Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/EV/22/3176

Re: Property at 92 South Commonhead Avenue, Airdrie, ML6 6PA ("the Property")

Parties:

Mr John Shannon, C/o Jones Whyte, 105 West George Street, Fyfe Chambers, G2 1PB ("the Applicant")

Miss Elizabeth Downie, 92 South Commonhead Avenue, Airdrie, ML6 6PA ("the Respondent")

Tribunal Members:

Josephine Bonnar (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 refused .

Background

1. The Applicant seeks an order for possession in terms of Rule 65 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Procedure Rules") and Section 18 of the Housing (Scotland) Act 1988 ("the 1988 Act"). The Applicant lodged a tenancy agreement, Notice to Quit and AT6 notice with the application. The application and AT6 state that recovery of possession is sought on ground 1 of Schedule 5 to the 1988 Act.

2. The application was served on the Respondent by Sheriff Officer. Both parties were advised that a case management discussion ("CMD") would take place by

telephone conference call on 21 February 2023. The CMD took place on this date. The Applicant was represented by Ms Hoey, solicitor. The Respondent participated.

Case Management Discussion on 21 February 2023

3. During the CMD, the Tribunal noted that the notice to quit specified a date to quit the Property which did not appear to be an *ish* (or end date) in terms of the lease. The tenancy agreement lodged with the application is dated (and appears to have commenced on) 24th June 2016. However, the section in the document for the start and end date have not been completed and the lease is therefore silent as to the agreed term.

4. The Tribunal drew Ms Hoey's attention to passages in legal textbooks concerning this situation, and in particular *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 *Stalker – Evictions in Scotland* (2nd Ed.) pages 51-52 and 58-60. These all suggest that in the absence of agreement on duration or end date, the Tribunal should imply a lease of one year. In that event, the *ish* date of this lease agreement would fall on the 23rd of June of each subsequent year in the event that tacit relocation operated, as appeared to be the case.

5. The Tribunal noted that if the Applicant was unable to establish that the date given in the notice to quit was an *ish* date of the lease agreement, then he would be unable to establish the validity of the notice to quit. In those circumstances it would appear from the information provided that the application must fail.

6. Ms Hoey sought a continuation to consider the legal position further and the Respondent did not oppose that request in the circumstances. The request was granted by the Tribunal.

7. The parties were notified that a further CMD would take place on 4 May 2023 at 2pm by telephone conference call. Prior to the CMD, the parties lodged written submissions.

8. The Applicant participated and was again represented by Ms Hoey, solicitor. The Respondent also participated. A related application under Chamber reference CV/23/0259 was also discussed.

Case Management Discussion on 4 May 2023

9. The Tribunal noted that there had been submissions from both parties regarding the surname of the Respondent. In the Tribunal correspondence the name "Donnie" is used. However, the Respondent had notified the Tribunal that her surname is "Downie". Following discussion, Ms Hoey said that there had

been a mix-up but that the name should be Downie. It was not clear whether the error had been on the part of the Applicant or the Tribunal administration, but the Tribunal determined that both applications should be amended to reflect the correct name “Downie”, for the avoidance of any further doubt on the issue.

10. The Tribunal proceeded to discuss the issue of the validity of the Notice to Quit with the parties. Ms Hoey said that she wished to rely on the written submissions lodged prior to the CMD. She said that the Applicant is of the view that the Notice is valid. She stated that the situation regarding the tenancy had been more complex than initially thought because the duration of the lease was not stated. However, the Applicant had complied with the legislation and applied common law. The required steps were taken, and the Notice is valid. She confirmed that she had nothing further to add. Mrs Downie said that she had no submissions to make on the issue.

11. The Tribunal advised parties that a decision would be taken following the CMD. If the Notice was invalid, and the tenancy contract had not been terminated, the application may be refused. If not, it would proceed to a hearing on whether the ground is established and whether it would be reasonable to grant the order for possession. The Tribunal proceeded to discuss these matters with the parties and noted the following:-

(a) The Applicant did not serve a Notice on the Respondent in relation to ground 1 at the start of the tenancy. Ms Hoey noted that she would require to address the Tribunal at the hearing on whether it would be reasonable to dispense with the notice.

(b) The Applicant is relying on ground 1(b) of schedule 5. His position is that he wishes to live in the let property because it is nearer to his family than his current accommodation.

(c) Mrs Downie disputes the claim that Mr Shannon wishes to live in the property. She said that he recently purchased a large house for himself and his family.

(d) The owner and registered landlord for the property is the Applicant. However, the person named on the tenancy agreement is John Kinnaird, who also appears to have signed the document. The Applicant states that he arranged for Mr Kinnaird to do the sign up as he was unavailable. Mr Kinnaird thought his name should be on the agreement because Mr Shannon was not present. There is an ongoing dispute and court action between the Applicant and Mr Kinnaird. Mrs Downie said that this relates to the ownership of the property. Ms Hoey said that it is a purely financial dispute, about a loan, and that her firm is not instructed to deal with the matter.

(e) Ms Hoey said that she would prefer to make a written submission regarding reasonableness prior to the hearing. However, the Applicant’s reasons for moving into the property, and the level of rent arrears incurred by the Respondent would be part of the submission.

(f) Mrs Downie said that she has a number of disabilities and resides at the property with her 11 year old daughter. She has nowhere else to go and is worried about ending up in homeless accommodation. Her daughter is in a nearby school and due to start secondary school, which is also very close to the house.

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Findings in Fact

12. The Applicant is the owner and landlord of the property.

13. The Respondent is the tenant of the property in terms of an assured tenancy dated 24 June 2016

14. The term of the tenancy is not specified in the agreement.

15. The parties did not agree a date upon which the tenancy would end.

16. The Applicant served a Notice to Quit on the Respondent on 16 June 2022. This notice calls upon the Respondent to vacate the property on 25 August 2022.

17. The Applicant served an AT6 Notice on the Respondent.

Reasons for Decision

18. The Applicant's submissions in relation to the validity of the Notice to Quit can be summarised as follows:-

(a) The issue of the validity of the Notice to Quit was first raised by the Tribunal on 17 October 2022. A full response was provided on 18 October 2022. As the Tribunal did not request further information, the Applicant assumed that the Tribunal was satisfied with the period of notice in the Notice. The matter was not raised again until the CMD.

(b) The Tribunal should re-consider their position regarding the Notice. In Stalker, page 51, it states that most leases have an ish. Where parties have not agreed a term, the court may imply a term of one year. There is no explanation as to why this period of a year must be applied in all circumstances. It therefore appears to be discretionary. The Applicant asks the Tribunal to exercise its discretion and not imply a period of one year.

(c) In the cases of Poole v Poole and Walker v Walker, the First-tier Tribunal implied the duration of one year because there was no written tenancy agreement. In the absence of an agreement, it was appropriate to imply a period of one year. In this case, there is an agreement and only the clause relating to duration has not been completed. In those circumstances, a Notice

to Quit which gives 40 days was issued.

(d) Stalker refers to a case in which the court said that 40 clear days notice is required to prevent tacit relocation from operating.

(e) Rennie and Ors at paragraph 22-48 says that, as most private sector tenancies are for 6 months or more, the required period of notice is usually 40 days.

19. The Tribunal notes the Applicant's claim that the Tribunal was satisfied with the explanation offered regarding the date in the Notice. However, this is incorrect. On 17 October 2022, the case was proceeding through the application or sifting stage of the Tribunal process. When an application is lodged, the Chamber President or a Legal Member with delegated powers, considers the application and decides whether to accept it, reject it or make a request for further information and documents in terms of Rule 5 of the Procedure Rules. The application is not determined at this stage unless it is rejected in terms of Rule 8. Otherwise, it proceeds to a Tribunal who are not bound by the views of the Legal Member who decided to accept the application. In this case, a request for further information was issued regarding the Notice to Quit. The Applicant provided a response, stating that the Notice was valid and providing an explanation for the date which had been specified. The Legal Member noted the argument and accepted the application. However, in the letter advising the Applicant that it had been accepted, the Tribunal stated that the Applicant would require to address the Tribunal at the CMD on the validity of the Notice.

20. The Applicant's submission appears to focus on the notice period given, rather than the date which is specified. However, the Tribunal has no issue with the period of notice. Section 112 of the Rent (Scotland) Act 1984 states, " No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwellinghouse shall be valid unless it is in writing and contains such information as may be prescribed and is given not less than four weeks before the date on which it is to take effect." The Notice lodged with the application is in writing and gives more than 4 weeks' notice. It also contains the information prescribed in the Assured Tenancies (Notices to Quit Prescribed Information (Scotland) Regulations 1988. The only issue with the Notice is the date specified as the "date on which it is to take effect".

21. It is not in dispute that the tenancy is an assured tenancy in terms of the 1988 Act. It commenced in 2016 and is the only or principal home of the Respondent. It is not one of the types of tenancy which cannot be an assured tenancy in terms of Schedule 4 of the 1988 Act.

22. Section 12 of the 1988 Act deals with security of tenure. It states, " (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 references

in this part of this Act to a "statutory assured tenancy" are references to an assured tenancy which a person is continuing to have by virtue of this subsection…." "(3) Notwithstanding anything in the terms and conditions of tenancy of a house being a statutory assured tenancy, a landlord who obtains an order for possession of a house as against a tenant shall not be required to give him any notice to quit" As is pointed out in Adrian Stalker "Evictions in Scotland", 2nd edition page 229, this section means that an assured tenancy becomes a statutory assured tenancy when the tenancy contract is terminated. "Thus, from the date when a contractual tenancy ends (usually on expiry of a valid notice to quit) the former tenant is either a person with no right to occupy the premises or he is the statutory assured tenant" (page 230). And at page 231 " Section 16(3) should not be read as indicating that that it is not necessary for the landlord to serve a notice to quit under any circumstances. A valid notice to quit terminating the tenancy and bringing about a statutory assured tenancy under section 16 may be a necessary preliminary to an action under section 18 or 33. However, once the tenancy is terminated and the landlord obtains an order under one of the sections, no further notice to quit is required."

23. Section 18(6) of the 1988 Act, allows the Tribunal to grant an order for recovery of possession of a house let on an assured tenancy in cases where the tenancy contract has never been terminated. Where this section applies, a landlord does not require to serve a notice to quit or otherwise terminate the contract. The section can also be relied upon where a notice to quit has been served but is invalid. The section only applies to certain grounds for possession, and ground 1 is not one of them. Furthermore, it can only be used where the "terms of the tenancy make provision for it to be brought to an end on the ground in question." The tenancy agreement lodged makes no such provision. The Tribunal is therefore satisfied that the Applicant had to terminate the tenancy contract before he is entitled to seek possession of the property.

24. In his submissions, the Applicant refers to Stalker "Evictions in Scotland", page 51, which indicates that most leases have a stated duration. If not, the court might imply a period of one year. However, a lease does not require to have a specified duration. Stalker also states that "the expiry of the agreed duration does not bring the lease to an end. Subject to express contrary stipulation, the lease has an implied agreement that its duration may be extended by the tacit consent of the parties."(page 51). "To prevent tacit relocation, a landlord must serve a notice to quit prior to the next ish. Otherwise, the tenancy continues for the same period as the original term". At page 52, Adrian Stalker states " the notice given by either party to terminate a lease at its next ish is a notice to quit." At page 58, Stalker states that, as the "purpose of the notice is to avoid tacit relocation taking place at the ish, it follows that the date stated in the notice should be the ish date. That is "the date on which it is to take effect" under section 112…". And, at page 59, he adds that "Where the landlord calls upon the tenant to leave before the ish, that requires some indication, in the notice, as to the basis on which that call is being made" and that "if the date stated on the notice to quit is earlier than the ish, but without any indication of why the tenant is being asked to leave early, the notice is ineffective; the landlord cannot call upon the tenant to leave before the tenant is contractually obliged to do so."

Various cases are referred to in support of this statement at footnote 55. It is also suggested that a notice which specifies the day after the ish may not be invalid, as the tenant is entitled to remain in the property until midnight on the ish date. The circumstances in which a tenant might be given notice to leave before the ish might include a breach of contract by the tenant, such as a failure to pay rent. However, this would require to be specified in the notice which was given by the landlord.

25. The Applicant does not claim that the notice was served due to breach of contract or that he is relying on irritancy or rescission, remedies available to a landlord where there has been a breach of contract. Indeed, he might have difficulty doing so, as the ground for possession specified in the application and AT6 is ground 1, which involves no fault or failure on the part of the tenant. The Applicant simply claims that the notice to quit which was served did not specify an ish because there wasn't one. This appears to miss the point that a Notice to Quit can only be used to terminate a tenancy at the natural term of that tenancy. In other words, there must be a duration and an ish. Otherwise, this type of notice cannot be used. In the absence of any evidence regarding an agreed term, the Tribunal can imply a term of one year. This would allow a notice to quit to be used to terminate the contract on 23 or 24 June. However, if the agreement is silent because the parties intended an unlimited duration, this is not an option. It seems an unlikely arrangement. Prior to 1 December 2027, residential tenancies invariably had an agreed term. The agreement lodged has several clauses which deal with arrangements for the end of the tenancy. It is more likely that the Applicant forgot to insert the relevant dates. If the parties did agree to an indefinite duration, this would also mean that the Applicant cannot use a notice to quit to terminate the lease and requires to find another way to end the contract.

26. Based on the information and documents lodged by the Applicant, the Tribunal is satisfied that the notice to quit lodged with the application is invalid as it does not specify a date which is an ish date of the tenancy. The Applicant has therefore failed to terminate the tenancy contract and cannot comply with the requirements of the 1988 Act. As a result, the application cannot succeed.

Decision

27. The Tribunal determines that the application is refused.

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.

Josephine Bonnar

Legal Member **9 May 2023**