



**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/20/1649

Re: Property at 15 Vert Court, Haddington, EH41 3PX (“the Property”)

Parties:

Mr Matthew McLoughlin, Ewood End, Ewood Lane, Dorking, RH5 5AP (“the Applicant”)

Mr Neil Brunton, 15 Vert Court, Haddington, EH41 3PX (“the Respondent”)

Tribunal Members:

Jan Todd (Legal Member) and Ahsan Khan (Ordinary Member)

Decision

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

Background

1. This was a continued hearing to consider the application by the Applicant for an order for eviction of the Respondent who is the tenant in the Property.
2. The following documents were originally lodged with the Application namely:-
 - a. Notice to Quit and S33 notice dated 10th January 2020
 - b. Various Minutes of Extension of a lease between the parties and dated between 2011 and 2019.
 - c. S11 notice to East Lothian council and evidence of e-mail service of the same
 - d. Evidence of personal delivery of the Notice to Quit and S33 notice
 - e. Certificate of posting of Notice to Quit and S33 notice dated 10th January 2020
3. There have been two Case Management discussions prior to the fixing a hearing to consider this application. At the CMDs it was established and agreed that the Respondent was the tenant in the Property and the Applicant was the landlord and owner of the Property.

4. The application is for an order for eviction based on S33 of the Housing Scotland Act 1988. The relevant notice to quit and S33 notice were served on 10th January 2020 with this application being raised on 3rd August 2020 so if the Notice to Quit and S33 notice are in order and the Applicant can prove this is a short assured tenancy then the Tribunal have no discretion but to issue an order for eviction.
5. At the CMDs it was established that the matter at issue was whether or not the Tenancy was a short assured tenancy. The Applicant has not been able to produce a copy of a signed AT5 or a copy of the signed lease. The Applicant's agent has lodged a draft of the tenancy agreement he alleges the parties entered into and a draft AT5 form. He advised that the originals could be in storage but their firm recently changed the storage company they use and despite extensive enquiries the original file has still not been found. Mr MacLeod also lodged a letter and form of Agreement from East Lothian Council in respect of a tenancy deposit agreement with the Council the letter being dated 17th September 2009 and copies of two letters dated 2nd October 2009 addressed to the Landlords and Tenant respectively both stating "that we "now enclose a copy of (the lease) for your records together with the AT5.
6. The Respondent acknowledged at the CMDs that he has a tenancy with the Applicants but due to the lengthy of time that has passed he could not remember if he signed or received an AT5 form.
7. At the first CMD there was a preliminary discussion about the extensions of the leases and Mr Macleod submitted that in his view the tenancy had continued by way of the written extensions and then finally by tacit relocation, meaning that the tenancy which had an original ish date of 27th March 2010 continued albeit over various time periods to be extended until 27th March 2020 when the Notice to Quit would take effect. The legal member suggested the terms of the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3 Amendment, Saving Provision and Revocation) regulations 2017 may apply and Mr McLeod advised he had not heard of this but was relying on the fact this is not a new tenancy but a continuing one and for the last two extensions the ish date was the 27th March so the Notice to Quit has been prepared he submitted on an ish date.
8. The Respondent has confirmed he has received the notice to quit and s33 notice and has contacted the Council about this and has been advised that they could not assist him until or unless he was evicted.
9. The Tribunal determined that a hearing required to take place to consider evidence in order to determine whether the lease of the Property is a short assured tenancy and if the eviction action is competent and a hearing was set down for 21st May 2021.
10. At that hearing date the Applicant's representative Mr MacLeod attended but did not have any witnesses to lead although he had lodged a short statement from Ms Lesley Scott of the letting department of Garden Stirling and Burnet confirming the signing of the tenancy and AT5 form would have gone ahead. He advised Ms Scott was unavailable to attend but as it was clear her evidence would be important the Tribunal confirmed the hearing would require to be continued to allow Ms Scott to attend as a witness along with any other witnesses the Applicant thought appropriate.

11. The Hearing

12. The continued hearing proceeded today, 30th June, at 10 am by teleconference in view of the continuing need for social distancing at the current time. Mr Macleod of Garden Stirling Burnet Solicitors once again attended for the Applicant who was not present and the Respondent Mr Brunton attended in person. The Legal Member explained the nature and purpose of the continued Hearing and confirmed that the Applicant was calling only one witness Ms Lesley Scott. The legal member summarised the prior discussions and confirmed with Mr Brunton that he agreed he was the tenant in a lease that commenced on 28th September 2009 and that is still continuing. He agreed he was.
13. Mr MacLeod summarised his client's position that the correct notices having been served namely a Notice to Quit and S33 notice prior to the Coronavirus (Scotland) Act 2020 having changed the nature of this type of eviction from mandatory to a discretionary ground, that if the Tribunal finds that this tenancy was a short assured tenancy then the grounds for eviction are met and he was requesting an order should be granted.
14. Ms Scott then joined the call and was asked questions by Mr McLeod and the Tribunal members to which she gave the following information:-
 - a. Ms Scott advised her role currently is as a lettings negotiator with GSB;
 - b. That in 2009 she was an administrator and responsible for drawing up leases and the AT5 forms. She confirmed that on average they would deal with around 10/15 new leases a month and she thought that all of them were short assured tenancies. Under questioning she advised that she was not aware of any of them being just assured tenancies.
 - c. Ms Scott confirmed that the firm's usual practice would be to send out the draft lease and AT5 form to the tenants and ask them to come into the office to make an appointment to sign them. The tenants would then come into the office to sign and after that confirmation and copies of those documents would be sent to the landlord and tenant. She advised she could not remember Mr Brunton specifically coming in to sign the lease or AT5 form in view of the length of time that has passed but was sure it would have been done given that there are copy letters sent from the firm confirming and sending to both the landlord and Mr Brunton a copy of the lease and AT5 form shortly after the tenancy started. She did confirm that Mr Brunton has attended the office on many occasions however to sign paperwork and deal with any tenancy issues so she has met him on several occasions.
 - d. Ms Scott also referred to the fact that the Council were assisting Mr Brunton in 2009 with housing benefit and she confirmed they would not have done so without seeing the lease although she was less clear if they would need to see the AT5 form.
 - e. In response to a question as to why the original signed copies are not available she advised that leases and AT5 forms are filed and then go into storage and she was aware the storage company just can't find the file.
 - f. Finally asked what her opinion was on the tenancy being created Ms Scott was clear and consistent that if the paperwork wasn't signed Mr Brunton would not have got the keys and she is sure the paperwork was completed.

15. Mr Brunton in response to this agreed that he believed the paperwork would have been completed as stated by Ms Scott. He has attended the offices on many occasions and advised he always asked for and tried to deal with Ms Scott. He believes the forms and tenancy agreement would have been given to him and signed and he has asked the Council for help and assistance to be rehoused in suitable accommodation but has been told they can't or won't do anything until he has a date for eviction. He confirmed that due to his health needs he requires a ground floor property and has been told he may have to go into temporary accommodation.
16. Mr McLeod also advised that he has written several times to East Lothian Council to ask if they have copies of the missing lease and AT5 form which he believes were sent to them to support Mr Brunton's request for assistance in 2009. Mr McLeod advised he has had no response to these requests.
17. Mr McLeod submitted that his client is seeking recovery of the Property on a no fault basis and invited the Tribunal to find that the lease was indeed a short assured tenancy and that the Notice to Quit and S33 notice were validly served and therefore the order should be granted.

18. Findings in Fact

19. The Applicant and Respondent have entered into a tenancy of the Property for a period of 6 months from 28th September 2009 to 27th March 2010
20. The Applicant is the owner and Landlord of the Property
21. The Applicant's agents served a Form AT5 on the Respondent who is the Tenant prior to the creation of the tenancy.
22. The Tenancy is a Short Assured Tenancy in terms of the Housing (Scotland) Act 1988.
23. The Applicant has served a Notice to quit and S33 notice on the Respondent terminating the contractual tenancy and giving more than 2 months' notice that they required possession of the Property by 27th March 2020 being a termination date of the tenancy.
24. The Respondent who is the tenant has not vacated the property although he has tried to seek assistance from East Lothian Council to be rehoused.
25. The Respondent agrees that he has received the Notice to Quit and S33 notice.
26. A s11 notice in terms of the Homelessness etc. (Scotland) Act 2003 has been served on the Local Authority

27. Reasons for Decision

28. The Applicant has entered into a Tenancy with the Respondent.
29. S33 of the Act says "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 for Scotland must make an order for possession of the house if it is satisfied-
 - a. That the short assured tenancy has reached its end
 - b. That tacit relocation is not operating
 - c. That no further contractual tenancy is for the time being in existenceand

- 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
30. The question for the Tribunal to determine is whether this tenancy entered into between the parties is a **short assured tenancy**, whether it has been correctly brought to an end by service of a Notice to Quit and that the landlord has correctly given the tenant notice that he requires possession of the house.
31. The parties agree they have a tenancy agreement. The Respondent agrees it started on 28th September 2009. The documentation produced and accepted by the Respondent shows that the initial period was for 6 months to 27th March 2010. It has been renewed by minutes of extension until 27th March 2019 and then Mr McLeod argued it has been continued by tacit relocation. The Tribunal noted that the provisions of the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3 Amendment, Saving Provision and Revocation) regulations 2017 appear to support the position that this is a continued tenancy and not a new one which would then be covered under the terms of the Private Housing (Tenancies) (Scotland) Act 2016. So the Tribunal is satisfied this is a tenancy created and continued under the 1988 Act.
32. Mr McLeod has produced an unsigned copy of a tenancy agreement from a database held by GBS and invited the Tribunal to accept this would be the same version as was accepted by Mr Brunton. The unsigned lease shows an entry date of 28th September, termination date of 27th March 2010 and rent due of £475. Clause 21 of this draft states "The tenant by signature hereof acknowledges receipt that prior to the commencement of the Lease formal intimation in the form of an AT5 notice that this tenancy is a Short Assured Tenancy in terms of S32 of the Housing (Scotland) Act 1988."
33. Ms Scott confirmed the usual practice of the letting department of GBS in 2009 was to grant only Short Assured Tenancies and that the tenants would be invited in to sign both the tenancy and the AT5 form. The draft lease produced supports the submission that this would be a short assured tenancy. The two letters addressed to the Respondent and Applicant dated 2nd October 2009 which were spoken to by Ms Scott also on the face of them state a copy lease and AT5 form were sent to both parties confirming they were entered into.
34. The draft AT5 form also produced by Mr McLeod shows that a draft was produced and contains the same details regarding, for example the landlords address, as in the lease.
35. Mr Brunton accepts that he would have signed papers to enter into the tenancy and accepts that they probably were the papers alleged by the Applicant although he can't remember the details of them after this length of time.
36. Given the evidence from Ms Scott who the Tribunal found clear and credible, the acceptance by the Respondent that he would have signed paperwork put to him, and the supporting letters that confirm not only a lease but an AT5 from was sent to both parties, the Tribunal accepts on the balance of probabilities that the AT5 was served on the Respondent and that it would have been served in advance of the tenancy being entered into and that therefore this tenancy is a Short Assured Tenancy.
37. The Applicant has served a Notice to Quit and S33 notice on 10th January 2020, and also hand delivered it on 21st January, advising the Applicant the tenancy will come to an end on 27th March 2020. This is an ish date. The period of notice

required to be given under S33 (1) (d) above is two months, in accordance with the legislation as it applied at the date the notice to quit was served.

38. The Short Assured tenancy has reached its end, tacit relocation is not operating and there is no further contractual tenancy in existence, so the Applicant having given adequate notice in terms of S33 above, the Tribunal has no discretion but to grant the order for possession.
39. Given however that the Respondent has indicated he has medical issues which means he requires a certain kind of property particularly one on the ground floor and near to his Doctor and others he relies on, the Tribunal confirmed it would grant the order for possession but with an extended period of time before it could be enforced, namely a period of 3 months to allow the Respondent time to be rehoused by East Lothian Council. The Tribunal took into account the rights of both parties when considering the date the order can be enforced and believes this will be fair to both parties and allow a suitable time for the tenant to leave while giving the landlord certainty as to when they can enforce their right to take possession of their property.

- Decision

An order for possession is granted which can be enforced only after 12 noon on 30th September 2021.

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.

Jan Todd
Legal Member/Chair

30th June 2021
Date