal to consider his preliminary plea, namely that the contractual tenancy in the present case ended with the Notice to Quit. A Short Assured Tenancy is a species of Assured Tenancy. It merely has an extra Ground for Possession, provided it qualifies as a Short Assured Tenancy under Section 32 of the 1988 Act. When a contractual tenancy is ended it becomes a Statutory Assured Tenancy by virtue of Section 16 of the

1988 Act. Mr Wilson's argument was that, when the Notice to Quit of 2022 took effect, the Short Assured Tenancy stopped and, with the tenant having remained in the Property, it became a Statutory Assured Tenancy. In terms of Section 33(4) of the 1988 Act, where the Tribunal makes an Order for Possession of a house by virtue of Section 31(1), any Statutory Assured Tenancy shall end on the day that the Order takes effect. There is no provision in the Act for a Statutory Short Assured Tenancy.

8. Mr Bar told the Tribunal that he did not follow the logic of Mr Wilson's argument. Section 33(4) of the 1988 Act did not apply, as an Order for Possession had not been granted in the previous application. He referred the Tribunal to the Respondent's written submissions which included a reference to the terms of the Notice to Quit as provided for under The Assured Tenancies (Notices to Quit Prescribed Information)(Scotland) Regulations 1988 namely "If a landlord issues a Notice to Quit but does not seek to gain possession of the house in question the contractual assured tenancy which has been terminated will be replaced by a statutory assured tenancy." In the present case and the previous one, however, the landlord **had** sought to recover possession.
9. As the Applicant's representative was not legally qualified and the Applicant might wish to take legal advice on the matter raised by Mr Wilson, the Tribunal decided to adjourn the Case Management Discussion to a later date and, in the meantime, to direct the Parties to provide any further information and legal argument, with copies of any authorities referred to, on the proposition that a tenancy loses its status as a Short Assured Tenancy on the expiry of a Notice to Quit served by the landlord.
10. The Parties were advised that they should also be ready at the reconvened Case Management Discussion to put their arguments on the question of the reasonableness or otherwise of making an Order for Possession, and to make any further submissions in respect of reasonableness in advance of the Case Management Discussion, so that the Tribunal is in a position to consider the application as a whole, in the event that it does not find in favour of the Respondent's argument on the status of the tenancy agreement and does not dismiss the application.
11. The preliminary view of the Tribunal was that it was not inclined to accept the argument put forward on behalf of the Respondent, as its impact would be that a landlord could never make a second application for an Order for Possession under Section 33 of the 1988 Act, should a first application be refused. The Sheriff Courts (Scotland) Act 1907, as amended, requires a Notice to Quit to be served in all applications for an Order for Possession or Eviction Orders. It appeared to the Tribunal that, as a Notice to Quit stops the operation of tacit relocation, it is an essential prerequisite of any application under Section 33 of the 1988 Act, that a Statutory Assured Tenancy is created when the Notice to Quit has run its course. Section 33(4) of the 1988 Act is designed to exclude such a tenancy from the requirements of Section 16 of the Act that a Statutory Assured Tenancy cannot be brought to an end by the

landlord except by obtaining an order from the Tribunal in accordance with, inter alia, Section 18, which states that the Tribunal shall not make an Order for possession of a house let on an assured tenancy except on one or more of the Grounds set out in Schedule 5 to the Act.

12. The Tribunal continued the case to a further Case Management Discussion and issued a Direction to the Parties on 22 January 2024, requiring them to provide any further information and legal argument, with copies of any authorities referred to, on the proposition that a tenancy loses its status as a Short Assured Tenancy on the expiry of a Notice to Quit served by the landlord, and to make any submissions they thought relevant on the issue of reasonableness.
13. The Applicant's representatives provided the Tribunal on 23 April 2024 with a medical report of 14 December 2023, which set out a number of health issues relative to the Applicant, including a statement that she "also struggles with long-term depression and anxiety and this is being exacerbated by the stress and worries regarding her financial situation and the years of disputes involved with dealing with her property in Scotland."
14. On 24 April 2024, the Tribunal received further written submissions from the Respondent's representative. They referred again to the Notice to Quit of 21 July 2021, which had led to a previous application to the Tribunal for an Order for Possession (FTS/HPC/EV/22/1008). In that case, the Tribunal had decided that, whilst the facts of the Section 33 application were met, it was not reasonable to grant the Order.
15. On 4 July 2023, sheriff officers served a further Notice to Quit on the Respondent, together with a further Section 33 Notice. These claimed there was a contractual tenancy reaching its end which would be terminated, and possession required from 27 September 2023. Section 16 of the 1988 Act provides that after termination of a contractual assured tenancy, a tenant who remains in possession shall continue to have a statutory assured tenancy, which can only be brought to an end by an Order of the Tribunal. Section 18 provides that the Tribunal shall not make an Order for Possession of the subjects of an assured tenancy except on one or more of the Grounds set out in Schedule 5 to the Act.
16. The Act also makes provision for Short Assured Tenancies, which are Assured Tenancies which are contractual tenancies and which, if meeting additional requirements for a pre-commencement Notice and an initial term of not less than six months, are then afforded an additional Ground for recovery of possession, under Section 33 of the Act.
17. The Respondent's representations stated that Section 32 of the Act provides that, at its finish, a Short Assured Tenancy can continue by tacit relocation and by no other means. Section 33 provides the additional Ground for recovery of possession of a Short Assured Tenancy. It requires the Tribunal

to be satisfied that the tenancy has reached its end and that tacit relocation is not in operation.

18. The Respondent's argument was that the application is made entirely in reference to a Short Assured Tenancy, but the Notice to Quit brought that tenancy to an end on 27 January 2022 and stopped any tacit relocation. It was replaced by a statutory assured tenancy, as provided for by Section 16 and as referred to in Section 33(4). The Tribunal refused the application under FTS/HPC/EV/22/1008 on the basis that it was not satisfied that it was reasonable to grant the Order. The statutory assured tenancy, therefore, continued.
19. Following the first Case Management Discussion in the present case, the Tribunal expressed its preliminary view that it was not inclined to accept the argument put forward by the Respondent (that in such circumstances, the tenancy could only be brought to an end under one or more of the Grounds set out in Schedule 5 to the Act), as its impact would be that a landlord could never make a second application for an Order for Possession under Section 33 of the Act. The Respondent argued that the fact that a landlord only has one opportunity to recover possession under Section 33 is not an unforeseen result of the amendment of all Grounds for eviction in Assured, Short Assured and even Private Residential Tenancies, to remove mandatory Grounds and require that it is reasonable to grant the Order. Ever since the 1988 Act came into force, the landlord could only seek eviction under Section 33 once, because it was mandatory that the Order would be granted. Neither the Notice to Quit nor the Section 33 Notice served in the present application have any relevance to a statutory assured tenancy.
20. The Respondent's representative submitted that the application falls to be dismissed.

Second Case Management Discussion

21. A second Case Management Discussion was held by means of a telephone conference call on the morning of 1 May 2024. The Applicant was again represented by Mr Rafael Bar. The Respondent was present and was again represented by Mr Andrew Wilson.
22. The Parties had nothing to add to the written submissions on the legal argument as to whether the application should be dismissed, and the Case Management Discussion was focused on the question of whether it would be reasonable to make an Order for Possession, should the Tribunal determine that the application was competent and should not be dismissed.
23. The Applicant's representative told the Tribunal that the Applicant intends to sell the Property as soon as possible if she obtains vacant possession. It forms her retirement capital fund, and she requires to sell it to release funds to be able to continue to live in her main home by carrying out necessary repairs. She has no private pension, and her income has declined, as she has had to take early retirement because she could not carry out the duties

required of her. She has physical and mental health issues as was evidenced by the medical report she had provided. She does not feel able to continue as a landlord due to her financial position and the impact it is having on her health and on her ability to plan for the future. Mr Bar's company's sales team had strongly advised her against selling with a sitting tenant, as it hugely diminishes the market, with a resultant impact on the potential sale price. She needs to be able to fix up her own house and plan for the future. She cannot do that if she does not have the funds from the sale of the Property. Mr Bar confirmed that the Applicant owns another property jointly with her sister. It was their mother's home. Her mother is now in residential care and it is currently let out, but, once her resources are depleted, the house will have to be sold to fund her nursing home fees of more than £4,000 per month. The share of net rental that the Applicant receives is £259.25 per month.

24. The Respondent's representative contended that there was no evidence that it would be necessary to evict the Respondent in order to realise the asset. It is possible to sell with a sitting tenant. The Respondent had suffered a personal catastrophe, following which he lost his job and his health. He cleared the rent arrears that had accrued, but still found himself with post-traumatic stress disorder which means that he is unfit for work and is classed as having a disability. The threat of eviction has taken a further toll on him. He has been looking for alternative accommodation, but such is the housing crisis in Edinburgh that he has not been successful. As he is on state benefits, he will not be able to find another private tenancy, because the Local Housing Allowance has not kept pace with rising rents, and landlords still discriminate against people on state benefits. The Respondent himself told the Tribunal that his only hope is that he might obtain social housing in the future. He is bidding on 3 Council properties every week and he has "silver" priority due to his health conditions, with additional points for the time he has been on the waiting list. His homelessness priority is intact.
25. Mr Wilson added that the Respondent would have to present himself as homeless before the Council would help. There is a buoyant private rented market in Edinburgh and the Applicant had provided no evidence that the pressures on her would not be relieved by selling with a sitting tenant. With so many families currently in temporary accommodation, the Respondent might find himself placed in an hotel or hostel with others with more acute mental health problems or with addiction issues. This would add to his own stress and mental health worries.
26. Mr Bar did not regard it as reasonable for the present situation to continue indefinitely. The Applicant was, in effect, being required to attend to the Respondent's housing needs rather than the local authority. His company's sales team would strongly advise against selling with a sitting tenant, because of the limited market it would attract and the diminution in price that would result.
27. The Parties then left the Case Management Discussion and the Tribunal Members considered all the evidence, written and oral, that had been presented to them.

Reasons for Decision

28. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation it required to enable it to decide the application without a Hearing. The Parties had indicated at the conclusion of the Second Case Management Discussion that they did not consider a full evidential Hearing to be necessary.
29. The Tribunal considered first the argument put forward on behalf of the Respondent that the application was incompetent and should be dismissed. The Respondent's case was that the Notice to Quit brought the tenancy to an end on 27 January 2022 and stopped any tacit relocation. It was replaced by a statutory assured tenancy, as provided for by Section 16 and as referred to in Section 33(4) and a statutory assured tenancy could only be terminated on one or other of the Grounds set out in Schedule 5 to the Act.
30. The Tribunal did not accept the Respondent's argument. The Tribunal agreed that the contractual tenancy was brought to an end on 27 January 2022 on the expiry of the period specified in the Notice to Quit and that it then became a statutory assured tenancy. A Notice to Quit stops the operation of tacit relocation, so is an essential prerequisite of any application under Section 33 of the 1988 Act.
31. Section 33(4) of the 1988 Act is designed to exclude a Short Assured Tenancy which has become a statutory assured tenancy from the requirements of Section 16 of the Act that a statutory assured tenancy cannot be brought to an end by the landlord other than on one or more of the Grounds set out in Schedule 5 to the Act. It specifically anticipates the existence of a statutory assured tenancy by stating that when the Tribunal makes an Order for Possession under Section 33(1), "any statutory assured tenancy which has arisen as at that time shall end (without further notice) on the day on which the Order takes effect." Section 33 does not simply provide another ground for recovery of possession. It is a discrete process. It requires that a Short Assured Tenancy has reached its end without tacit relocation operating and that is evidenced by the service of a Notice to Quit. The tenancy does not lose all of the characteristics of a Short Assured Tenancy when a Notice to Quit is served. It continues on a statutory rather than a contractual basis and the statutory assured tenancy is ended automatically if the Tribunal makes an Order for Possession under Section 33.
32. The Respondent argued that the landlord under a Short Assured Tenancy Agreement can only make one application for an Order under Section 33. That cannot be correct in a situation where a landlord has failed to persuade

a Tribunal that it would be reasonable, on the basis of the facts and circumstances set out at the time, to make an Order for Possession, but those facts and circumstances have materially changed. In such an application, there clearly is no need to serve another Notice to Quit, but a further Section 33 Notice would be required, giving the tenant two months' notice.

33. Having determined that the application should proceed to determination, that the tenancy has reached its end, that tacit relocation is not operating, that there is no further contractual tenancy in existence and that the Applicant has given the requisite Notice under Section 33 of the 1988 Act, the remaining matter for the Tribunal to decide was whether it would be reasonable to make an Order for Possession. The Tribunal considered carefully the representations made by both Parties.
34. The Tribunal recognised that the situation is difficult for both Parties. The Respondent may have difficulty in finding alternative accommodation in the private sector, and the local authority will not help him to find another flat in the absence of an Order for Possession. He might be placed in temporary accommodation. He has, however, been seeking another property and is in contact with the relevant departments at City of Edinburgh Council.
35. The Applicant has provided evidence that her finances are in a very poor state, being unable to work and having increased mortgage payments to meet, that substantial repairs are required to her own home and that she cannot afford to have these essential repairs carried out unless she can sell the Property. She has also provided medical evidence that she has a number of health issues which mean she is unable to work, and also struggles with long-term depression and anxiety, which is being "exacerbated by the stress and worries regarding her financial situation and the years of disputes involved with dealing with her property in Scotland."
36. The Tribunal did not think it was reasonable to expect a landlord to sell their property with a sitting tenant, as an alternative to seeking to recover possession in order to be able to sell with vacant possession. The market would be restricted to buyers looking for investment buy-to-let properties and potential owner-occupiers would be excluded. The view of the Tribunal was that the limiting of the market in this way would have an impact, and possibly a significant impact, on the price the Applicant might hope to achieve.
37. The Tribunal recognised that both Parties have health issues and that, whatever its Decision, the mental health of one or other Party will be affected, but the Tribunal had to make that difficult Decision. Having taken into account all the facts and circumstances and the anticipated effect on both Parties of the Decision the Tribunal had to make, the Tribunal determined, on balance, that it would be reasonable to make an Order for Possession. It was not reasonable that the Applicant should have to remain in her present situation indefinitely, with no prospect of respite. She is unable to work and appears to have no alternative means whereby she can afford to carry out necessary repairs to her own house, let alone any works that might be required in the

Property in the future. The Respondent is in a position in which he can seek help to secure alternative accommodation in the social rented sector, although the Tribunal does not underestimate the difficulties involved.

38. The Tribunal's Decision was unanimous.

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.



Legal Member/Chair

1 May 2024
Date