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 ("the 1988 Act")

Chamber Ref: FTS/HPC/EV/24/4194

Re: Property at 62 Tollhouse Gardens, Tranent, E Lothian, EH33 2QQ ("the Property")

Parties:

Mrs Joan Rosselle, 140 Main Street, Neilston, Glasgow, G78 3JX ("the Applicant")

Miss Caitlin McDonald, 62 Tollhouse Gardens, Tranent, E Lothian, EH33 2QQ ("the Respondent")

Tribunal Members:

Sarah O'Neill (Legal Member) and Jane Heppenstall (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.

Background

1. An application was received from the Applicant on 10 September 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) Copy short-assured tenancy agreement between the parties which commenced on 1 November 2017.
   (ii) Form AT5 relating to the tenancy dated 20 February 2016 and signed by the parties on 5 and 6 October 2017 respectively.

(iii) Copy undated notice required under section 33 of the 1988 Act ('the section 33 notice') addressed to the Respondent.
(iv) Copy Notice to Quit dated 2 June 2024 addressed to the Respondent, requiring her to remove from the property on or before 2 September 2024.
(v) Various certificates of posting dated 29 April 2024 and 3 June 2024 relating to letter sent be recorded delivery.
(vi) Copy undated notice under section 11 of the Homelessness etc (Scotland) Act 2003 addressed to the City of Edinburgh Council.
(vii) Copy emails from the Applicant to the Respondent dated 28 and 29 April and 3 June 2024.

3. Further information was received from the Applicant on 27 September and 10 October 2024.

4. The application was accepted on 7 November 2024.

5. Notice of the case management discussion scheduled for 13 May 2025, together with the application papers and guidance notes, was served on the Respondent by sheriff officers on behalf of the Tribunal on 5 March 2025. The Respondent was invited to submit written representations to the Tribunal by 22 March 2025.

6. The Tribunal issued a direction to the Applicant on 7 April 2025, directing her to provide further information in relation to the section 11 notice and the Notice to Quit by 29 April 2025. A response was received from the Applicant on 12 April 2025.

7. No written representations were received from the Respondent prior to the case management discussion.

The case management discussion

8. A case management discussion (CMD) was held by teleconference call on 13 May 2025. The Applicant was present on the teleconference call and represented herself. The Respondent was not present or represented. The Tribunal delayed the start of the CMD by 10 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 issues

10. The Tribunal raised two preliminary issues with the application, both of which were related to the subject matter of its direction of 7 April 2025.

11. Firstly, the Tribunal noted that the section 11 notice which the Applicant had provided was addressed to the City of Edinburgh Council, rather than East Lothian Council. It was also unclear when it had been sent.

12. The Applicant said that she had posted two section 11 notices on the same date, 29 April 2024, with regard to both the property and another rental property in Edinburgh. The other section 11 notice was sent to Edinburgh Council and she had produced a certificate of posting dated 29 April 2024 which related to both notices, as well as notices to quit for both properties. She may have made a mistake in completing the name of the Council on the notice for the property, but the landlord registration number stated on the notice was the correct one for East Lothian Council. She said that she had sent the notice to the correct Council, pointing out that one of the postcodes showing on the certificate of posting was for the homelessness unit at East Lothian Council. Having checked this postcode, the Tribunal was satisfied that this was the case.

13. The Tribunal noted, however, that the section 11 notice was sent to East Lothian Council on 29 April 2024, several months before the application was submitted. The Applicant explained that she had sent a previous Notice to Quit to the Respondent on that date, as again evidenced by the certificate of posting for that date. There had been a typographical error in that notice, however, and she had sent a later Notice to Quit to the Respondent on 3 June 2024. She had not, however, re-sent the section 11 notice.

14. The Tribunal noted that rule 66 (b) (v) of the 2017 rules requires that an application under section 33 of the 1988 Act must be accompanied by "a copy of the notice by the landlord given to the local authority under section 11 of the Homelessness (Scotland) Act 2003". The Applicant had complied with this requirement. The Tribunal noted, however, that in relation to short assured tenancies, it appears that the section 11 notice should be given at the same time as, or shortly after the proceedings are raised (Stalker: Evictions in Scotland (Second Edition) at page 246), which did not happen in this case.

15. The Tribunal also noted, however, that in Stalker's view (see reference above), given the drafting of the legislation and the statutory form*: "It is therefore doubtful that failure to serve the notice could be a basis on which to hold that the action is incompetent: the wording of the provisions is not such as to indicate that service of the notice is a prerequisite to an action".* The Tribunal therefore took the view that, although the section 11 notice appeared to have been served prematurely, this did not in itself render the application invalid.

16. The second preliminary issue related to the service of the Notice to Quit dated 2 June 2024. While the Applicant had produced a second certificate of posting to the property address dated 3 June 2024, she had been unable to provide proof of delivery. She had produced an email to the Respondent dated 2 June 2024, attaching a copy of the Notice to Quit and stating that she would send it by post the following day. The Tribunal noted that email was not a valid method of service under section 54 of the 1988 Act.

17. The Applicant said that she had sent the Notice to Quit and the section 33 notice by recorded delivery on 3 June 2024, but that no proof of delivery was showing on the Royal Mail website. She had called Royal Mail to find out if they could locate the signature. They had apologised and told her that something had gone wrong but that they were unable to do anything about it.

18. In light of the evidence produced by the Applicant, and the lack of any objection by the Respondent, the Tribunal concluded that the Notice to Quit and section 33 notice had been validly served on the Respondent.

The Applicant's submissions

19. The Applicant told the Tribunal that she had made the application because she wished to sell the property. The property was one of a portfolio of 9 rental properties which she owned jointly with her former husband. They had entered into an agreement under which all of the properties were to be transferred into her sole name, and she was required to pay him a sum of money. Recent increases in mortgage rates, together with the inability to increase the rent in recent years, meant that she was losing money on the property.

20. In order to pay her former husband the amount he was due, she said that she would need to sell all of the rental properties. She and her family had moved into one of the rental properties, and she had used the proceeds of another sale to pay off the remaining mortgage on that property. Most of the other properties had already been sold. One had been sold back to the council at a loss, and two had been sold with a sitting tenant, for less than she had anticipated. Another was also sold for less than expected due to repairs issues. She had submitted eviction applications to the First-tier Tribunal with regard to the two remaining properties. All of the properties were mortgaged and there was not much equity (roughly £10000 each) in any of them.

21. Her former husband had anticipated that he would receive the money owed to him much more quickly than was proving to be the case. She therefore needed to sell the property as soon as possible.

22. The Applicant has four children, two of whom have now left home. The two younger children, one of whom is at university and the other who is at secondary school, live with her. She works full-time as a teacher.

23. The Tribunal asked the Applicant what she knew about the Respondent's circumstances. She said that she had not had much contact with the Respondent during her tenancy, other than when there had been any issues with the property. She believed that the Respondent was still living in the property but there had been no recent contact with her. The Applicant had sent the Respondent a rent increase notice in January 2025. She had not received an email from the Respondent since May 2024.

24. The Respondent lives in the property with her son, whom the Applicant believes is of primary school age. The Applicant thought that the Respondent is in employment. She said that the Respondent had been a great tenant who had always paid her rent on time. The Applicant did not know whether all or some of the rent is paid by housing benefit, as the Respondent has always paid the rent directly to her.

25. The Applicant had offered to sell the property to the Respondent at market value in April 2024, but the Respondent had said that she was not in a position to buy it. She had considered the possibility of selling the property with the Respondent as a sitting tenant, as she had done with two other properties. She had concluded, however, that this was not a realistic option as the rent, even following the increase to £824 per month from 1 May 2025, was not high enough to secure a good price for the property.

26. The Applicant said that she believed that the Respondent had been in touch with East Lothian Council in around June 2024. She had the impression that the council had told the Respondent to remain in the property until she had received an eviction order.

Findings in fact

27. The Tribunal made the following findings in fact:

    i. The Applicant owns the property jointly with her former husband, Mr Vincent Rosselle. The Applicant is the registered landlord for the property.
    ii. The property is one of a portfolio of 9 rental properties owned jointly by the Applicant and Mr Rosselle.
    iii. The Applicant and Mr Rosselle entered into a minute of agreement which was registered in the Books of Council and Session on 19 April 2023. In terms of the minute of agreement, the Applicant and Mr Rosselle agreed that 8 rental properties (it having been agreed that one would be sold to the City of Edinburgh Council) would be transferred into the Applicant's sole name. They also agreed that the Applicant would pay to Mr Rosselle the sum of £67,608, less half the costs of sale of one of the rental properties.

iv. The tenancy between the parties commenced on 1 November 2017 and was initially for a period of 6 months until 2 May 2018 (both dates inclusive). It had then continued by tacit relocation on a monthly basis after the end of the initial term.
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 the minimum notice to be given by the Applicant would be in accordance with the statutory provisions in force from time to time.
vii. The Notice to Quit and the section 33 notice dated 2 June 2024 stated that the Applicant required vacant possession of the property on or before 2 September 2024. These provided more than two months' notice of vacant possession.
viii. The notices dated 2 June 2024 were validly served on the Respondent by recorded delivery post on or around 4 June 2024.
ix. The tenancy reached its ish on 2 September 2024.
x. The Respondent is currently resident in the property and lives there with her son.

Reasons for decision

28. 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.

29. The Tribunal noted that section 33 (1) of the 1988 Act as amended 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.

30. 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 2 June 2024 had been validly served on the Respondent, for the reasons set out above.

31. 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.

32. The Tribunal 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, were the Tribunal satisfied that she 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.

33. The Tribunal also noted the Applicant's position that given her financial situation, she needed to sell all of the rental properties, including this one, in order to pay her former husband the sum that she was required to pay him under the minute of agreement.

34. The Tribunal also noted that the Applicant had given the Respondent the opportunity to buy the property, but that she had been unable to do so.

35. In the absence of any appearance by the Respondent or any written representations from her, the information available to the Tribunal about her circumstances was limited. She had been living in the property for more than 7 years and the Applicant had said she was a very good tenant who had always paid the rent of the time. She was, however, facing the loss of her home through no fault of her own. She appears to have a primary school age child living with here, who presumably attends school in the area.

36. The Respondent has not opposed the application, however. It may be that she wishes an eviction order to be granted, to allow her to secure council or other social housing. The Tribunal has little information about this, however, in the absence of any representations from her.

37. Having carefully considered all of the evidence and all of the circumstances of the case as set out above, the Tribunal found that there was a difficult balance to be struck here. While it acknowledged the difficulties the Applicant finds herself in, it also notes that the Respondent faces a very difficult situation, for the reasons outlined 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.

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

Decision

39. The Tribunal granted an order in favour of the Applicant against the Respondent for recovery of possession of the property.

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.

Sarah O'Neill

13 May 2025

Legal Member/Chair **Date**