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/20/0940

Re: Property at 9 Arnott Road, Blackford, Perthshire, PH4 1QE ("the Property")

Parties:

Mr Graham McNaughton, Ms Gillian Brown, Mill Lade, Moray Street, Blackford, PH4 1QP; Lucknow, Abercairney Place, Blackford, PH4 1QB ("the Applicant")

Mr Robert Murray, 9 Arnott Road, Blackford, Perthshire, PH4 1QE ("the Respondent")

Tribunal Members:

Susan Christie (Legal Member)

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Application for recovery of possession of the Property from the Respondent be refused.

Background

1. The Application for recovery of possession of the Property was received by the Tribunal on 13 March 2020.
2. A Notice of Acceptance of the Application by the Tribunal is dated 29 May 2020.
3. The application type is stated as being made under Rule 66 and Section 33 of the Housing (Scotland) Act 1988 (the 1988 Act). The Application Form states "Landlords are seeking eviction of the tenant under section 33 having served a Notice to Quit and a section 33 notice to remove at the ish, being 1st February 2019 and has a current order for payment of arrears granted by the Tribunal. Tenant has not removed from the subjects following notices being served." There was produced along with the Application form- Tenancy agreement, Notice to Quit, Section 33 notice, AT5 &AT6.Prior to the

Application being accepted by the Tribunal, further documents were produced namely a Section 11 Notice and an e mail sent to Perth & Kinross Council.

The Case Management Discussion (CMD)- 12 August 2020 by conference call

4. Ms Brown participated and was represented by Ms Grant. Ms Burnett observed. The Respondent participated.
5. The Applicants seek recovery of possession of the Property.
6. The documents lodged in support of the application were examined and discussed.
7. The initial term of the Short Assured Tenancy (SAT) was for 6 months from 1 July 2017 and continued in terms of the contract thereafter monthly until such times as it is ended by either party giving notice to terminate it.
8. The rent being £500 per calendar month. I was advised that the Tribunal had made an Order for payment of arrears of rent around November 2019.It appeared that no time to pay had been applied for, no payments had been made and the rent arrears had increased.
9. From the papers produced it appeared:
10. A Notice to Quit was served. It is dated 29 November 2019 and gives Notice to Quit 'by 2 months' notice' to the Respondent to leave. It was served by Ms Brown on the same date. It does not have a date in it and which coincides with an *ish* (or finish) date for the SAT.I indicated my concerns that the formalities required of a Notice to Quit may not have been met and it might be considered ineffective and having regard to the requirements to be satisfied in Section 33 of the 1988 Act that allow an Order to be made.
11. A Notice under section 11 of the Homelessness etc (Scotland) Act 2003 was produced. On my copy none of the boxes showing the legislation being relied upon had been ticked. I was advised that there was another copy available of the notice showing the correct legislation relied upon when it was sent to the local authority and this could be produced to the Tribunal.
12. The Respondent's position was that he has sought alternative accommodation with the local authority, but they have not accepted the paperwork that was served on him.
13. The Applicants Representative sought a continuation of the CMD to answer the matters raised by me. The Respondent had no objection as he wished it sorted out. I agreed to proceed to a further CMD and issued a Direction.

The Direction dated 12 August 2020 (sent to Parties 19 August 2020)

The Applicant was required to provide:

(1) A written outline of the submission with reference to authority, in support of their position that the Notice to Quit dated 29 November 2019 is valid and satisfies the formalities required in law regarding the date upon which it is to take effect, so as to show that the Short assured tenancy has reached its finish (Section 33 of the 1988 Act refers); and

(2) Produce a further copy of the Section 11 Notice relied upon, showing the legislation referred to therein;

Should the Applicant insist on the application for an Order for eviction.

To be lodged with the Chamber no later than close of business 14 days before the next Case Management Discussion date to be afterwards assigned.

The Respondent was required to provide:

(1) A written response to the Applicants submission, should he wish to respond to it; and
(2) Any other relevant information he wishes the Tribunal to take into account.

To be lodged with the Chamber no later than close of business 7 days before the next Case Management Discussion date to be afterwards assigned.

Applications for Postponement

14. A further Case Management Discussion (CMD)conference call was Scheduled for 12 August 2020 at 2pm and intimated to the Parties.
15. On 1 September 2020 the Applicants' Representative requested a postponement of the CMD stating, "Following the Case Management Discussion previously held, it was agreed that the Applicant would serve new notices, which are attached along with certificate of service and fresh section 11 notice(e mailed today)….We would therefore request that the case is postponed until the expiry of theses notices." It did not disclose who had decided to serve fresh notices.
16. The new Notice to Quit produced was dated 14 August 2020 and said, "We….give you formal notice to quit the premises currently occupied by you at 9 Arnott Road…by 1 November 2020, giving you 2 months' notice…"
17. A fresh Section 33 Notice was also produced which required vacant possession by 1 November 2020 and a signed execution of service showing that Mr McNaughton had hand delivered the documents to the Respondent in the presence of a witness on 14 August 2020.
18. The Application to postpone the CMD was refused by me after I considered the terms of Rule 28 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the Rules) and having regard to the overriding objective.
19. A second postponement request was received from the Applicants' Representative dated 16 September 2020 which stated, "As noted in our request for a postponement on behalf of our clients, we have now issued fresh, valid notices to the tenant of the above property. Our clients took the view that on account of the uncertainty surrounding the omission of the date on the previous notice to quit it would be fairer on all Parties to issue fresh notices. On account of that, we requested that the Tribunal postponed the case management discussion until those notices expired, which we consider to be a reasonable request. The Applicants' agent, being ourselves, accept that the original Notice to Quit did not specify the ish date and therefore, the simplest remedy for this was to issue notices specifying the ish date. These notices were

submitted to the Tribunal as supplementary evidence. The Applicants are working closely with the local authority in terms of securing alternative accommodation for the Respondent and we note that we have cited a representative from the local authority as a witness to the case. Further to the above, at the last calling of this case for a case management discussion, all parties were asked for unsuitable dates over the course of the 6 weeks following that hearing date. The date that has been fixed for the next case management discussion is outwith that period and having notifying our clients of the Tribunals refusal to our postponement request, we have been advised that they are not available to attend on 30 September 2020 and respectfully request the Tribunal reconsider their decision. As discussed in the previous case management discussion which took place on 12 August 2020, both parties to this action wish for the matter to be at a close. The Applicants originally served notice(albeit the Notice to Quit did not specify the ish date)some 10 months ago and find themselves in the position where they still have a tenant residing in their property not paying rent and they have been unable to recover possession of their property. The Applicants respectfully request that the Tribunal, taking all of the above into consideration and acting reasonably allow the case to be postponed and called again at the expiry of the fresh notices. The Respondent is now left in no doubt as to the date on which his tenancy ended. Given the length of time since raising this action to the case calling, the Applicant respectfully requests that the Tribunal accept these circumstances and allow them to have the tenancy ended. As noted by the Respondent at the last calling of this case, this is also his wish. We trust the above is clear but please do be in touch should you require any further information."

20. The second application to postpone the CMD was refused by me after I considered the terms of Rule 28 of the Rules and having regard to the overriding objective. The Application before the Tribunal relies on Notices already served and is not conditional on fresh Notices expiring.
21. On the morning of 30 September 2020 the Respondent e mailed the Tribunal at 11.26 and stated "Hi, I was due to have a conference call today but received a letter that the other party had requested a postponement til a later date and that a decision would be sent prior to today. I was under the impression that it was cancelled due to not receiving any update via letter ,e mail or phone call and so I am asking if the conference call could be postponed as I'm unavailable at the requested time."
22. Having checked with the caseworker, I was advised a letter had been sent to the Respondent intimating the refusal on 24 September 2020. The Application to postpone the CMD was refused by me having considered the terms of Rule 28 of the Rules and having regard to the overriding objective. The Respondent was emailed telling him of the refusal, advised that he still had the opportunity to participate, and that if he is absent a final decision can still be made.
23. Just prior to the CMD commencing I was also given the 'Claimant's Written Submission' that had been received shortly before-

CLAIMANT'S WRITTEN SUBMISSION

This case called for a case management discussion on 12th August 2020 in which the validity of the Notice to Quit served on the Respondent was considered.

Following from the case management discussion, to preserve their position the Claimants served fresh notices upon the Respondent. The Claimants then requested a postponement on this basis and then on the basis of unavailability. Both requests were refused.

Accordingly, the Claimant submits to the Tribunal the following: -

1. Clause third of the Tenancy agreement between the parties is clear in its terms that the term of the tenancy agreement runs month to month from 1st of the month until notice is provided with the relevant statutory period of notice. The Respondent has been provided with a copy of the tenancy agreement, signed by himself.
    a. Statutory Notice is ‘in excess of 40 days’.
    b. Contractual notice required under the tenancy agreement is 2 months.
    c. In McDonald v O’Donnell 2007 similar circumstances occurred in which it was noted that the terms of a notice which in fact provided more notice than contractually required were sufficiently clear that it was intended that the lease should not continue and this was sufficient to end tacit relocation.
2. In addition to the above, the section 33 notice which was served on the same day provided the ish date. Being served on the same day, these notices made it sufficiently clear to the Respondent when his tenancy ended.
3. The prescribed information dictates that the Notice should tell the tenant how long their notice is, which I this case it did and it should tie in with the ish date, which again in this case it did on account of being tied in and served alongside the section 33 notice.

The Notice to Quit and Section 33 Notice served in this case are, in terms of the above sufficiently clear in their terms and accordingly, the case should be accepted by the Tribunal as being properly raised. As the Respondent has made it clear that he does not wish to continue residing in the property, the Claimant requests the Tribunal to grant the Order of Eviction as sought.

Case Management Discussion (CMD)- 30 September 2020 by conference call

24. Ms Grant participated as the Applicants’ Representative along with Ms Brown who is one of the two Applicants. The Respondent did not participate. I was satisfied that he was aware of the CMD and proceeded in his absence.

25. When asked, the Applicants’ Representative stated that her Submission had first been sent into the Tribunal on 24 September 2020 by e mail. Whilst no record could be found at that point in time, I received the submission albeit late as it was being relied on today.

26. In addition to what is contained in her written submission, the Applicants' Representative today relies on the original Notices served and indicated that the Notice to Quit did not require to have in it a date, to coincide with an ish. She stated that the Notice to Quit dated 29 November 2019 when read along with the Section 33 Notice of the same date (which has a date in it for requiring vacant possession as at 1 February 2019),makes it clear to the tenant that he needed to leave by 1 February 2019.She did not accept that her clients could be said to have departed from relying on the Notices served on 29 November 2019 (relied on originally in this application) when they decided to serve fresh Notices on the Respondent on 14 August 2020 now telling him that he required to quit the Property by 1 November 2020.The latter Notice to Quit also stated that the contractual assured tenancy will end then. The latter Section 33 Notice also required to remove by 1 November 2020. She did not consider her position was inconsistent with her representations made on 1 &16 September, as detailed above. She stated that fresh Notices were served so that there were no more questions raised about the ish date. She did not consider the current application could potentially now be viewed as being used as a vehicle to progress an eviction based on fresh Notices that had not yet expired, she did not consider that to be the case. This is even though she had sought a postponement of this Application to allow the new Notices to expire in her requests for a postponement. I observed that the fresh Notices did not appear to have taken account of the changes in legislation in relation to Coronavirus (Scotland) Act 2020, in that in terms of the Section 33(1)(d) Notice a period of six months was to be given as a minimum, not two months. She accepted that she was aware of the change in legislation but relied on the savings provision in Schedule 10 and that the notice was not invalid due to the error in the Notice period. She considered that the Respondent had no real regard to her client's position and that rent had not been paid and that he had not participated to make comment. Her clients had tried to have alternative accommodation secured by engaging with the local authority, but this had not progressed.

27. An adjournment of around 30 minutes was made to allow me to consider the case quoted in the Submission and for the Applicants' Representative to speak with her clients and to respond further. After that time, the Applicants' Representative stated that she relied on the following paragraph in the case of McDonald v O'Donnell 2007,

39. I do not accept the respondent's submissions. The argument presented by counsel for the appellant, with which the Sheriff did not essentially disagree, was that the lease commenced on 8 February 1989 and had continued from year to year on the basis of tacit relocation. It was clear from the letter of 13 July 2004 that the appellant was not prepared to countenance a continuation of the lease. In my opinion that letter is sufficient to prevent the operation of tacit relocation at the next ish which was 7 February 2005. Albeit the wrong date was stated in the letter, the defender and respondent had 6 months and 23 days notice to the effect that the lease would not be renewed as at the next ish namely 7 February 2005.

28. Finally, I observed that the second section 11 Notice that had been produced appeared to be the same as the first and had no indication on it as to the legislation relied upon. I was told that a further copy could be produced. This was forwarded and showed that rather than intimating that the tenancy was an assured tenancy under the Housing(Scotland) Act 1988(box 2), it instead referred to 'Other proceedings for possession-none of the above boxes are appropriate' and had typed in box 5, 'Tenancy is a Short assured Tenancy'.

Findings in Fact

I. The Applicants entered into a Short Assured Tenancy (SAT) with the Respondent over the Property on 30 June 2017 for an initial term of 6 months from 1 July 2020 and monthly thereafter, recurring on 1st of every month until terminated in writing, with the relevant statutory period of notice as required by law.
II. The Short Assured Tenancy continued monthly by agreement after the initial term.
III. A Notice to Quit dated 29 November 2019 was served on the Respondent by the Gillian Brown on the same date. It did not contain a date when it is to take effect. It is invalid.
IV. A second Notice to Quit dated 14 August 2020 was served on the Respondent by Graham McNaughton on the same date. It did contain a date when it is to take effect, namely 1 November 2020.
V. The SAT has not reached its finish and tacit relocation is operating
VI. The Applicant is not entitled to recovery of possession of the Property from the Respondent in the present Application, the requirements set out in Section 33 of the 1988 Act not having been fully satisfied.
VII. The Application for recovery of possession of the property is accordingly refused.

Reasons for Decision & Decision

29. I was satisfied that a decision could be made and as there was enough material before me to do so. I was satisfied that the procedure was fair.
30. I was satisfied that the tenancy between the Parties is a Short Assured Tenancy under Section 32 of the Act.
31. This Application is made under Section 33 of the Housing (Scotland) Act 1988.The original Notices relied upon as at 30 September 2020 are dated 29 November 2019.For the purposes of this application-

    33.— Recovery of possession on termination of a short assured tenancy.
    (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]1 shall make an order for possession of the house if the Tribunal is satisfied—
    (a) that the short assured tenancy has reached its ish;
    (b) that tacit relocation is not operating; and

(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.

(2) The period of notice to be given under subsection (1)(d) above shall be—

(i) if the terms of the tenancy provide, in relation to such notice, for a period of more than two months, that period;

(ii) in any other case, two months.
(3) A notice under paragraph (d) of subsection (1) above may be served before, at or after the termination of the tenancy to which it relates.
(4) Where the First-tier Tribunal makes an order for possession of a house by virtue of subsection (1) above, any statutory assured tenancy which has arisen as at that ish shall end (without further notice) on the day on which the order takes effect.
(5) For the avoidance of doubt, sections 18 and 19 do not apply for the purpose of a landlord seeking to recover possession of the house under this section.

32. I require to grant recovery of the Property in terms of Section 33 of the Act if I am satisfied

- The SAT has reached its finish
- That tacit relocation is not operating
- That no further contractual tenancy is in existence and
- The landlord has given to the tenant notice stating that it requires possession of the house, on a period of notice of 2 months.

33. I do not consider that the tenancy has reached its finish and that tacit relocation is not operating. There are certain Common Law requirements of valid notice to quit (Paton & Cameron & Rankine).In terms of Section 112 of the Rent(Scotland) Act 1984 it is given not less than 4 weeks before the date on which it is to take effect.
34. The purpose of the Notice to Quit is to end the contractual tenancy at the next finish date and to prevent tacit relocation occurring. A notice which simply calls upon the tenant to leave on an unspecified date is invalid. The Notice to Quit dated 29 November 2019 does not specify a date within it as a date when it is to take effect, being an i*sh* or finish date. The Notice to Quit is separate and distinct from the Section 33(1)(d) Notice produced. I do not consider that the Applicants can remedy the defect in the Notice to Quit dated 29 November 2019 by relying on it being read alongside the Section 33(1)(d) Notice. I consider that the facts of this case are different from those in the case quoted of McDonald v O'Donnell 2007 and I am not bound by that decision. In any event, the approach taken in that case seems inconsistent with the general approach taken in subsequent cases in the Sheriff Court,

such as Aberdeenshire Council v Mark Shaw Banff 24.10.2011, The City of Edinburgh Council v Martin Smith [2016] SC EDIN 42,and Eastmoor LLP v Keith Bulman 2014SCDUM31; in academic works and decisions within the FTT Housing and Property Chamber more recently. I am aware that those cases quoted from the Scottish Courts are not exactly in point in relation to the type of tenancy, but the comments made in them support the Common law position I have referred to, in that the Notice to Quit is expected to contain a date when it is to take effect. Even if I am wrong on that point, in this case the Applicants decided to serve fresh Notices after this Application was made, including a Notice to Quit dated 14 August 2020.Reference is made to the comments made in the written representations dated 1 &16 September 2020.The second Notice to Quit contains a date when it is to take effect, 1 November 2020.The Respondent has been told that he requires to leave the property by that date, which is a date in the future and not the original date relied on in the Application. It indicates that this future date is the date on which the contractual tenancy comes to an end.
Whilst I do have some sympathy with both Parties, who for different reasons seek resolution, I must have regard to the terms of the legislation.
Accordingly, I refuse this Application.

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.

Susan Christie

Legal Member/Chair **1 October 2020**
Date