



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/23/1507

Property at Burnside Cottage, Dalguise, Dunkeld, PH8 0JZ (“the Property”)

Parties:

Donald Skene T/A Skene Group, Fouracre, Fernie Castle, Ladybank, Fife, KY15 7RU (“the Applicant”)

Mr Moray MacFarlane, formerly residing at Burnside Cottage, Dalguise, Dunkeld, PH8 0JZ and now at 8 Allt-Mor Place, Kinloch Rannoch, PH 16 5PH (“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 an order for possession should be granted against the Respondent in favour of the Applicant.

Background

- 1. The Applicant seeks an order for possession in terms of Section 18 of the 1988 Act. A tenancy agreement, Notice to Quit, AT6 notice, Section 11 Notice and rent statement were lodged with the application.**
- 2. A copy of 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 19 September 2023 at 2pm and that they were required to participate. Prior to the CMD, the Respondent lodged written submissions and documents.**
- 3. The CMD took place on 19 September 2023. The Applicant was represented by Ms Campbell, solicitor. The Respondent was represented by his wife, Mrs McFarlane.**

Case Management Discussion on 19 September 2023

4. The Tribunal noted that the owner and registered landlord of the property is Donald Skene. Following discussion, Ms Campbell asked to amend the application to Donald Skene T/A Skene Group. This was not opposed by Mrs McFarlane. It was also explained that Jill Mason, named in the tenancy agreement as the landlord, is an employee of the Skene Group.
5. Mrs MacFarlane told the Tribunal that she and her husband were due to move to alternative rented accommodation. This had been delayed because of her husband's health issues but she was aiming for 1 October 2023. She stated that Mr MacFarlane issued a final invoice to the Applicant in connection with his contract with them in October 2022. This covered the period from March to August 2022, when the contract for services came to an end. The sum due in terms of the invoice was over £13000 which included the sum of £1700 due each month from March to August, admin costs of about £2400 and some outlays. The invoice was not paid or even acknowledged. She has since been told it was not received. The copy invoice is in storage. The rent for the property was always deducted at source from the sums invoiced due by the Applicant. As the sums due to Mr McFarlane exceed the outstanding rent, no payments have been made to the Applicant to the rent account. Mrs MacFarlane told the Tribunal that invoicing during the pandemic became erratic. There was a period when the Applicant agreed to waive the rent and they agreed to work without payment. In response to questions from the Tribunal, Mrs McFarlane said that her husband had a stroke in May 2023. The Applicant issued a Notice to Quit in August 2022 on the basis that an employment relationship had ended. However, Mr McFarlane worked for the Applicant on a self-employed basis. They took advice from Shelter who said that the notice was not valid. Later, they were served with a further notice based on rent arrears. Mrs MacFarlane also advised that invoices were always sent by email until the October 2022 invoice. This was sent by post as they no longer had access to the shared mailbox.
6. Ms Campbell told the Tribunal that she had not had sight of the Respondent's submissions in advance of the CMD. She was covering the CMD for a colleague who was on annual leave. The submissions had been sent to her colleague on 14 September 2023. Ms Campbell said that she could not comment on the submissions, or the further information provided by the Respondent, until she had spoken to her client.
7. The Tribunal discussed the notice to quit and AT6 with the parties. Mrs MacFarlane said that she was unable to comment on the validity or otherwise of the notices and was happy to accept the Tribunal's decision on same. The Tribunal noted that the Applicant relied on section 18(6) of the 1988 Act and as such, a valid notice to quit was not required. The AT6 appeared to give insufficient notice in relation to ground 8A. However, this ground was removed from the application before it was accepted, and it was proceeding only in relation to grounds 11 and 12. The AT6 appeared to be satisfactory in relation

to these grounds.

8. Following a short adjournment, the Tribunal advised parties that the CMD would be continued to a further CMD and that a direction would be issued for further information and documents in relation to the nature of the relationship between the parties and whether any sums are due by the Applicant to the Respondent which should be offset against the alleged rent arrears. The Tribunal also noted that the application may be withdrawn if the Applicant recovers possession of the property.
9. The parties were notified that a further CMD would take place on 9 January 2024 at 10am. Prior to the CMD, the Applicant submitted copies of invoices from the Respondent to the Applicant and redacted bank statements. In the covering submission the Applicant stated that these documents comprised all invoices received, all payments made, and all deductions made for rent and that there had been no written contract with the Respondent for services. The Respondent did not lodge a response to the direction.
10. The CMD took place on 9 January 2024. The Applicant was represented by Mr Anderson, solicitor. The Respondent was again represented by his wife, Mrs MacFarlane.

Case Management Discussion on 9 January 2024

11. Mrs MacFarlane advised the Tribunal that she and her husband moved out of the property in October 2023. However, she still stays there one night a week as they still have a number of possessions at the property, especially in the outbuildings and garage. As she is working at two jobs and is her husband's carer, it is taking longer than expected to clear the property. The tenancy has not yet been relinquished. Their new address is 8 Allt-mor Place, Kinloch Rannoch. She said that the application is not opposed because they have found alternative accommodation. When asked about the direction, she apologised for failing to comply with this and provide the required documents. The reason given was that she is the sole breadwinner and her husband's carer, so hasn't had the time.
12. Mr Anderson told the Tribunal that the Applicant insists on his application for an order for possession. He stated that although a notice to quit was issued in August 2022 the Respondent is still in occupation of the property. In addition, the Applicant has had to apply to the Tribunal under the Right of Entry procedure to get access for inspection and maintenance of the property and there were several occasions when arranged access was cancelled by the Respondent. Mr Anderson indicated that the Applicant could facilitate access to the outbuildings for the Respondents to collect their belongings after the property is recovered. Mr Anderson advised the Tribunal that no rent has been paid since the last CMD and the balance on the account is now £15,400.
13. Mrs MacFarlane told the Tribunal that the Respondent disputes the statement regarding access to the property for inspection and repairs. She stated that the

rent was always deducted from the invoices rendered. It was an informal arrangement, but they were not given the opportunity to pay rent by another method. The October 2022 invoice was for over £15000. She accepted that she has not provided the Tribunal with a copy of this invoice. In response to questions from the Tribunal Mrs MacFarlane confirmed that no manual payments of rent have ever been made. The only rent paid was by deductions from the invoices sent to the Applicant. She stated that the Respondent needs some further time to move out of the property and doesn't believe they would be allowed back to collect belongings. Her husband is unable to work because of health issues. She works for the NHS and from home as well. She also has some health issues and is receiving treatment. Her husband is in receipt of ADP. Her daughter is 23 and stays with them some of the time.

14. Mr Anderson told the Tribunal that the Applicant is a commercial landlord with a number of rental properties.

Findings in Fact

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

16. The Respondent is the tenant of the property in terms of an assured tenancy agreement.

17. The Respondent is due to pay rent at the rate of £700 per month.

18. The Respondent owes the sum of £15,400 in unpaid rent to the Applicant.

19. The Applicant served an AT6 Notice and Notice to Quit on the Respondent on 16 January 2023.

20. The Applicant has issued letters in compliance with the Rent Arrears Pre Action Protocol.

21. The Respondent's rent arrears are not attributable to a failure or delay in the payment of a relevant benefit.

22. Between January 2021 and August 2022, the Respondent provided fishing days, river management and ghillie services to the Applicant.

23. The Respondent issued invoices to the Applicant in connection with the services provided on 1 June 2021, 1 September 2021, 1 October 2021, 1 December 2021 and 29 April 2021.

24. The Applicant deducted the rent due by the Respondent from the sums invoiced. Rent for the period January 2021 to February 2022 was collected in this way.

25. The arrangement for services ended in August 2022. No further invoices were received for the period March to August 2022.
26. The arrangement for the collection of rent by way of deduction from the invoices was an informal agreement.
27. The Respondent has paid no rent since February 2022.
28. The Respondent is in ill health. He has vacated the property and obtained alternative accommodation. The tenancy has not been relinquished because there are still a number of items belonging to the Respondent within the property, the outbuildings and garage.

Reasons for Decision

29. The application was submitted with an assured tenancy agreement. The initial term of the tenancy was a period of 6 months from 1 May 2015 with a provision that it would continue on a month to month basis, if not terminated at the end of the initial term. The Applicant also submitted a Notice to Quit and AT6 Notice, with a post office certificate of posting dated 16 January 2023 and track and trace report . This establishes that the Notices were delivered on 17 January 2023. The Notice to Quit called upon the Respondent to vacate the property on 17 March 2023, which is not an ish date. However, the Applicant relies on Section 18(6) of the 1988 Act, which stipulates that the Tribunal can grant an order for possession of a property on certain grounds, in the absence of a valid Notice to Quit, if “(b) the terms of the tenancy make provision for it to be brought to an end on the ground in question.” The application is based on grounds 11 and 12 of schedule 5, both of which are narrated in full in the tenancy agreement as grounds upon which the landlord might seek possession of the property. The AT6 Notice is in the prescribed format and specifies grounds 11 and 12. It states that the earliest date that proceedings can be taken is 17 March 2023, giving the Respondent more than two weeks notice, as required by Section 19(4) of the 1988 Act. A copy of a section 11 Notice has also been lodged, with evidence that it was sent by email to the Local Authority. The Tribunal concludes that the Applicant has complied with Sections 19 and 19A of the 1988 Act.
30. Section 18 of the 1988 Act (as amended by the Cost of Living (Scotland) Act 2022) states:-
 - (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 the Act.
 - (4) If the First-tier Tribunal is satisfied that any of the grounds in Part i or 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

- (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 Scottish Ministers in regulations.

31. Ground 11 of Schedule 5 states, “ 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.”. Ground 12 states, “Some rent lawfully due from the tenant – (a) is unpaid on the date on which the proceedings for possession are begun: and (b) except where subsection 1(b) of Section 19 of this Act applies, was in arrears at the date of the service of the notice under that section relating to those proceedings”.

32. It is accepted by the Respondent that the tenancy is an assured tenancy under the 1988 Act. In addition to the landlord/tenant relationship there was a commercial relationship between the parties. The Respondent provided certain services – fishing days, ghillie services, river management and maintenance. The Respondent was not an employee of the Applicant. He was self employed and would issue invoices for the services provided. There was no written contract between the parties for these services. However, it was informally agreed that the rent would be deducted from sums due in terms of the invoices before payment was made. In response to a direction issued by the Tribunal, the Applicant provided bank statements and copies of invoices for the period 1 January 2021 to 1 February 2022. These documents show the rent for that period being deducted before the invoices were paid.

33. The parties are also agreed that the provision of services ceased in August 2022. The Respondent stated that there is an outstanding invoice for the services provided between March and August 2022, issued in October 2022. Although a direction was issued for a copy of this invoice, the Respondent failed to provide it and the Applicant maintains that it was never received. The Respondent claims that substantial sums are owed in terms of that invoice - £13000 was mentioned at the first CMD and £15000 at the second. However, they have failed to provide the Tribunal with a copy or indeed issue a copy to the Applicant when they notified the Respondent that no invoice had been received. In the absence of evidence that the invoice was issued, the Tribunal is not persuaded that it exists. In any event, the question of whether the Applicant owes the Respondent money is not relevant to the present application. It is also outwith the jurisdiction of the Tribunal. Even if a sum of money is owed (which appears to be in dispute), it is evident that the Respondent has remained in occupation of the property and has made no payments to the rent account since February 2022. The sum of £15,400 is now outstanding. The arrangement regarding deduction of rent from invoices was

informal and convenient, but not binding on either party. The Tribunal is satisfied that Grounds 11 and 12 are both established.

34. The Tribunal proceeded to consider whether it would be reasonable to grant the order for possession and noted the following:-

(a) The Applicant has issued letters in compliance with the Rent Arrears Pre Action Protocol.

(b) The arrears are not due to a delay or failure in the payment of a relevant benefit, such as housing benefit or universal credit. The Respondent only receives ADP. Although he is not working due to ill health, his wife is in employment and the Applicant is not in receipt of means tested benefits.

(c) The rent arrears are substantial and are increasing.

(d) The Respondent states that he moved out of the property in October 2023. However, all possessions have not been removed and the tenancy has not been relinquished. Alternative accommodation has been obtained.

35. Having regard to the factors listed in (a) to (d) above, the Tribunal is satisfied that it is reasonable to grant an order for possession of the property.

36. As the Applicant has complied with the requirements of the 1988 Act, and as the Tribunal is satisfied that it would be reasonable to grant the order, the Tribunal determines that an order for possession should be granted.

Decision

37. The Tribunal determines that an order for possession of the property should be granted against the Respondent.

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.