



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 33 Housing (Scotland) Act 1988 (“the 1988 Act”)

Chamber Ref: FTS/HPC/EV/20/1712

Re: Property at 40 Hillcrest Avenue, Glenburn, Paisley, PA2 8QW (“the Property”)

Parties:

Mr Jamie Millar, Mrs Nicola Millar, 12 Cumbrae Road, Glenburn, Paisley, PA2 8HA (“the Applicants”)

Miss Maria Millar, 40 Hillcrest Avenue, Glenburn, Paisley, PA2 8QW (“the Respondent”)

Tribunal Members:

Josephine Bonnar (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the application for an order for possession of the property should be refused.

Background

1. By application received on 14 August 2020, the Applicants seek an order for possession of the property in terms of Section 33 of the Housing (Scotland) Act 1988 (“the 1988 Act”). A tenancy agreement, AT5 notice, copy Notice to Quit, Section 33 Notice and Notice in terms of Section 11 of the Homelessness etc (Scotland) Act 2003 were lodged in support of the application.
2. A copy of the application and supporting documents were served on the Respondent by Sheriff Officer on 28 October 2020. Both parties were advised that a Case Management Discussion (“CMD”) would take place on 1 December 2020 at 11.30 am and that they were required to participate. Both were provided with a telephone number and passcode. The Respondent contacted the Tribunal by telephone prior to the CMD and stated that she would not participate in the call. The application called for a CMD at 11.30am on 1 December 2020. The Applicants participated. The Respondent did not participate and was not

represented. The Applicants advised the Legal Member that the Respondent is still in occupation of the property and that they were seeking an order for possession.

3. The Legal Member noted two issues with the application. Firstly, it appeared that the Notices had been sent to the Respondent by ordinary post. This did not appear to meet the requirements of section 54 of the 1988 Act. The Applicants advised that the Notices had also been delivered by Mrs Millar to the property on 26 February 2020. The Legal Member noted that this appeared to meet the requirements of the Section 54(b) of the 1988 Act – leaving the notice at the last known address. The second issue related to the Notice to Quit. The Legal Member noted that the tenancy agreement lodged with the application is dated 1 June 2017. Clause 7 of the agreement states that the term of the tenancy is “commencing at 12 noon on 1 June 2017 and continuing on a year to year basis until the landlord or the tenant terminates the tenancy”. The Applicant confirmed that no further written agreement was entered into by the parties. It therefore appeared that the tenancy has continued by tacit relocation with an ish date on 1 June 2018 (or possibly 31 May 2018) and on the 1 June or 31 May each subsequent year. The Notice to Quit which was served on the Respondent purports to terminate the tenancy contract on 30 May 2020, which does not appear to be an ish. Following discussion with the Applicants regarding this matter, the Legal Member determined that the CMD should be continued to allow them to take advice on the matter. The Legal Member also noted that the Applicants might withdraw the application if satisfied that it is unlikely to succeed.
4. The parties were notified that a further CMD would take place by telephone conference call on 21 January 2021 at 2pm. The CMD took place on this date. Both Applicants and the Respondent participated.

Case Management Discussion

5. Miss Millar advised the Legal Member that although she had been notified of the date and time of the CMD, she had not been sent a copy of the Legal Member’s note from the previous CMD. The Legal Member provided her with a summary of the matters which were discussed. Miss Miller said that she needed to get out of the property, but the COVID 19 pandemic had prevented her doing so. She also disputed some of the allegations made by the Applicants regarding her and said that she had expected to live at the property for 10 years. She advised that rent has not been paid due to repairs not being carried out. She confirmed that the Notices which had been served on her by the Applicants had been put through the letterbox of the property.
6. The Legal Member asked the Applicants whether they had taken advice following the previous CMD and whether they were able to provide further information or documents which would establish that the Notice to Quit was valid. The Applicants advised the Legal Member that they had taken advice from a property manager, who has experience of tenancy related matters. He advised them that, as their application was not affected by the Coronavirus (Scotland) Act 2020, and as they had given more than the required 2 months

notice to the Respondent, there should be no difficulty with the application being granted. They confirmed that the property is due to be sold and that the new owner does not want to proceed with the purchase with the Respondent in occupation. They also indicated that there are arrears of rent. They were unable to provide any further information to or documentation in support of the application.

Findings in Fact

7. The Applicants are the owners and landlords of the property.
8. The Respondent is the tenant of the property in terms of a short assured tenancy agreement which started on 1 June 2017
9. The Applicant served a Notice to Quit and Notice in terms of Section 33 of the 1988 Act on the Respondent on 26 February 2020.
10. The date specified in the Notice to Quit and Section 33 Notice is 30 May 2020

Reasons for Decision

11. The application was submitted with a short assured tenancy agreement and AT5 Notice. The tenancy agreement states that the term of the tenancy is, “ a periodic tenancy commencing at 12 noon on 1 June 2017 and continuing on a year to year basis until the landlord or tenant terminates the tenancy.
12. Section 32 of the 1988 Act states “(1) A short assured tenancy is an assured tenancy - (a) which is for a term of not less than 6 months; and (b) in respect of which a notice is served as mentioned in subsection (2) below. (2) The notice referred to in subsection (1)(b) above is on which – (a) is in such form as may be prescribed; (b) is served before the creation of the short assured tenancy; (c) is served by the person who is to be the landlord under the assured tenancy (or, where there are to be joint landlords under the tenancy, is served by a person who is to be one of them) on the person who is to be the tenant under the tenancy; and (d) states that the assured tenancy to which it relates is to be a short assured tenancy.”
13. The Legal Member is satisfied that the tenancy agreement between the parties was for an initial term one year and therefore meets the requirements of Section 32 (1) of the 1988 Act. The Legal Member is also satisfied that an AT5 Notice were given to the Respondent prior to the creation of the tenancy. In the circumstances, the Legal Member is satisfied that the tenancy is a short assured tenancy in terms of section 32 of the 1988 Act.
14. On 26 February 2020, the Applicants hand delivered two Notices to the Respondent. The first was a Notice to Quit which called upon the Respondent to vacate the property on 30 May 2020. The second was a section 33 Notice which stated that the Applicants required possession of the property on 30 May 2020.

15. Section 33 of the 1988 Act states 51(1) of the 2016 Act 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 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.” Subsection 2 states “The period of notice to be given under subsection (1)(d) above shall be – (1) 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”.
16. The Legal Member is satisfied that a valid notice in terms of section 33(d) has also been served on the Respondent, giving at least 2 months notice that the Applicants require possession of the property. However, the Legal Member is not satisfied that the Applicants have served a valid Notice to Quit on the Respondent. The tenancy started on 1 June 2017 and was for an initial period of one year, continuing on a year to year basis thereafter. It therefore appears that there has been an ish date on 1 June (or possibly 31 May) each year since the start of the tenancy. The date specified in the Notice is 30 May 2020, which is before the ish. As a landlord cannot call upon a tenant to vacate a property before he or she is contractually obliged to do so, the Notice which has been served has not terminated the tenancy contract between the parties. The Applicants have therefore failed to comply with Sections 33(a) and (b) of the 1988 Act.
17. As the Applicants have not complied with the requirements of Section 33 of the 1988 Act, the Legal Member determines that an order for possession cannot be granted and the application must be refused.

Decision

18. The Legal Member determines that the application for an order for possession of the property is refused.

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.

Josephine Bonnar