



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/20/0815

Re: Property at 26 Albans Terrace, Dundee, DD3 9QA (“the Property”)

Parties:

Ramsay’s Properties Ltd, Unit 7, 15 Kirk Street, Dundee, DD2 3UY (“the Applicant”)

Ms Leah McConnachie, 26 Albans Terrace, Dundee, DD3 9QA (“the Respondent”)

Tribunal Members:

Ruth O’Hare (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined to refuse the application and make no order.

Background

- 1 By application dated 4 March 2020 the Applicants sought an order for repossession against the Respondent under section 33 of the Housing (Scotland) Act 1988 (“the 1988 Act”). The following documents were submitted in support of the application:-
 - (i) Copy Tenancy Agreement between the parties dated 19 November 2016 and Form AT5 of same date;
 - (ii) Copy Notice to Quit dated 10 December 2019 terminating the tenancy as at 2 March 2020;
 - (iii) Copy Notice under section 33(1)(d) of the 1988 Act dated 10 December 2019 intimating that the landlord required possession of the house as at 2 March 2020;

- (iv) Execution of Service from Sheriff Officers in relation to the aforesaid Notices dated 11 December 2019; and
 - (v) Notice under section 11 of the Homelessness etc (Scotland) Act 2003 to Dundee City Council.
- 2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds to reject the application. A Case Management Discussion was therefore assigned for 19 August 2020. Due to the ongoing restrictions caused by the Covid-19 pandemic, a Direction was issued by the Chamber President confirming that the case conference would take place by tele-conference.
 - 3 The application paperwork together with notification of the date, time and location of the Case Management Discussion was served on the Respondent by Sheriff Officers.
 - 4 On 14 August 2020 the Tribunal received email correspondence from the Respondent's Representative Ms Rebecca Menzies of Dundee North Law Centre. In summary, Ms Menzies advised that it was the Respondent's position that she had signed a private residential tenancy agreement with the Applicant in December 2018 and therefore the action was incompetent. The Tribunal subsequently received further written representations from the Applicant advising that there was no private residential tenancy agreement in their records for the Respondent. It had been discussed but after further advice it was decided to keep the short assured tenancy agreement in place. To the best of the Applicant's knowledge the lease attached to the application was the correct one.

The Case Management Discussion

- 5 The Case Management Discussion took place on 19 August 2020. Mrs Elizabeth McBain appeared on behalf of the Applicant. The Respondent was in attendance and represented by Ms Rebecca Menzies. The Respondent confirmed that she had instructed Ms Menzies to speak on her behalf.
- 6 Mrs McBain advised that the Applicant sought the order under section 33 of the Housing (Scotland) Act 1988. The relevant notices and forms had been completed. The Applicant wanted to get the property back.
- 7 Ms Menzies confirmed that the Respondent did not dispute that she had signed the Short Assured Tenancy Agreement which had been lodged with the application. However it is her position that latterly she discussed and signed a new private residential tenancy agreement. She was advised by the Applicant at the time that this was a new style of tenancy which had no end date and did not require to be signed every year. The agreement had been signed at her sister's house. Her sister is also a tenant of the Applicant and was also signing a new private residential tenancy agreement at the time. The Respondent's

sister would be willing to give evidence. The Respondent hasn't been able to locate a copy of the tenancy agreement as yet, but was continuing to make enquiries in this regard. Ms Menzies wondered if it had become attached to her sister's agreement.

- 8 Mrs McBain advised that no private residential tenancy agreement had been signed between the parties. There had been discussions back in 2018, but ultimately the Applicant had decided to keep the Respondent on a short assured tenancy agreement following advice on the issue. Mrs McBain confirmed her understanding that all of the Applicant's tenants who pre-dated the new private residential tenancy regime would have remained on short assured tenancy agreements, however she would have to double check this point just to be sure. She advised that one of the reasons why the Respondent was left on the short assured tenancy agreement was because of her rent arrears. The Applicant was keen to obtain the order for possession as a result of the ongoing rent arrears which were increasing.
- 9 Having heard from the parties, the Tribunal determined that a hearing would be required in the matter and identified the issue to be resolved as follows:-
 - (a) Whether the Respondent signed a private residential tenancy agreement with the Applicant in December 2018.
 - (b) Whether therefore the tenancy agreement which governs the relationship between the parties is a private residential tenancy agreement, as opposed to a short assured tenancy agreement.
- 10 The Tribunal further noted the following matters as agreed between the parties:-
 - (a) The parties entered into a Short Assured Tenancy Agreement dated 19 November 2016.
 - (b) The term of the tenancy was from 2 December 2016 to 2 December 2017 and monthly thereafter.
 - (c) On 11 December 2019, the Respondent was served with a Notice to Quit seeking to terminate the tenancy as at 2 March 2020 and a Notice under section 33(1)(d) of the Housing (Scotland) Act 1988.
 - (d) The 2 March 2020 would be a valid ish date having regard to the provisions of the aforesaid Short Assured Tenancy Agreement.
- 11 The Tribunal issued a Direction to parties requiring any further documentation and a list of witnesses for the Hearing to be lodged with it no later than 9 September 2020.
- 12 On 23 September 2020 the Tribunal received email correspondence from the Applicant which included a copy letter sent by the Applicant to the Respondent on 20 September 2020. The letter advised that the Applicant would be willing to sign the Respondent up to a new private residential

tenancy agreement if the Respondent would be willing to make payment at the rate of £100 per month. On 2 October 2020 the Tribunal received email correspondence from the Respondent's representative Ms Menzies with copy letter she had sent to the Applicant accepting the offer. Ms Menzies advised that the Applicant had since withdrawn the offer due to concerns regarding the Respondent's income and on that basis she sought an adjournment of the Hearing for settlement discussions. Ms Menzies further advised that she had only recently been made aware of the Hearing date and therefore had not had sufficient time to prepare. On the same date the Tribunal also received email correspondence from the Applicant confirming that she wished the Hearing to proceed.

The Hearing

- 13 The Hearing took place on 6 October 2020. Ms McBain appeared on behalf of the Applicant. The Respondent was present and represented by Joyce Horseman.
- 14 As a preliminary matter Ms Horseman sought an adjournment as per Ms Menzies request. She explained that Ms Menzies was now off sick and she had therefore picked up the case in her absence. Ms Horseman advised that the Respondent had been of the view, having received the offer from the Applicant, that the Hearing would not be going ahead and accordingly had not asked her sister to be present. Ms McBain opposed the request for adjournment.
- 15 The Tribunal considered the request for adjournment, however noted that both Ms Menzies and the Respondent had been present at the Case Management Discussion in August. They were aware that the Hearing had been fixed and the requirement to produce the List of Witnesses prior to the deadline set by the Direction. No such List had been lodged therefore the Tribunal were able to conclude that only the Respondent was intending on giving evidence. The Tribunal did have sympathy with Ms Horseman, with her having had to pick up the matter at short notice, however the Respondent would retain the benefit of representation and would not therefore suffer any detriment in that respect. The Tribunal therefore had regard to the overriding objective to avoid delay insofar as compatible with the proper consideration of the issues and determined to proceed with the Hearing. The Tribunal proceeded to hear evidence from Ms McBain and from the Respondent, led by Ms Horseman, which is summarised below.
- 16 Ms McBain explained what had transpired in December 2018. She advised that the Respondent had rent arrears at the time and that was the reason why the Applicant did not want to offer her a new private residential tenancy agreement. Ms McBain had spoken with their partner agency Westport Property and had asked them for advice. They told her not to sign the Respondent up to a new private residential tenancy. Ms McBain stated that there had not been any discussions with the Respondent regarding the new tenancy agreement. Since December 2018 there had been numerous payment plans which the

Respondent had not adhered to which had culminated in the service of the Notice to Quit and Notice under section 33(1)(d) earlier this year.

- 17 In response to questions from the Tribunal, Ms McBain acknowledged that that her previous written representations and verbal submissions at the Case Management Discussion had stated that discussions had taken place in 2018 with the Respondent regarding a new private residential tenancy agreement and conceded therefore that this must have been the case. Ms McBain stated that she herself had no knowledge of the Respondent having signed a private residential tenancy agreement. The Applicant had searched their systems, files and records but had found nothing. Ms McBain advised that notes of any verbal discussions with tenants would not be recorded. It would just be any correspondence via email. When the new private residential tenancy regime had come into force, Ms McBain and colleagues had attended a seminar in Dundee about it. She noted it would have its pros and cons and may be beneficial in some cases however did not go into detail about what such pros and cons may be. She confirmed that there were other tenants who were signed up to the new private residential tenancy agreement, and that included the Respondent's sister. However she had been advised by Westport Property to keep the Respondent on a short assured tenancy and followed that advice. Westport Property was a partner agency of the Applicant dealing with commercial property. Ms McBain confirmed that in relation to any tenancy agreement signed by a tenant, the Applicant would keep a copy and the tenant would keep a copy. There was no electronic version saved.
- 18 Ms Horseman was given the opportunity to cross-examine Ms McBain. She queried why the Applicant had been prepared to sign the Respondent up to a private residential tenancy agreement in recent weeks, but not in 2018 when the arrears were lower. Ms McBain explained that she and her colleague had gone to seminars and did think about it but it didn't happen. The reason she was discussing the private residential tenancy agreement with the Respondent in 2018 was because it was all new to her. The recent offer was a lifeline with the payment plan. Ms Horseman then took Ms McBain through the rent account, with the intention of outlining the payments that had been made by the Respondent during the tenancy. Ms McBain confirmed that there had been months when the Respondent had paid rent, but many months when she hadn't.
- 19 Ms Horseman asked about the seminar Ms McBain had attended back in 2018. Ms McBain explained that the Council had organised it in the central library in Dundee. She had gone along to find out what would be required of the new private residential tenancy. It was a good seminar. She noted that the new tenancies had pros and cons. As a result she had considered in quite a lot of detail whether to offer one to the Respondent. It had not been a flippant decision.
- 20 The Respondent then gave evidence, led by Ms Horseman. She explained that the private residential tenancy agreement had been the third agreement she had signed with the Applicant. There had been the agreement produced with application which was signed in November 2016 and a year later a further agreement was signed in 2017. With regard to the private residential tenancy

agreement, both the Respondent and her sister had been approached by the Ms McBain and had been told that the new tenancy would mean they would not require to sign annual agreements going forward. The Respondent described the tenancy agreement she had signed in December 2018, explaining that it was a lot thicker than the previous agreement with a lot more detail. The new agreement had been signed in her sister's kitchen at the time. Ms McBain had contacted them both via text and had asked to meet them at her sister's house so that she and her sister could discuss and sign the new agreements. Both the Respondent and her sister had received a text message. They both reside on the same street, with the Respondent at number 26 and her sister residing at number 4 which is six doors down. The Respondent's sister had moved in a year before the Respondent had. When Ms McBain attended her sister's property, both the Respondent and her sister had been told the same thing, namely that they would no longer require to sign tenancy agreements on an annual basis. The Respondent had signed the agreement and had left it in her sister's house. It was her understanding at the time that she was being signed up to a new tenancy as a result.

- 21 In response to questions from the Tribunal, the Respondent confirmed that she had signed the agreement at the kitchen table. Ms McBain had come to the property and they had chatted, she was asking how the Respondent and her sister were. The Respondent had then signed two copies of the agreement, one for the Applicant and one for her to keep. Ms McBain had then left with her copies of the agreements. The Respondent was going straight to her job at Tesco, therefore the lease had been left in her sister's kitchen. It was signed in the afternoon at around 4pm and she was due to start her shift at teatime. This was in mid-December. The Respondent had hoped to search again for her copy of the agreement however she had understood that the hearing would not be going ahead on the basis that the Applicant had offered a settlement. Her sister couldn't locate her copy either, but thought they might both be somewhere in the loft of her property.
- 22 Ms McBain was given the opportunity to cross-examine the Respondent. She declined to do so, but simply wished to confirm that the Respondent's sister had signed a private residential tenancy agreement in December 2018 however the Respondent had not.
- 23 Both parties were then given the opportunity to make any final submissions. Ms McBain stated that she did not have much more to say, other than the fact that the Applicant had done everything required by section 33 and therefore the order should be granted. Ms McBain confirmed that she was inviting the Tribunal to prefer her version of the events that transpired in December 2018.
- 24 Ms Horseman accepted that no tenancy agreement had been produced by the Respondent however she invited the Tribunal to prefer the Respondent's account of events in December 2018 on the basis that she had been candid, recalling specific dates and times and consistent with the change in the type of tenancy. Sufficient doubt had been raised about the Applicant's position that a short assured tenancy remained in place. The Respondent had been quite clear in her understanding of the position and the Tribunal should accept her account

as genuine. Ms Horseman therefore invited the Tribunal to conclude that an application based on section 33 of the Housing (Scotland) Act 1988 would be incompetent as the tenancy between the parties was governed by the Private Housing (Tenancies) (Scotland) Act 2016.

Findings in Fact

- 25 The Respondent signed a private residential tenancy agreement with the Applicant in December 2018.
- 26 The tenancy between the parties is therefore a private residential tenancy as defined by section 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

Reasons for Decision

- 27 Having considered the written representations from the parties and the evidence from the Hearing the Tribunal was satisfied that it had sufficient information upon which to make a determination of the application.
- 28 The Tribunal ultimately preferred the Respondent's account of events and therefore accepted that a private residential tenancy agreement had been entered into between the parties. Whilst the Respondent had not been able to produce a copy of the private residential tenancy agreement, she was clear and consistent in her evidence when explaining the circumstances in which it had been signed. She was able to give detail regarding the format of the private residential tenancy agreement and the circumstances in which she had discussed and signed it, when pressed by the Tribunal on these points. The Tribunal was therefore prepared to accept that she may have simply misplaced a copy of the agreement. The absence of documentary proof did not, in the view of the Tribunal, prevent it from making a finding that the Respondent signed the agreement in December 2018 in circumstances where her verbal evidence in this respect was credible and convincing.
- 29 In contrast, Ms McBain appeared uncertain at points in her evidence and on occasion directly contradicted herself, for example stating there had been no discussions with the Respondent about a private residential tenancy agreement when her written representations to the Tribunal stated otherwise. The Tribunal also found it difficult to believe why the Applicant would have decided against signing the Respondent up to a private residential tenancy agreement back in 2018 because of arrears on the rent account but had offered to do so shortly prior to the hearing by which point the rent arrears had increased. It appeared to the Tribunal, both in the wording of Ms McBain's written representations which referred to there being no private residential tenancy agreement "*to the best of my knowledge*" and in her evidence at the Hearing that there was an element of doubt in what had transpired back in December 2018, which contrasted with the Respondent's cogent account.
- 30 Having made its findings in fact, the Tribunal had to conclude that the application before it was incompetent in that it sought recovery under the

Housing (Scotland) Act 1988 as opposed to the Private Housing (Tenancies) (Scotland) Act 2016 which was the correct statutory regime for private residential tenancies. The Tribunal was therefore obliged to refuse the application and make no order.

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.

Ruth O'Hare

6th October 2020

Legal Member/Chair

Date