



**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/22/3141

Re: Property at 28 Monks Road, Airdrie, ML6 9QW (“the Property”)

Parties:

JWR Holdings Ltd, 52 Southburn Avenue, Airdrie, ML6 9QW (“the Applicant”)

Ms Sara Pollock, 28 Monks Road, Airdrie, ML6 9QW (“the Respondent”)

Tribunal Members:

Melanie Barbour (Legal Member) and Linda Reid (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that it would refuse to grant an order for recovery of possession of the property 28 Monks Road, Airdrie.

BACKGROUND

1. An application was made to the First Tier Tribunal for Scotland (Housing and Property Chamber) under Rule 65 of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Rules”) seeking an order for eviction.
2. The application contained:- a copy of the Tenancy Agreement; rent statement; AT6 Notice and Notice to Quit with evidence of service; and Section 11 Notice with evidence of service.

3. A case management discussion was held by telephone conference call on 21 February 2023. The applicant's agent, John Grant from Wright Johnston & MacKenzie and the respondent's agent, Rhona McLeod from LSA both took part in the case management discussion. After hearing from both parties, the tribunal ordered that the matter would proceed to a hearing to deal with questions about the validity of the notice to quit and also, issues of reasonableness. Reference is made to the case management discussion note and direction.
4. The application was continued to a hearing on 2 May 2023 together with the associated civil application for payment of rent arrears. James Rafferty from the applicant company, the applicant's agent, John Grant, the respondent and the respondent's agent, Rhona McLeod all took part in the hearing.
5. Both parties had submitted further papers in writing prior to the hearing. Both parties had had sight of the others parties' papers. Parties were asked to address the tribunal first, on the issues of the competency of the application in terms of the notice which had been served.

HEARING

6. The applicant's agent advised the tribunal that it was accepted that the question of reasonableness only applied if the other part of the statutory test was met. He advised that the issue of reasonableness had been set out in the papers he had submitted to the tribunal. He advised that the applicant's position was that they sought to recover possession of the property at some point and were therefore looking for an order for recovery. They were looking for a decision to be reached by the tribunal as to whether it agreed with the submission by the respondent, with particular reference to paragraph 8 of the respondent's submission.
7. The respondent's agent advised that she rested on her written submission and had nothing further to add. She advised that if the tribunal was not with her, then the matter could come back to a hearing for the tribunal to be addressed further on the issue of reasonableness. In summary her submission was that the notice to quit was invalid as it did not terminate the tenancy on an ish date; and the tenancy agreement did not narrate the grounds in Schedule 5 of the Housing (Scotland) Act 1988 and accordingly,

the applicant was not able to rely only on the AT6 Notice to secure an order for possession; to succeed the applicant would have to first terminate the contractual tenancy by serving a valid notice to quit and then rely on the AT6 Notice.

FINDINGS IN FACT

8. The Tribunal found the following facts established:-

- a. There existed an assured tenancy between the Applicant and the Respondent. It had commenced on 4 September 2017.
- b. The tenancy was for the property 28 Monks Road, Airdrie.
- c. Clause 1.3 of the tenancy agreement sets out that the period of the tenancy was 3 year with an option to extend thereafter.
- d. Clause 1.6 of the Tenancy Agreement provides that the rent for the property is £750 per calendar month. It is payable on the 4th of each month.
- e. Clause 4 provides that the landlord lets to the tenant the premises and for which the tenant undertakes to pay the landlord rent.
- f. The ish date falls annually on the 4th day of September.
- g. The notice to quit was dated 23 February 2022 and sought vacant possession by 24 August 2022.
- h. The AT6 Notice was dated 23 February 2022 and advised that proceedings would not be raised before 24 August 2022.
- i. The AT6 notice sought to rely on ground 8 (three months' rent arrears); and ground 11 (persistent delay in paying rent)
- j. A section 11 notice had been sent to the local authority.
- k. When the AT6 notice was served there were rent arrears of £5,320.
- l. When the application was made on 30 August 2022 there were rent arrears of £9,070.
- m. When the hearing took place on 2 May 2023 there were rent arrears of £15,070.
- n. The tenancy agreement did not contain a narration or a summary of the statutory grounds of eviction set out in schedule 5 of the Housing (Scotland) Act 1988.

REASONS FOR DECISION

9. The grounds of recovery were 8 and 11, as set out in Schedule 5 of the Housing (Scotland) Act 1988, which were in the following terms:-

Ground 8 : Both at the date of the service of the notice under section 19 of this Act relating to the proceedings for possession and at the date of the hearing [or the date of the case management discussion, whichever is the earlier, at least three months' rent lawfully due from the tenant is in arrears.

Ground 11: Whether or not any rent is in arrears on the date on which proceedings for possession are begun, the tenant has persistently delayed paying rent which has become lawfully due.

10. The relevant sections of the Housing (Scotland) Act 1988 for considering an application for eviction relying on the schedule 5 grounds for recovery are :-

11. 16.— Security of tenure

(1) After the termination of a contractual tenancy which was an assured tenancy the person who, immediately before that termination, was the tenant, so long as he retains possession of the house without being entitled to do so under a contractual tenancy shall, subject to section 12 above and sections 18 and 32 to 35 below—

- (a) continue to have the assured tenancy of the house; and
- (b) observe and be entitled to the benefits of all the terms and conditions of the original contract of tenancy so far as they are consistent with this Act but excluding any—
 - (i) which makes provision for the termination of the tenancy by the landlord or the tenant; ...

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)-(3A) [...]²

(4) If the First-tier Tribunal is satisfied that any of the grounds in [Part I or II of Schedule 5] 3 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 [—] 5 [(a) 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, and (b) the extent to which the landlord has complied with the pre-action protocol specified by the Scottish Ministers in regulations.

...

(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 in Part I of Schedule 5] 6 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.

...

19.— Notice of proceedings for possession.

(1) The First-tier Tribunal shall not entertain proceedings for possession of a house let on an assured tenancy unless— (a) the landlord (or, where there are joint landlords,

any of them) has served on the tenant a notice in accordance with this section; or (b) the Tribunal considers it reasonable to dispense with the requirement of such a notice.

(2) The First-tier Tribunal shall not make an order for possession on any of the grounds in Schedule 5 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the Tribunal.

(3) A notice under this section is one in the prescribed form informing the tenant that—
(a) the landlord intends to raise proceedings for possession of the house on one or more of the grounds specified in the notice; and (b) those proceedings will not be raised earlier than the expiry of the period of two weeks or two months (whichever is appropriate under subsection (4) below) from the date of service of the notice.

(4) The minimum period to be specified in a notice as mentioned in subsection (3)(b) above is— (a) two months if the notice specifies any of [Grounds 1, 1A, 2, 5, 6, 7, 8A, 9 and 17 in Schedule 5] 2 to this Act (whether with or without other grounds); and (b) in any other case, two weeks.

(5) [...]3

(6) Where a notice under this section relating to a contractual tenancy— (a) is served during the tenancy; or (b) is served after the tenancy has been terminated but relates (in whole or in part) to events occurring during the tenancy, the notice shall have effect notwithstanding that the tenant becomes or has become tenant under a statutory assured tenancy arising on the termination of the contractual tenancy.

(7) A notice under this section shall cease to have effect 6 months after the date on or after which the proceedings for possession to which it relates could have been raised.

12. It is helpful first to consider section 16 of the 1988 Act, it provides that after the termination of a contractual assured tenancy, the tenant shall, continue to have the assured tenancy of the house and be entitled to the benefits of the original tenancy but excluding any which makes provision for the termination of the tenancy. Subsection (2) goes on to provide that a statutory assured tenancy cannot be brought to an end

by the landlord except by obtaining an order of the First-tier Tribunal in accordance with the following provisions of this Part of this Act. In order to obtain an order for possession under rule 65 an applicant must comply with the terms of section 18 and 19 of the Act.

13. Considering the terms of section 18(6), this subsection provides that no order for possession will be made if the tenancy is an assured tenancy, not being a statutory assured tenancy unless certain other stipulations have been complied with. In order for an assured tenancy to be a statutory assured tenancy, the contractual tenancy has to be terminated. This is done by serving a valid notice to quit on the *ish* date.
14. Turning to the stipulations in section 18(6) which allow for an order for possession to be made where the contractual tenancy has not been terminated, they only apply where the ground for possession the landlord wishes to rely on is set out in the tenancy agreement, and the terms of the tenancy make provision for it to be brought to an end on the ground in question.
15. The respondent referred to the case of *Royal Bank of Scotland v Boyle* 1999 Hous LR 63 in support of her position. In that case the notice to quit had not terminated the contractual tenancy on the *ish* date. The sheriff had considered that the AT6 Form could be relied on as irritating the tenancy agreement. The sheriff principal however did not agree with the sheriff when the case came before him on appeal, holding that.

“(1) that the essential ingredients of the grounds for recovery of possession in Sched 5 to the 1988 Act must be referred to in the tenancy agreement, and while this could be done by an exact citation of the grounds, and maybe also by providing a summary containing the essential ingredients of the grounds, incorporation by reference would not necessarily be appropriate (para 12-11),”.

16. In the present case the tenancy agreement does not narrate in full the grounds upon which the applicant wishes to rely to obtain their order, neither does the agreement contain a summary of those grounds. There is no reference to the grounds in the tenancy agreement. We agree therefore with the respondent's submission on this matter. We find that the applicant would be not entitled to rely on the AT6 Notice only and the terms of section 18 (6) of the 1988 Act as a means of recovering possession of the property. In our opinion the applicant has to terminate the contractual tenancy and once done, he may then rely on an AT6 Notice.

17. The tribunal considered whether the applicant is entitled to an order on the basis that the notice to quit is valid, the contractual tenancy has ended and the AT6 Form can be relied on. We find that the *ish* date in this tenancy agreement falls on the 4th of September each year. The tenancy agreement renews on an annual basis. To terminate the tenancy agreement on the *ish* date in this case, the notice to quit must seek vacant possession on the *ish* date, namely 4 September. In present case the notice to quit sought vacant possession on 24 August 2022. That is not the *ish* date. The notice to quit is not therefore valid. The contractual tenancy has not been terminated; the statutory requirements have not been met.
18. No submissions were provided by the applicant in support of their position. The respondent also did not refer to any authorities in support of her position that the notice to quit was not valid. The tribunal in considering the validity of the notice to quit considered Adrian Stalker in *Evictions in Scotland, 2nd Edn*. At page 52 he considers terminating a lease and advises that “*The expiry of the agreed duration does not bring the lease to an end. Subject to express contrary stipulation, a lease contains an implied agreement that its duration may be extended by the tacit consent of the parties. If either party wishes to avoid the tenancy being prolonged in this way, he must give notice to the other party of his desire to terminate the lease at the next ish.*”
19. Stalker goes on to consider notices to quit and looks at the requirements for a valid notice to quit, noting that if a party fails to adhere to the requirements of a valid notice to quit, the notice will be ineffective, and tacit relocation will continue (see page 53). At page 58 he advises that one requirement is that the notice must specify the date on which it is to take effect, being an *ish* date.
20. We find therefore that the contractual tenancy has not terminated, and tacit relation continues to operate. For the reasons set out above we consider that the contractual tenancy has to be terminated before the AT6 Notice can be relied upon by the applicant. Accordingly, this tribunal has no power to make an order for possession at this time. Further, as we do not consider that the statutory terms of the 1988 Act have been met in this application, we do not go on to consider whether it would be reasonable to grant an order possession.
21. Accordingly, the tribunal refuses to make an order for eviction under Grounds 8 and 11.

DECISION

22. The Tribunal refuses to grant an order for eviction in favour of the Applicant against the Respondent for possession of the property.

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.

M. Barbour

Legal Member/Chair

2nd May 2023
Date