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 33 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/24/1985

Re: Property at 11 Fyne Court, Hamilton, ML3 8UH ("the Property")

Parties:

Mr Richard Caplan, Office 2, Room 8, Kirkhill House, Broom Road East, Newton Mearns, G77 5LL ("the Applicant")

Ms Sylvia Johnstone, 11 Fyne Court, Hamilton, ML3 8UH ("the Respondent")

Tribunal Members:

Sarah O'Neill (Legal Member) and Gordon Laurie (Ordinary Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that an order for recovery of possession should be granted in favour of the Applicant. The tribunal delayed execution of the order until 13 January 2025.

Background

1. An application was received from the Applicant's representative on 1 May 2024 under rule 66 of Schedule 1 to the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 ('the 2017 rules') seeking recovery of possession of the property under a short assured tenancy by the Applicant against the Respondent.

2. Attached to the application form were:

   (i) The short-assured tenancy agreement between the parties which commenced on 10 April 2009.
   (ii) Form AT5 relating to the tenancy dated 10 April 2009 and signed by the Respondent on the same date.

(iii) Copy notice required under section 33 of the 1988 Act ('the section 33 notice') dated 31 October 2023 and addressed to the Respondent.
(iv) Copy Notice to Quit dated 31 October 2023 addressed to the respondent, requiring her to remove from the property on or before 10 April 2024.
(v) Covering letter dated 31 October 2023 addressed to the Respondent.
(vi) Certificate of posting relating to the Notice to Quit and section 33 notice, dated 31 October 2023.
(vii) Copy notice under section 11 of the Homelessness etc (Scotland) Act 2003 to South Lanarkshire Council with proof of sending by email on 1 May 2024.

3. Following a request by the tribunal administration, further information was received from the Applicant's representative on 31 May 2024.

4. The application was accepted on 21 June 2024.

5. Notice of the case management discussion, together with the application papers and guidance notes, was served on the Respondent by sheriff officers on behalf of the tribunal on 25 September 2024.

6. The Respondent was invited to submit written representations to the tribunal by 14 October 2024. No written representations were received from her prior to the case management discussion.

7. The tribunal issued a direction to the Applicant on 7 October 2024 requiring him to provide further information regarding the ish date of the tenancy and the date stated in the Notice to Quit by 22 October 2024. A response was received from the Applicant's representative on 22 October 2024.

The case management discussion

8. A case management discussion (CMD) was held by teleconference call on 29 October 2024. The Applicant was represented on the teleconference call by Mr James McMillan of Ecosse Estates Ltd. The Respondent was not present or represented on the teleconference call. The tribunal delayed the start of the CMD by 15 minutes, in case the Respondent had been detained. She did not attend the teleconference call, however, and no telephone calls, messages or emails had been received from her.

9. The tribunal was satisfied that the requirements of rule 17 (2) of the 2017 rules regarding the giving of reasonable notice of the date and time of a CMD had been duly complied with. The tribunal therefore proceeded with the CMD in the absence of the Respondent.

Preliminary issue

10. The tribunal noted that the initial term of the tenancy agreement was 10 April 2009 to 9 October 2009. There did not appear to be any provision in the lease for the tenancy to continue for a shorter period following the end of that term. It therefore appeared that the tenancy agreement has continued by tacit relocation on a six monthly basis. If that was the case, it appeared to the Tribunal that the "ish" or termination date of the tenancy would be 9th October/April, rather than 10th, which was the date stated in the Notice to Quit dated 31 October 2024.

11. The tribunal asked the Applicant to address this issue in its direction of 7 October 2024. With his response of 22 October 2022 on behalf of the Applicant, Mr MacMillan had enclosed a further Notice to Quit and section 33 (1) (d) notice from the Applicant addressed to the Respondent. These were dated 15 November 2023 and stated the "ish" or termination date of the tenancy to be 9th April 2024. No proof of posting of these was included, but there was an email dated 22 October 2024 from the Respondent to Mr MacMillan confirming that she had received the notices sent on 15 November 2023 by regular post.

12. Mr MacMillan explained to the tribunal that a number of Notices to Quit had been sent by A Need to Sell, which was a partnership between the Applicant and his brother, to different tenants at the same time. There had been an administrative error on the part of Ecosse Estates Ltd and the inaccuracy in the dates of the original Notice to Quit and section 33 notice had been discovered within 10 days of sending them out. At that point the updated notices with the correct ish date of 10 April had been issued. The notices had been delivered to the Respondent personally by the Applicant and by standard post.

13. The tribunal noted, with reference to Stalker: Evictions in Scotland (Second Edition) at pages 498-499, that a landlord may serve a Notice to Quit by personal delivery to the tenant or by ordinary post. Given that the Applicant has produced confirmation from the Respondent that she received the updated notices, the tribunal is satisfied that these were served on the Respondent.

The applicant's submissions

14. Mr MacMillan asked the tribunal to grant an order in favour of the Applicant against the Respondent for recovery of possession of the property. He explained that the Applicant and his brother, Mr Brian Caplan, were both directors of four property businesses, including A Need to Sell and three companies, including Ecosse Estates Ltd. They owned around 150 properties in total across the four businesses. The partnership, namely A Need to Sell, had a portfolio of 40 properties, and had decided to sell 15 of these. The property which this application concerns is one of those properties.

15. The 15 properties to be sold had been chosen because they had been purchased in 2009, prior to the establishment of the later property companies. They were financed differently, via personal buy to let mortgages taken out by the Applicant and/ or his brother. Recent changes in interest rates meant that it was not feasible to maintain them on a buy to let basis, given the level of the rents being paid and the mortgage payments on the properties. As A Need to Sell was a partnership rather than a limited company, this also meant that the tax paid on rental income for these properties was higher.

16. All of this meant that the Applicant had been losing money on the property, which was owned in his sole name, for some time. The current rent being paid by the Respondent was £625 per month, and the Applicant's mortgage payments on the property were £621 per month. It would not be viable to sell the property with the Respondent as a sitting tenant. The Applicant had paid too high a price for the property in the first place, and the level of rent currently being paid would not be attractive to other investors. Current rents for a similar property in the area would be around £900 per month.

17. Mr MacMillan said that the Applicant had held out for some time against selling this property as the Respondent was a longstanding tenant. He said that the Applicant was a good landlord who had tried to be as flexible as possible. He pointed out that the Applicant had given the Respondent more than 6 months' notice and had offered in the cover letter sent out with the original notices to discuss selling the property to the Respondent were she in a position to buy.

18. The tribunal asked Mr MacMillan what he knew about the Respondent's circumstances. He said that the Respondent is aged around 50, lives alone and has no health issues which he is aware of. He had spoken to the Respondent a few days ago and said that she understood the Applicant's reasons for selling and accepted that she would need to leave the property. She had approached the council regarding housing and had been told that she would need an eviction order before the council could assist her with finding alternative accommodation.

Findings in fact

19. The tribunal made the following findings in fact:

i. The Applicant owns the property.
ii. The Applicant is the registered landlord for the property.
iii. There is a short-assured tenancy in place between the parties. The tenancy commenced on 10 April 2009 for an initial period of 6 months, and had then continued by tacit relocation on a six-monthly basis.
iv. The rent at the start of the tenancy was £550 per month and is currently £625 per month.
v. The form AT5 was in the prescribed format and the short-assured tenancy agreement between the parties was validly constituted.

vi. The tenancy agreement provided that either party could terminate the tenancy by providing two months' notice.
vii. The Notice to Quit and the section 33 notice dated 15 November 2023 stated that the Applicant required vacant possession of the property on or before 9 April 2024. These provided more than two months' notice of vacant possession.
viii. The notices dated 15 November 2023 had been sent to the Respondent by standard post on or around that date and had been received by the Respondent on or around 17 November 2023.
ix. The tenancy reached its ish on 9 April 2024.
x. The Respondent is still resident in the property and lives there alone.
xi. The Respondent is currently paying rent of £625 per month.

Reasons for decision

20. The tribunal considered that in the circumstances, it was able to make a decision at the CMD without a hearing as 1) having regard to such facts as were not disputed by the parties, it was able to make sufficient findings to determine the case and 2) to do so would not be contrary to the interests of the parties.

21. The tribunal noted that section 33 (1) of the 1988 Act as amended by the 2020 Act states:

(1) Without prejudice to any right of the landlord under a short assured tenancy to recover possession of the house let on the tenancy in accordance with sections 12 to 31 of this Act, the First-tier Tribunal may make an order for possession of the house if the Tribunal] is satisfied—

(a)that the short assured tenancy has reached its finish;

(b)that tacit relocation is not operating;

(c). . . . . .

(d)that the landlord (or, where there are joint landlords, any of them) has given to the tenant notice stating that he requires possession of the house, and

(e)that it is reasonable to make an order for possession.

22. The tribunal was satisfied that the short-assured tenancy agreement between the parties had been validly constituted. It was also satisfied that the short-assured tenancy had reached its ish; that tacit relocation was not operating; and that the Notice to Quit and section 33 notice dated 15 November 2023 had been validly served on the Respondent, for the reasons set out above.

23. The tribunal then considered whether it was reasonable to make an order for recovery of possession. In doing so, it took into account all of the circumstances of the case.

24. The tribunal noted that it was not financially viable for the Applicant to continue to rent out the property at the current rent as he was currently losing money on it. The property was not attractive to other buy to let landlords with a sitting tenant, given the level of rent. The tribunal noted that the Applicant had kept the rent low, had given the Respondent more notice than was legally required and that he had indicated a willingness to discuss selling the property to the Respondent were she in a position to buy.

25. The tribunal noted that as the owner of the property, the Applicant has a legal right to use and dispose of it as they see fit, within the confines of the law. It also noted that at the start of the short assured tenancy, given the rules that were in place at that time, the Applicant might have expected to be granted an eviction order automatically if the tribunal was satisfied that the applicant had followed the correct rules in terms of creating the tenancy and serving the various notices correctly. The Notice to Quit had been served on the Respondent almost a year ago. She had therefore been aware for some time that the Applicant sought to repossess the property.

26. The tribunal took into account what it knew about the Respondent's circumstances. She has been living in the property for 15 years and there was no suggestion that the Applicant had experienced any difficulties with her as a tenant.

27. The Respondent had not opposed the application. In the absence of written representations from the Respondent or any appearance by her at the CMD, the information available to the tribunal about her personal circumstances was unfortunately limited.

28. The tribunal noted that the Respondent appeared to have been advised by South Lanarkshire Council that in order to be considered as a priority case for council housing, she would need to be in possession of an eviction order.

29. Having carefully considered all of the evidence and all of the circumstances of the case as set out above, the tribunal considered that on balance it was reasonable to grant an eviction order. It gave particular weight to the fact that the Respondent had not opposed the application, and that obtaining an eviction order would assist her with her application to the local authority for permanent accommodation.

30. The tribunal therefore determined that an order for recovery of possession should be granted in favour of the Applicant.

31. Before deciding to grant the order, the tribunal asked Mr MacMillan for his views on the possibility of delaying execution of the eviction order in terms of rule 16A of the 2017 rules, to give the Respondent more time to find a new property. Mr MacMillan said that believed the Applicant would be happy to allow the Respondent to stay in the property until after Christmas. He said that the Applicant would not wish to see the Respondent in a situation where she had nowhere else to go.

Decision

The tribunal granted an order in favour of the Applicant against the Respondent for recovery of possession of the property. The tribunal delayed execution of the order until 13 January 2025.

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.

Sara O'Neill	**29 October 2024**
Legal Member/Chair	**Date**