

Housing and Property Chamber
First-tier Tribunal for Scotland



Discussion session 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/19/1185

Re: Property at 140 Hazel Avenue, Culloden, Inverness, IV2 7WS ("the Property")

Parties:

Mr Ian George Maclean, 64 Slackbuie Way, Inverness, IV2 6AT ("the Applicant")

Mr Alistair Rennie, 140 Hazel Avenue, Culloden, Inverness, IV2 7WS ("the Respondent")

Tribunal Members:

Valerie Bremner (Legal Member)

Decision (in absence of the Respondent)

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

This is an application for a possession order in terms of section 33 of the Housing (Scotland) Act 1988.

The Applicant attended the Case management Discussion on 19th June 2019 and was represented by Mr Brown Solicitor of Harper MacLeod Solicitors, Inverness. The Respondent was not present or represented. Mr Brown moved the Tribunal to proceed in the absence of the Respondent. The Tribunal had sight of a certificate of service by Sheriff Officer of the application and associated papers. These had been served personally on the Respondent at the property on 17th May 2019. The Tribunal granted the request to proceed in absence of the Respondent in terms of Rule 29 of the Tribunal Rules.

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The Tribunal had sight of the application, tenancy agreement, Form AT5, Notice in terms of the Homelessness etc (Scotland) Act 2003, Notice to Quit, Notice in terms of Section 33 of the Housing (Scotland) Act 1988 and a post office receipt and copy track and trace document.

Discussion

At the start of the discussion the Tribunal Legal member raised two issues with the Applicant's representative.

The first of these related to whether the tenancy agreement had been brought to an end at the appropriate ish or end date, preventing tacit relocation from being in operation and the second issue related to whether the Notice in terms of Section 33 of the Housing (Scotland) Act 1988 had been served to give at least two months' notice to the Respondent of the requirement for vacant possession of the property.

The first issue raised by the Tribunal legal member was addressed by first considering the ish or end date in respect of the tenancy agreement. The tenancy had commenced on 9 May 2008 and ran for six months. The Tribunal legal member raised the issue of whether the tenancy agreement continued on the basis of any provisions with the agreement itself or whether, put simply, it 'rolled over ' on a six-monthly basis by means of tacit relocation until terminated by one party or the other. The legal member asked Mr Brown the applicant's representative to indicate whether it was his position that the tenancy rolled over on the basis of any provision within the tenancy agreement. Mr Brown advised the Tribunal that he had understood that the agreement continued on a month-to-month basis. Examination of the tenancy agreement terms and conditions section at the case management discussion revealed that there appeared to be no such month to month provision within the agreement and Mr Brown confirmed that he could trace no such provision.

The issue as to whether the Notice to Quit served in this application had brought the tenancy to an end at its ish or end date remained for consideration.

The Tribunal legal member also raised the question at this stage of whether the section 33 notice gave at least two months' notice of the requirement for vacant possession to the Respondent. The notice issued by recorded delivery mail on 16 November 2018 was collected and signed for by the Respondent on 19 November 2018, with the date at which possession was required being 18 January 2019.

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After a short adjournment to consider matters Mr Brown advised the Tribunal that his position was that even if he accepted that the Notice to Quit contained a date which did not coincide with the ish date he was of the view that clause 7.2 in the terms and conditions attached to the tenancy agreement allowed for either party on or after the term, to give the other party not less than two months' notice in writing of termination or such shorter period of notice that the parties might mutually agree in writing. The Tribunal legal member considered the terms of clause 7 and expressed the view that this appeared to be for the most part an irritancy clause, and on careful reading of clause 7.2 this appears to relate to termination by mutual agreement. The Tribunal was of the view after consideration that clause 7 could not be relied on here in terms of a request for a possession order under section 33 of 1988 Act.

The Tribunal raised for discussion the case of MacDonald v O'Donnell 2008 SC189. Mr Brown indicated that he had not considered this case and there followed a discussion in relation to this case. In this case the main arguments related to whether the lease under discussion was an agricultural lease or commercial lease. A notice served on the tenant in that case to recover possession contained a date that was after the ish or end date of the agreement. There were particular reasons why the date was chosen by the landlord's agent however it was clear from the case that it was accepted that a notice giving a later date than the ish or end date could be valid to prevent tacit relocation occurring. In that case the court had taken the clear view that since the date when possession was said to be required was after the proper ish or end date there was no prejudice to the tenant. This case of course did not relate to a residential lease.

The issue of whether two months' notice of the requirement to give vacant possession of the property had been given to the Respondent was discussed. Mr Brown advised the Tribunal that the applicant himself had also put the notice to quit and the Section 33 notice through the letterbox at the property on 16 November 2018. He accepted that the track and trace receipt in respect of the recorded delivery service of documents was not helpful to his position in that it indicated that the respondent had collected the documents sent by recorded delivery on 19 November 2018. There was then a discussion as to how the period of time from 19 November 2018 to 18 January 2019 should be counted and whether this could constitute notice of at least 2 months. The Tribunal referred to the case of McCabe v Wilson 2006 Hous.L.R 86 and the discussion in that case in relation to computation of time. It was suggested in argument in that case that as a general rule the day from which a period runs should be excluded from consideration, and the whole of the last day should be included. This calculation involves the principle of *civilis computatio*. If

the notice period was to be said to run from the date which the Respondent had picked up the recorded delivery letter, 19 November 2018, it appeared to the Tribunal that the notice period did not amount to at least two months. Mr Brown argued that using the principle of *civilis computatio* the date of 18 January 2019 fell to be included in the calculation. He submitted that this would amount to 2 months' notice. The Tribunal did not find favour with this argument as it was of the view that the clear provisions of section 33 of the 1988 act required at least two months' notice of the requirement to give vacant possession in advance of the latest date when the tenant was expected to leave the property in question.

The Tribunal considered whether service of the section 33 notice and a notice to quit had validly taken place when the Applicant had put these documents through the letterbox on 16 November 2018. Mr Brown submitted to the Tribunal that in the circumstances in this application, if the argument regarding sufficiency of notice was not accepted in relation to the Respondent picking up the recorded delivery letter on 19 November 2018, then the Tribunal would be entitled to take into account that this was a Respondent who had not answered an application and supporting paperwork from the Tribunal. No written representations had been received and indeed there had been no response of any kind to the Tribunal by the Respondent and there had been no appearance of the case management discussion. Mr Brown advised that he was aware that the Respondent had taken legal advice. He was not in a position to advise of the nature of that advice as communicated to him, but could say that he was satisfied that the Respondent understood the requirement to vacate the property as of 18th of January 2019. Mr Brown submitted there was clear evidence of the respondent receiving notice of the requirement to quit the property in advance of the minimum notice period under section 33. The Applicant Mr MacLean was also in a position to confirm that the Respondent appeared to be no doubt of the date at which he was required to leave the property, 18 January 2019, because he had paid rent in part for the month of January 2019, and the amount appeared to coincide with that date as being a termination date and he had paid no further rent since that date even although he was still in occupation at the property.

The position regarding the Notice to Quit was considered. The purpose of a Notice to Quit is to prevent the operation of tacit relocation with the effect that the tenancy terminates at its next ish or end date. There are no rules at common law requiring a particular method of service for the Notice to quit. Although there are sheriff court rules, which require certain modes of services for notices, these rules do not appear to apply to the Tribunal. The Tribunal was therefore satisfied that the notice to quit could properly be given to the Respondent by the method employed by the Applicant in this matter, by putting it through the letterbox at the property. The Tribunal was also satisfied that the Notice under section 33 of the 1988 Act could be intimated in this way and that what was of importance in an application such as this was the proper period of notice being given to a tenant.

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The Tribunal was satisfied, having regard to the depositing of the notices through the letterbox on 16 November 2018 that sufficient notice to satisfy the terms of section 33 of the 1988 Act had been effected.

The only issue that still required to be considered by the Tribunal was whether the notice to quit had effectively brought the tenancy to an end at its ish or end date and prevented the operation of tacit relocation. Having regard to the case of Macdonald against O'Donnell, referred to above, the Tribunal was satisfied that a date after the correct ish date was intimated and that this did not prejudice the tenant and could effectively prevent tacit relocation being in operation.

Findings in Fact

1.The applicant and the respondent entered into a short assured tenancy agreement with effect from 9 May 2008 for a period of six months. Thereafter the lease continued on a six monthly basis by means of tacit relocation.

2.By means of a notice to quit and Notice in terms of section 33 of the housing (Scotland) Act 1988 the Applicant gave notice to the respondent that vacant possession of the property was required as at 18 January 2019.

3.The notice to quit and section 33 notice were hand delivered by being deposited through the letterbox at the property by the Applicant on 16th November 2018.

4.The tenancy has reached its end date.

5.Tacit relocation is not in operation.

Reasons for Decision

The Tribunal was satisfied that the terms of Section 33 of the Housing (Scotland) Act 1988 were complied with in this application and a possession order should be granted.

Decision

The Tribunal grants a possession order in favour of the Applicant in respect of the property.

Ms Valerie Bremner

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.

Ms Valerie Bremner

Legal Member/Chair

19 June 2019

Date