



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 1988 Act”) and Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”)

Chamber Ref: FTS/HPC/EV/23/1143

Re: Property at 15 Dixon Road, Flat 3/1, Glasgow, G42 8AS (“the Property”)

The Parties:

Coatbridge Property & Investment LTD, 40 Carlton Place, Glasgow, G5 9TW (“the Applicant”)

Mr Tom Brannigan, 15 Dixon Road, Flat 3/1, Glasgow, G42 8AS (“the Respondent”)

Tribunal Members:

Nicola Weir (Legal Member) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application for an order for possession of the Property be refused.

Background

1. By application received on 11 April 2023, the Applicant sought an order under Section 33 of the Housing (Scotland) Act 1988 (“the Act”) for possession of the Property on termination of a Short Assured Tenancy. The application was made in terms of Rule 66 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Regulations”). Supporting documentation was submitted with the application, including a copy of the Tenancy Agreement; AT5; Notice to Quit, Section 33 Notice and Section 11 Notice to the local authority; and proof of service of the notices.
2. During initial procedure, an issue was identified concerning the AT5 Notice submitted in support of the application, given that it was dated some months

after the tenancy commencement date stated in the Tenancy Agreement. There was further correspondence with the Applicant's agent and, in view of responses received, the view was taken that the discrepancy with the dates would require to be the subject of evidence at a later stage in the proceedings. On 7 September 2023, a Legal Member of the Tribunal with delegated powers from the Chamber President issued a Notice of Acceptance in respect of the application in terms of Rule 9 of the Regulations.

3. A Case Management Discussion ("CMD") was fixed for 18 September 2023. The application and details of the CMD fixed were served on the Respondent by Sheriff Officer. In terms of said notification, the Respondent was given an opportunity to lodge written representations. No representations were lodged prior to that CMD. However, the Respondent did make a postponement request on medical grounds, proof of which was produced, and which was granted by the Tribunal. Having reviewed the application and background papers, the Tribunal issued a Direction to parties under Rule 16 of the Regulations, dated 21 September 2023, requiring the Applicant to fulfil various requirements by 13 October 2023. The reason for the Direction was to satisfy the Tribunal "that the tenancy is a Short Assured Tenancy and that the application is therefore competent."
4. The Applicant complied with the Direction and responded to the Tribunal on 3 October 2023, with written submissions and also lodging a copy of a Rent Statement showing the rent arrears position between July 2020 and September 2023.
5. A further CMD was fixed for 14 December 2023 at 10am and parties were notified of same. On 13 December 2023, the Respondent emailed the Tribunal to provide an update on his health condition and to advise that he would not be attending the CMD due to this but was not asking for it to be postponed on this occasion.

Case Management Discussion

6. The CMD took place on 14 December 2023 at 10am by telephone conference call. The CMD was attended on behalf of the Applicant by Ms Kira Keaney of Happy Lets Ltd, the Applicant's letting agents. The commencement of the CMD was delayed for a few minutes in case the Respondent decided to join but he did not do so.
7. Following introductions and introductory comments by the Legal Member as to the purpose of the CMD, Ms Keaney confirmed that she had been in direct communication with the Respondent and had not expected him to attend today. The Legal Member referred to the Direction granted previously and Ms Keaney's response to that on behalf of the Applicant, in which she had confirmed that the commencement date of the tenancy had been 31 March 2010. The date of the AT5 was, however, 24 August 2010, which was also the date the lease had been signed. Ms Keaney conceded that, although they had initially thought that the date stated in the AT5 was wrong and that it had been

served on the Respondent at an earlier stage, it has not been possible to provide any further clarification or documentation concerning this. She explained that it had been some years ago, in 2010. They only took over management of the Property in 2020. The Applicant has undertaken checks on the matter themselves but have been unable to find anything further on their systems which could be produced to the Tribunal. Ms Keaney had hoped that, given these background circumstances, the length of time this matter has been ongoing and the substantial rent arrears (in excess of £10,000) that the Tribunal would still be able to consider granting the application. However, the Legal Member referred to the terms of the legislation and indicated, as the Applicant had been advised previously, the Tribunal did not have any discretion in respect of this matter. The Legal Member advised that, in these circumstances, it appeared to the Tribunal that a Short Assured Tenancy had not been properly created here at the outset and that, in law, the tenancy is instead an Assured Tenancy and would have to be the subject of a Rule 65 application to the Tribunal, under an appropriate ground. Ms Keaney was offered a further adjournment of the CMD if she wished to seek legal advice on the matter but she stated that she accepted the position and will probably now be instructed to proceed with a fresh eviction application on grounds of the substantial rent arrears.

8. As to her communications with the Respondent, Ms Keaney was asked if she was aware of his position as to seeking alternative accommodation and removing voluntarily from the Property. Ms Keaney stated that he has previously indicated several times that he would move out but has then not done so.
9. The Tribunal confirmed that the order would be refused. Ms Keaney was thanked for her attendance and the CMD was brought to a close.

Findings in Fact

1. The Applicant is the owner and landlord of the Property.
2. The Respondent is the tenant by virtue of a tenancy, which purported to be a Short Assured Tenancy, which commenced on 31 March 2010.
3. The AT5 was dated 24 August 2010, several months after the commencement of the tenancy.
4. The AT5 was not served before the creation of the tenancy which was therefore not a properly constituted Short Assured Tenancy.
5. The Applicant sought to end the contractual tenancy by serving a Notice to Quit and Section 33 Notice on 20 July 2022, specifying the end date of the contractual tenancy as 31 March 2023, an ish date in terms of the lease. Both notices were in the correct form and provided sufficient notice to terminate a Short Assured Tenancy and were served validly on the Respondent by way of Sheriff Officer.

6. The Respondent has remained in possession of the Property following expiry of the notice period.
7. This application was lodged with the Tribunal on 11 April 2023, following expiry of the notice period.
8. The Respondent did not lodge any written representations in respect of the application.

Reasons for Decision

1. The Tribunal was satisfied that the technical aspects of an application for a Short Assured Tenancy eviction, including the service of notices, had been properly and timeously carried out by the Applicant prior to the lodging of the Tribunal application in terms of Rule 66 of the Regulations and in terms of the 1988 Act. However, the Tribunal was not satisfied that the application was competent in the circumstances of this case. The commencement date of the tenancy stated in the tenancy agreement was 31 March 2010 and the Applicant confirmed that this was the correct commencement date. The AT5 was, however, dated 24 August 2010, several months after the commencement date. The Applicant conceded that they were unable to produce any evidence that an AT5 had been served on an earlier date ie. before the creation of the tenancy.
2. The Tribunal considered the relevant provisions of the 1988 Act, as follows:-

“32 Short assured tenancies.

(1)A short assured tenancy is an assured tenancy—

(a)which is for a term of not less than six months; and

(b)in respect of which a notice is served as mentioned in subsection (2) below.

(2)The notice referred to in subsection (1)(b) above is one which—

(a)is in such form as may be prescribed;

(b)is served before the creation of the assured tenancy;

(c)is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under that tenancy; and

(d)states that the assured tenancy to which it relates is to be a short assured tenancy.

(3)Subject to subsection (4) below, if, at the finish of a short assured tenancy—

(a)it continues by tacit relocation; ...

(b).....

the continued tenancy ... shall be a short assured tenancy, whether or not it fulfils the conditions in paragraphs (a) and (b) of subsection (1) above.

(4)Subsection (3) above does not apply if, before the beginning of the continuation of the tenancy ..., the landlord or, where there are joint landlords, any of them serves written notice in such form as may be prescribed on the tenant that the continued ... tenancy is not to be a short assured tenancy.

(5)Section 25 above shall apply in relation to a short assured tenancy as if in subsection (1) of that section the reference to an assured tenancy were a reference to a short assured tenancy.” and

“55 Interpretation of Part II.

(1)In this Part of this Act, except where the context otherwise requires—

.....

(2)Any reference in this Part of this Act to the beginning of a tenancy is a reference to the day when the lease of the house let on the tenancy commences.”

The Tribunal considered that the terms of Section 32 above had not been met, in that the notice which required to be served in accordance with Section 32(1)(b) [the AT5] had not been “served before the creation of the assured tenancy” (Section 32(2)(b). The Tribunal also considered the terms of Section 55, the Interpretation section which applies to Part II of the Act (which includes Section 32) which defines the beginning of the tenancy as the day when the lease commences [and not, for example, the day when the lease is signed]. The Tribunal did not, accordingly, given the circumstances narrated in paragraph 1 above, consider that a Short Assured Tenancy had validly been constituted here. The tenancy instead appeared to be an Assured Tenancy. Accordingly, the termination of tenancy process which had been followed by the Applicant here was incorrect and the application to the Tribunal under Rule 66 was incompetent as this is only applicable to Short Assured Tenancies. The Tribunal has no discretion, in terms of the 1988 Act to find otherwise.

3. The Tribunal accordingly determined that the application should be refused and also that it was appropriate to do so at the CMD as the Applicant conceded that no evidence to the contrary regarding the AT5 and the commencement of the tenancy could be produced at an adjourned hearing.

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

14 December 2023
Date