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 of the Housing (Scotland) Act 1988

Chamber Ref: FTS/HPC/EV/24/1962

Re: Property at 4 Heron Place, Kirkcaldy, KY2 6NB ("the Property")

Parties:

Mr Mark Brown, Mrs Nicola Brown, 52 Westholme Avenue, Aberdeen, AB15 6AB ("the Applicants")

Louise Lead, 4 Heron Place, Kirkcaldy, KY2 6NB ("the Respondent")

Tribunal Members:

Nairn Young (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that

- Background

This is an application for an order for recovery of possession of the Property, which is let to the Respondent by the Applicants in terms of an assured tenancy. It called for a hearing at 10am on 14 February 2025 at 10am, by teleconference. The Applicants were on the call in-person and represented by Mr Napier of Anderson Strathern, solicitors. The Respondent was also on the call and was represented by Ms Iona Watson of Frontline Fife.

The matter had previously called for a case management discussion ('CMD') on 25 October 2024. It was identified in the note on the CMD prepared by the member chairing it that the Applicant was to address the question of when the correct ish date

under the tenancy was and whether a valid notice to quit had been served at this hearing. At the hearing, the Tribunal asked for this issue to be addressed first, effectively as a preliminary issue: an approach neither party objected to.

- Findings in Fact and in Law

1. The Applicants let the Property to the Respondent in terms of an assured tenancy with an initial term running from and including 1 November 2013 to 1 May 2014.

2. In terms of the tenancy agreement, rent was payable on the second day of each month.

3. The tenancy agreement contained the following terms regarding termination:

   "Landlord Notice

   (a) The landlord may end the tenancy by giving notice in writing to the tenant of not less than two months where the notice starts on a rent due date and ends no later than the last day of the fixed term.
   (b) Where the tenant is in breach of the letting provisions then the landlord may end he [sic] tenancy by giving fourteen days notice at any time.
   …

   Tenant Notice

   The tenant may end the tenancy by giving notice in writing to the landlord of not less than two months where the notice starts on a rent due date and ends no later than the last day of the fixed term."

4. Following the end of the initial term, the contractual tenancy ran on by tacit relocation.

5. On 26 October 2023, the Applicants purported to serve notice to quit upon the Respondent, identifying 9 December 2023 as the termination date.

6. That notice was ineffective, having failed to give the requisite two months notice and, separately, not having been served on a rent due date.

7. The lease continues as a contractual tenancy by tacit relocation.

- Reasons for Decision

8. This application is for an order for possession under s.18 of the Housing (Scotland) Act 1988. So far as is relevant to this decision, that section reads:

> "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.
>
> …
>
> (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 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.

…

(7) Subject to the preceding provisions of this section, the First-tier Tribunal may make an order for possession of a house on grounds relating to a contractual tenancy which has been terminated; and where an order is made in such circumstances, any statutory assured tenancy which has arisen on that termination shall, without any notice, end on the day on which the order takes effect."

9. It was accepted by the parties that the effect of the quoted provisions, taken together, was that, in this case, the 'notice to quit' served on 26 October 2023 had to be effective in terminating the contractual tenancy, in order for the application to be capable of being granted. That is because the ground relied on in this case (ground 1A of schedule 5 to the Act) does not meet either of the requirements set out in s.18(6)(a) and (b). It was therefore a prerequisite for the application to be successful that the tenancy had become a statutory tenancy.

10. The three salient questions that had to be addressed were therefore:

- Did the notice identify an ish date?
- Was sufficient notice given to terminate the tenancy on that date?
- Was the notice validly served on the date it was served?

11. In his submission on behalf of the Applicants, Mr Napier suggested the Tribunal should answer all three of these questions in the affirmative. On the question of the ish date, he noted that the initial term according to the agreement was stated to run, "From & including: 01 November 2013, To & including: 01 May 2013." It appeared from this that there had been a typographical error in the later of these dates, which had to be interpreted to

mean ‘01 May 2014’; but, otherwise, the intention was clear that the initial term was to include both the first date and last date mentioned. This gave an initial term of 6 months and 1 day. On that basis, unless the lease were terminated by either party, tacit relocation would operate to add a further 6 months and 1 day to its term on each ish date. On that basis, 9 December 2023 was an ish date and could therefore be a valid date of termination.

12. On the other two questions, Mr Napier’s submission was in effect that the term of the tenancy set out at para.3, above, was an optional, additional procedure, over and above the requirement to give 40 days notice of termination, found in the Sheriff Courts (Scotland) Act 1907. Support for this interpretation is found in the use of the word ‘may’, which, Mr Napier invited the Tribunal to hold, had to be read permissively. Read this way, there were in effect two means by which the landlord could opt to terminate the tenancy, absent the tenant being in breach of its terms: the procedure requiring notice of no less than two months to be served on a rent due date, set out in the agreement; and the 1907 Act process, by which notice could be served at any time, provided it were at least 40 days prior to the ish date.

13. In response, Ms Watson confirmed that her client considered the notice to quit invalid, on the ground that it had not given 2 months notice.

14. Following a short adjournment for the Tribunal to consider the submissions, Mr Napier indicated that he wished also to draw the Tribunal’s attention to the fact that a form AT6 had been served on the Respondent on 25 January 2024, indicating an intention to raise proceedings on ground 1A no earlier than 26 March 2024.

15. The Tribunal considered that the notice to quit was not valid and that the contractual tenancy had not therefore been terminated.

16. It agreed with the submission on behalf of the Applicants that the initial term had been agreed to be for 6 months and 1 day and that, therefore, each extension under tacit relocation would be for that period. On that basis, the

notice had identified an ish date correctly. However, it did not accept the Applicants' submissions in relation to the other two questions set out at para.10, above. It made no sense for the provision regarding termination of the tenancy to be read to be an optional, additional procedure, over-and-above the procedure set out in the 1907 Act. There would be no reason for parties to agree such a procedure, in circumstances where its requirements were more onerous than the purported alternative, if that procedure were to be optional. Put another way, why would a landlord (or tenant) ever use such a procedure, if a less onerous one were available? Rather, the word 'may', properly read in this context, must refer to the fact that termination of the contract is optional, and not the means by which termination may be effected.

17. The service of the AT6 was not relevant to the issue of validity of the notice to quit. An AT6 is a separate type of notice required by the 1988 Act and does not, on its own, have the effect of terminating the tenancy. That must still be done by an effective notice to quit.

18. The notice to quit was therefore deficient in failing to give sufficient notice to the Respondent and in failing to be served on a rent due date. It follows that the contractual tenancy remains and, in terms of s.18(6), the Tribunal may not make an order for recovery of possession. The application falls to be refused.

- Decision

Application 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.

N.Young

Legal Member/Chair _ _**19/02/2025**__ **Date**