



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 (“the Act”)

Chamber Ref: FTS/HPC/EV/19/3514

Re: Property at 11 Annfield Gardens, Stirling, FK8 2BJ (“the Property”)

Parties:

E.D.M Landscaping Limited, a company incorporated under the Companies Acts (Registered Number SC098480) and having its Registered Office at Orchardhead, Blairdrummond, Stirling, FK9 4UP (“the Applicant”)

Miss Karen Morrison, 11 Annfield Gardens, Stirling, FK8 2BJ (“the Respondent”)

Tribunal Members:

Ewan Miller (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that no valid AT5 form had been served at the commencement of the tenancy between the parties. As a result the tenancy was not a short assured tenancy and the s33 Notice served in terms of the Act had no effect. Accordingly the Applicant’s request for an order for possession was refused and the application dismissed.

Background

The Applicant was the owner of the Property. A lease had been granted to the Respondent in 2016. As narrated below, a s33 Notice in terms of the Act and a Notice to Quit had been served on the Respondent as the Applicant sought to regain possession of the Property on the basis the period of the lease had expired. The Respondent challenged the validity of the notices on the basis they had not been served by the owner of the Property but had been done individually by one of its directors, Hugh Cullens

The Tribunal had before it the following documentation:-

- An application to the Tribunal from Jardine Donaldson solicitors, on behalf of Hugh Cullens;
- A copy of a Short Assured Tenancy purporting to be between Hugh Cullens and the Respondent commencing 23 April 2016;
- Copy AT5 signed by Hugh Cullens;
- A Section 33 Notice, Notice to Quit and covering letter from Jardine Donaldson all dated 19 August 2019, along with proof of service;
- A copy of the Applicant's Land Certificate Title Number STG6530 evidencing their ownership of the Property;
- Minute of Agreement between the Applicant and Hugh Cullens dated 5 April 2017

Hearing

The Tribunal had originally held a Case Management Discussion on 20th January 2020. The matter had been referred to a full hearing as a result of the dispute between the parties as to the identity of the owner of the Property and validity of the s33 Notice and Notice to Quit. The Tribunal held a hearing at Wallace House, Maxwell Place, Stirling on 3 March 2020. Hugh Cullens, a director of the Applicant was present and was represented by Andrew Cullens of Messrs Jardine Donaldson. The Respondent was present and represented herself.

Preliminary Matter

The Tribunal noted that the title to the Property was, and had been since before the commencement of the tenancy, in the name of the Applicant. The application before the Tribunal, however, had been raised by the agents on behalf of Hugh Cullens. The original lease had been signed by Hugh Cullens as landlord, as had the AT5.

This point had been raised by the Tribunal during the initial assessment of the application. The agents had responded by providing a copy of a Minute of Agreement from April 2017 between E.D.M Landscaping Limited and Hugh Cullens as an individual, appointing him as the agent of that company and entitling him to act on behalf of the company in his own name

The Tribunal considered the matter. Notwithstanding that there was some form of agency agreement in place between the Applicant and Hugh Cullens, nonetheless, the Property was in the name of the Applicant and they were the owner of it. Any application to the Tribunal ought to be in the name of the Applicant.

The Tribunal was aware that in terms of Paragraph 32 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended the Tribunal may add, substitute or remove a party where the wrong person has been named as a party. The Tribunal did not perceive that there had been any deliberate intent to confuse matters. The agency agreement gave Hugh Cullens certain powers and he was clearly used to acting in his own name in relation to the Property. He was one of the directors and shareholders of the Applicant. The Tribunal did not perceive that there would be any prejudice to either party by substituting E.D.M Landscaping Limited in place of Hugh Cullens as the Applicant. The Respondent did not raise any

objection. On that basis, the Tribunal orders the substitution of the E.D.M Landscaping Limited in place of Hugh Cullens as Applicant in relation to the matter before the Tribunal

Findings in Fact

The Tribunal found the following facts to be established:-

- The Applicant was the owner of the Property both at the date of the hearing and also at the date the lease had been granted to the Respondent;
- Mr Cullens had never been the owner of the Property;
- The lease and the AT5 purported to be granted by Mr Cullens as the landlord when he was, in fact, not the landlord;
- The AT5 was invalid as it did not meet the requirements of s32 of the Act;
- As a result of the invalidity of the AT5 the lease could not be a short assured tenancy;
- As the lease was not a short assured tenancy the s33 Notice served under the Act was not competent and had not been validly served;
- As a result the Applicant's application was not competent and the request for an order for possession was refused.

Reasons for the Decision

The Tribunal considered the key matter was whether the AT5 had been validly constituted. The Tribunal noted that the lease had been signed by Hugh Cullens. There was no evidence at all that he was signing as a director or as an agent – he was simply stated to be the landlord. The Respondent was therefore entitled to assume he was the landlord and the owner of the Property. The agency agreement between Hugh Cullens and the Applicant had been signed in 2017 and post dated the signing of the tenancy. Accordingly the Minute of Agreement did not cure any defect in the tenancy or AT5.

The AT5 had also been signed by Mr Cullens. The AT5 gave no indication whether he was signing it as landlord or agent. The statutorily prescribed form for an AT5 had been used. An AT5 has the option to be signed by a landlord or their agent. However, the AT5 requires a party to indicate in which capacity it is being signed. No indication had been given in the AT5 however. Given the lease purported to be signed by Hugh Cullens as the landlord, the Tribunal was of the view that any party looking at the AT5 would read it as also having been signed by Hugh Cullens as the Landlord as an individual

The Tribunal considered whether he could have been signing as an agent or director of the Applicant. The Tribunal, as noted above, considered the terms of the Minute of Agreement that established Hugh Cullens as the agent. This was, however, signed in 2017 and post-dated the lease and the AT5. Hugh Cullens confirmed at the hearing that the 2017 agreement was the first agency agreement that had been put in place and none existed prior to that. The Tribunal was of the view that when being read in conjunction with the lease, it appeared that Hugh Cullens had signed the AT5 as the owner of the Property rather than as an agent or director. There was nothing in the AT5 to indicate otherwise. There was no evidence

before the Tribunal that Hugh Cullens had the authority to enter in to the lease or sign the AT5 or that the true owner was the company.

The Tribunal considered the terms of s32 of the Act. Subsection 1 requires that for a short assured tenancy it must be for a period of not less than 6 months and that the prescribed notice (the AT5) must be given in terms of Subsection 2.

Subsection 2 has four elements to create a valid AT5. It must be in the form prescribed by the Act, it must be served before the creation of the tenancy and it must state the tenancy being created is a short assured tenancy. All three of these elements were present. However, the fourth element is that it is served by the person who is to be the landlord. This element had not been satisfied. The AT5 purported to be served by a party who was not the landlord nor an agent. Accordingly the Tribunal was satisfied that the AT5 was invalid.

Without a valid AT5 underpinning it, the lease could not be a short assured tenancy in terms of s32 of the Act. As a result the option to terminate at ish and to utilise the provisions of s33 of the Act to do so were not available to the Applicant. Accordingly the s33 notice and Notice to Quit that were served were not valid as they lacked the supporting foundation of a valid AT5.

Accordingly the Applicant did not have the power to terminate the tenancy in the manner sought and the application was dismissed by the Tribunal

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.

Ewan Miller

Legal Member/Chair

5 March 2020
Date