Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 18 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/19/1980

Re: Property at 28 Aitken Crescent, St Ninians, Stirling, FK7 0JX ("the Property")

Parties:

Mr Allan McDiarmid, 16 The Oval, Findon, Worthing, BN14 0TN ("the Applicant")

Ms Kerrie McGowan, 28 Aitken Crescent, St Ninians, Stirling, FK7 0JX ("the Respondent")

Tribunal Members:

Neil Kinnear (Legal Member) and Linda Reid (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 dated 20th June 2019 brought in terms of Rule 65 (Application for order for possession in relation to assured tenancies) 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 19 notice (form AT6), section 11 notice, and execution of service.

The form AT6 intimated to the tenant that the Applicant intended to raise proceedings for possession of the house on grounds 8 and 11 of Schedule 5 to the *Housing (Scotland) Act 1988*.

The Respondent had been validly served by sheriff officers with the notification, application, papers and guidance notes from the Tribunal on 29th August 2019, and the Tribunal was provided with the execution of service.

A Case Management Discussion was held on 2nd October 2019 at Wallace House, Maxwell Place, Stirling. The Applicant did not appear, but was represented by Miss Wilson, solicitor. The Respondent did not appear, nor was she represented. The Respondent has not responded to this application at any stage either in writing or by any other form of communication.

The Tribunal noted at the Case Management Discussion that there appeared to be a variety of legal difficulties regarding the validity of the legal process utilised in bringing this application. In particular, the Tribunal raised questions regarding the validity of the notice to quit, the validity of the form AT6, and whether the Applicant had satisfied the requirements in respect of grounds 8 and 11 of Schedule 5 to the *Housing (Scotland) Act 1988*.

Miss Wilson was not in a position to respond in detail to the Tribunal's questions on these matters without an opportunity to consider the various points raised, and required time to consider those and conduct legal research before making further submissions. She requested that the Tribunal set a Hearing in this matter, and the Tribunal acceded to that request.

The Tribunal was advised by the Applicant's representative, in a letter dated 4th November 2019, that the representative would not be attending the Hearing following the outcome of the Case Management Discussion.

The Tribunal e-mailed the Applicant in advance of the Hearing, asking him to confirm if he was proceeding further with this application, and if so, to confirm who would be attending the Hearing.

The Applicant responded to the Tribunal's enquiry by e-mail during the evening of 13th November 2019. He indicated that he was unaware of the Hearing, and was unaware that his representative was not attending on his behalf. He indicated that he would not attend, as he lived and worked in the south of England and was unavailable on the 14th November 2019. He indicated that he wished to proceed with the application, and asked what steps he could take to conclude this matter.

The Tribunal e-mailed the Applicant in response during the morning of 14th November 2019, asking him if he wished to request an adjournment of the Hearing in the circumstances he had described. The Applicant did not respond.

Hearing

A Hearing was held at 14.00 on 14th November 2019 at Wallace House, Maxwell Place, Stirling. The Applicant did not appear, and was not represented. The Applicant had not responded to the Tribunal's enquiry regarding whether he wished to request an adjournment. The Respondent again did not appear, nor was she 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 left in the rather unusual situation of having no parties nor representatives in attendance at the Hearing.

Rule 29 (Hearing case in the absence of a party) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that if a party or a party's representative does not appear at a hearing, the Tribunal may proceed with the application upon the representations of any party present and all the material before it, if it is satisfied that the requirements of Rule 24(1) regarding the giving of notice of a hearing have been duly complied with.

The date, time and location of the Hearing was intimated to the Applicant's representative and to the Respondent by letters both dated 10th October 2019. The former letter was attached to an e-mail to the Applicant's representative dated 10th October 2019, and the latter letter was sent by recorded delivery post, which was signed for.

The Tribunal was satisfied that the requirements of Rule 24(1) have been complied with, and considered it was appropriate and in the interests of justice to proceed in the absence of the parties.

The undated short assured tenancy agreement, which was signed on 24th May 2016, narrates a date of entry of 16th May 2016 and that the let will run until 17th November 2016. There is no express provision regarding continuation of the agreement after the *ish.*

Clause 6 of the short assured tenancy agreement is in the following terms:

"I understand that my failure to comply with any of the terms of this missive may entitle you to take steps to repossess the premises and in particular I acknowledge that this tenancy may be brought to an end by an order for possession granted by a Sherriff on the application of you the landlord in any of the circumstances set out in Grounds 8 and 11 to 16 inclusive of Schedule 5 of the Housing (Scotland) Act 1988."

Clause 7(b) of the short assured tenancy agreement is in the following terms:

"7. Notice is hereby given that:-
(b) The subjects of let may be repossessed by virtue of any of the grounds specified in Schedule 5 (a copy of part 1 and part 11 of the Schedule the tenant hereby acknowledges having received) of the Housing Scotland Act 1988 and in particular but without prejudice to the foregoing generality possession may in appropriate

circumstances be recovered by either the landlord or by any heritable creditor on any of the following ground namely:- Ground 1, Ground 2, Ground 3 and Ground 8."

No copy of Parts 1 and 11 of Schedule 5 have been provided by the Applicant with the copy lease agreement, and the Tribunal accordingly has seen no evidence confirming what the copy contained, nor confirming that a copy was provided to the tenant.

Clause 9 of the short assured tenancy agreement is in the following terms:

"Either party shall be entitled to terminate the Lease on giving two months written notice to the other party."

The Applicant served a notice to quit dated 29th May 2019, which was served by sheriff officers on that same day. The notice to quit advised the Respondents to quit the Property by 12th June 2019.

A form AT6 dated 28th May 2019, and indicating that proceedings would not be raised before 13th June 2019, was served with the notice to quit.

Statement of Reasons

Sections 18(6) of the *Housing (Scotland) Act 1988* as amended (hereinafter referred to as "the Act") provides:

"18.— Orders for possession.

(1) The First-tier 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 this Act.

(2) The following provisions of this section have effect, subject to section 19 below, in relation to proceedings for the recovery of possession of a house let on an assured tenancy.

(3) If the First-tier Tribunal is satisfied that any of the grounds in Part I of Schedule 5 to this Act is established then, subject to subsections (3A) and (6) below, the Tribunal shall make an order for possession.

(3A) If the First-tier Tribunal is satisfied—

(a) that Ground 8 in Part I of Schedule 5 to this Act is established; and

(b) that rent is in arrears as mentioned in that Ground as a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit,

the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4) If the First-tier Tribunal is satisfied that any of the grounds in Part II of Schedule 5 to this Act is established, the Tribunal shall not make an order for possession unless the Tribunal considers it reasonable to do so.

(4A) In considering for the purposes of subsection (4) above whether it is reasonable to make an order for possession on Ground 11 or 12 in Part II of Schedule 5 to this Act, the First-tier Tribunal shall have regard, in particular, to the extent to which any delay or failure to pay rent taken into account by the Tribunal in determining that the Ground is established is or was a consequence of a delay or failure in the payment of relevant housing benefit or relevant universal credit.

(5) Part III of Schedule 5 to this Act shall have effect for supplementing Ground 9 in that Schedule and Part IV of that Schedule shall have effect in relation to notices given as mentioned in Grounds 1 to 5 of that Schedule.

(6) The First-tier Tribunal shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless—

(a) the ground for possession is Ground 2 or Ground 8 in Part I of Schedule 5 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9, Ground 10, Ground 15 or Ground 17; and

(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.

(6A) Nothing in subsection (6) above affects the [First-tier Tribunal][18] 's power to make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, where the ground for possession is Ground 15 in Part II of Schedule 5 to this Act.

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

(8) In subsections (3A) and (4A) above—

(a) *"relevant housing benefit"* means—

(i) any rent allowance or rent rebate to which the tenant was entitled in respect of the rent under the Housing Benefit (General) Regulations 1987 (S.I. 1987/1971); or

(ii) any payment on account of any such entitlement awarded under Regulation 91 of those Regulations;

(aa) *"relevant universal credit"* means universal credit to which the tenant was entitled which includes an amount under section 11 of the Welfare Reform Act 2012 in respect of the rent;

(b) references to delay or failure in the payment of relevant housing benefit or relevant universal credit do not include such delay or failure so far as referable to any act or omission of the tenant."

The provisions of this section relevant to the issues raised in this application are that the Tribunal may only make an order for possession on one or more of the grounds set out in Schedule 5 to the Act, and shall not make an order for possession of a house which is for the time being let on an assured tenancy, not being a statutory assured tenancy, unless the terms of the tenancy make provision for it to be brought to an end on the ground in question.

The Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect.

The effect of these provisions is that the Tribunal may only make an order for possession on the grounds sought in this application if either the terms of the tenancy make provision for it to be brought to an end on the ground in question, or if the contractual tenancy has been terminated (by a valid notice to quit) and a statutory assured tenancy has arisen.

The lease commenced on 16th May 2016, and ended on 17th November 2016. As neither party served notice in terms of clause 9 of the agreement terminating the lease, the agreement continued upon the legal presumption of *tacit relocation* for further periods of the same duration as the original lease agreement provided. That period is 186 days.

That being so, the *ish* date would appear to have fallen on 6th June 2019, and not the date given in the notice to quit of 12th June 2019.

The notice to quit required to end the lease on a date which is an *ish* of the lease, but the date specified of 12th June 2019 was not an *ish* of the lease (see *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-46 to 22-49, *Gloag & Henderson – The Law of Scotland* (14th Ed.) paragraph 35-25 and 35-26, and section 38 of the *Sheriff Courts (Scotland) Act 1907*). Upon that basis, the notice to quit is invalid.

Further, the notice to quit is dated and was served on 29th May 2019, and gave a notice period of 15 days till the 12th June 2019.

In order to be valid, a notice to quit for any premises let as a dwelling-house must be given not less than four weeks before the date on which it is to take effect (see s.112 of the *Rent (Scotland) Act 1984* and *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-48). As the notice period given in the notice to quit is less than four weeks, the notice to quit is invalid on this basis also.

A further defect in the notice to quit which renders it invalid, is that it fails to include the prescribed information set out in paragraph 2 of Schedule 1 to the *Assured Tenancies (Notices to Quit Prescribed Information) (Scotland) Regulations 1988* as

amended, and that the information set out in paragraphs 1 and 3 which is included are versions of that information in previous versions of the legislation. The notice to quit is invalid on that basis also (see *Rennie & Ors. – Leases* S.U.L.I. (1st Ed.) paragraphs 22-47).

For all these reasons, the lease has not been terminated by a valid notice to quit, remains in force, and a statutory assured tenancy has not arisen.

The remaining question is whether the Tribunal was entitled to make an order for possession in this application, upon the basis that the terms of clause 6 and 7(b) of the lease agreement are deemed by the Tribunal in relation to grounds 8 and 11 of Schedule 5 of the Act to "make provision for it to be brought to an end on the ground in question" in terms of section 18(6)(b) of the Act.

That question was considered previously in the Sheriff Court in the cases of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63 and *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, which held that a lease may only be brought to an end prior to its *ish* if there is a statutory or conventional irritancy, and that section 18(6) of the *Housing (Scotland) Act 1988* is in effect a provision *anent* conventional irritancies the purpose of which is to restrict the conventional irritancies to the grounds set out in section 18(6)(a). For that reason, the tenancy agreement must provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the 1988 Act specified in section 18(6)(a).

In paragraph 12-13 of *Royal Bank of Scotland v Boyle*, the then Sheriff Principal Wheatley noted:

"I think it is important that the connection between the tenancy agreement and the schedule is reasonably precise and complete. In addition, it appears to have been the intention of the statute that in these agreements the tenant in particular has taken the additional step of binding himself into a contractual arrangement which provides that he can lose possession on certain grounds before that possession can be granted to the landlord. I am therefore unable to accept the closely argued submissions of the agent for the landlord that a more general indication in the tenancy agreement as to what might happen should rent arrears arise is sufficient to satisfy the terms of s 18(6)(b)."

Interestingly, in the Editor's Note to the case, the editor comments:

"The standard practice among housing associations and many other assured tenancy landlords is to repeat the terms of Sched 5 verbatim in the tenancy agreement. Since the agreements are a common style held on a word processor, this creates no real difficulty for the landlord and ensures that there can be no doubt that any ground which might come to be relied upon is actually part of the lease. Given the widespread nature of this practice it is unlikely that there will be many cases which will test the extent to which something less than full repetition will suffice.".

In paragraph 30 of *Eastmoor LLP v Bulman* [2014] 6 WLUK 135, Sheriff Jamieson noted:

"Since therefore a tenancy agreement may only be "brought to an end" prior to its ish on certain permitted conventional grounds, I am of the view, as with the sheriff principal in the Royal Bank case, that the parties must contract in such a way that the contract itself sets out the grounds for bringing to an end the lease prior to determination of its ish. It is not sufficient for the tenancy agreement merely to refer to the number of the ground in schedule 5 . Best practice is to refer to its number and terms *ad longum* ; if the ground is summarised, the summary must contain the "essential ingredients" of the ground in question.".

The Tribunal agrees with the comments of both the Sheriff Principal and the Sheriff, for the reasons that they fully explain. The Tribunal therefore has to consider whether the wording in clause 6 and 7(b) of the lease noted earlier, is a reasonably precise and complete repetition of the terms of the grounds (particularly ground 8) contained in Schedule 5 to the Act.
Best practice is to refer to the number and terms *ad longum* of the ground in Schedule 5. The lease agreement here does not do so. It identifies the grounds by number and refers to the Schedule to the Act, but does not attempt to set out the terms of those grounds, even in summary.

Clause 7(b) does contain an acknowledgement that the tenant has received a copy of Parts 1 and 11 of Schedule 5 the *Housing (Scotland) Act 1988,* but the Tribunal noted that firstly, it has not seen a copy of what it is said the tenant has received, and secondly, that in any event, the provision does not attempt to incorporate whatever may have been given to the tenant as a term of the contract.

The Tribunal does not consider that the wording used in clauses 6 and 7(b) of the lease is sufficient to be considered a reasonably precise and complete repetition of the terms of the grounds contained in Schedule 5 to the Act, nor does it attempt to summarise the essential ingredients of the ground in question.

For these reasons, the Tribunal did not consider that the terms of the tenancy agreement contained in clauses 6 and 7(b) were sufficient to provide for it to be brought to an end on the ground in question, being a ground in schedule 5 to the Act specified in section 18(6)(a), in terms of section 18(6)(b) of the Act.

In those circumstances, the Tribunal is not entitled to make an order for possession, and dismissed the application.

Finally, the Tribunal has a number of further observations. Part 2 of the form AT6 narrates grounds 8 and 11 of Schedule 5 to the *Housing (Scotland) Act 1988* and indicates that these are the grounds upon which the Applicant relies.

However, Part 3 of the form AT6, which should specify the reasons for seeking possession on the grounds set out in Part 2, simply narrates "Rent lawfully due not being paid.". It fails to state the circumstances that the Applicant relies on as establishing the grounds for seeking possession which are set out in Part 2, and in

particular, fails to set out the monetary figure of rent arrears due as at the date of the notice, and the periods of time to which this figure relates.

Indeed, the six words used in Part 3, far from providing further specification of the reasons for seeking possession under the grounds relied upon, provide less information and detail than what is narrated in Part 2.

In *Rennie & Ors – Leases (1st Ed.)* at para 22-52, the authors state in relation to the content of a form AT6:

"It is not sufficient merely to refer to the Ground in question, or to incorporate the text of the Ground in the notice. The landlord must also specify "particulars" of the Ground(s) stated in the notice. In other words the landlord should state the circumstances that the landlord relies on as establishing the Ground, e.g. if possession were sought on Ground 13, the notice should specify which obligation of the tenancy has been breached and by what action/inaction of the tenant."

In *Stalker – Evictions in Scotland* at pages 78 to 79, the learned author states:

"...the notice must give the tenant sufficient details of the circumstances that the landlord relies upon in asserting that a ground is made out; the purpose of the notice is to tell the tenant what complaint is made against him such that the tenant knows what he has to do in order to put matters right. The landlord should state in summary form the facts which he intends to prove in support of the stated ground. For example, if the ground for eviction is one of the rent arrears grounds under schedule 5 to the Act, the amount of the arrears should be stated or the notice must contain sufficient information so as to enable the tenant to calculate the amount that is due... If insufficient particulars are given, the court cannot entertain the proceedings, unless the sheriff is persuaded to dispense with the notice, or to allow it to be altered or amended in terms of section 19(2)."

Similarly, in the previous edition of *Robson – Residential Tenancies (3rd Edition)*, which comments in more detail upon this issue than the current edition, the author states at paragraph A10-06 with regard to Part 3 of the form AT6 that "It should be made clear to the tenant what actions need to be done to put matters right.".

The Tribunal considered that the form AT6 is invalid, upon the basis that it fails in Part 3 to state the circumstances that the Applicant relies on as establishing the grounds for seeking possession which are set out in Part 2. In particular, it fails to give any information regarding the amount of arrears which the tenant requires to pay, nor any details of how or when those were accumulated.

The Tribunal would note that it does have the power to dispense with the need for the notice of proceedings for possession (form AT6) if it considers it reasonable to do so. However, given the purposes of the notice of proceedings, the requirement to serve one ought not to be dispensed with lightly (see *Rennie & Ors – Leases (1st Ed.)* at para 22-53).

Standing the importance of the notice of proceedings in giving notice to the tenant, the Tribunal would not have considered in these circumstances that it is reasonable to dispense with the need for the notice, in the absence of the many other invalidities earlier discussed, if it had been asked to do so.

The Tribunal also observed that the section 11 notice is also defective, in respect that it erroneously states the start date of the tenancy as 17th May 2019 instead of the correct date of 16th May 2016, and erroneously states the date of raising of proceedings as 13th June 2019 instead of the date on the application to the Tribunal of 20th June 2019.

Finally, the Tribunal observed that it has been provided with no information since the Case Management Discussion regarding how much, if any, rent is currently in arrears.

It is an essential condition in granting an order on ground 8 of Schedule 5 of the *Housing (Scotland) Act 1988* that it is established that at the date of the Hearing before the Tribunal that at least three months' rent lawfully due from the tenant is in arrears. The Tribunal has been provided with no evidence that as at the date of the Hearing three months rent lawfully due is in arrears.

Decision

For the above reasons, the Tribunal dismissed the application and refused the order sought.

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.

N Kinnear

Legal Member/Chair

14/11/19

Date